

Opinion No. 93-28

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion Regarding JAMES VAN HOOSE

This Opinion is in response to a first-party opinion request filed with the Nevada Commission on Ethics (Commission) on May 25, 1993, by Mr. James L. Van Hoose, Chairman of the Nevada State Board of Hearing Aid Specialists (Board). Mr. Van Hoose asked the Commission to determine whether his ownership of a Miracle-Ear hearing aid franchise in Northern Nevada constituted a conflict of interest which prohibited him from mediating a dispute between a Miracle-Ear hearing aid franchise in Southern Nevada and one of its customers, Ms. Kim Rhude.

The Nevada Commission on Ethics has jurisdiction in this matter pursuant to NRS 281.511(1).

A hearing on this matter was held on September 29, 1993, in the Washoe County Commission Chambers in Reno, Nevada, at which time the Commission heard testimony from Mr. Van Hoose and received other evidence regarding the opinion request. Mr. Van Hoose waived statutory confidentiality in the matter and the proceeding was therefore open to the public.

Immediately thereafter the Commission deliberated and orally issued Mr. Van Hoose an opinion in response to his request. The Commission has incorporated its oral opinion into these written Findings and Opinion that follows.

FINDINGS

1. At the time of the hearing of this opinion request, Mr. Van Hoose was the Chairman of the Nevada State Board of Hearing Aid Specialists. As such, Mr. Van Hoose was a public officer to whom the Nevada Ethics in Government Law applied. NRS 281.481.4365.
2. In 1989, the Board consisted of only two members, one of whom was Mr. Van Hoose, who were appointed by the governor for three-year, renewable terms. At that time each member was required to be licensed in the state as a hearing aid dispenser and own his or her own business.
3. Effective July 1, 1993, the Nevada Legislature increased membership of the Board from two to five members and required the following composition of the Board:
 - (a) One member who is a physician with a specialty in otorhinolaryngology or otology.
 - (b) One member who is licensed to engage in the practice of audiology pursuant to chapter 637B of NRS.
 - (c) One member who is a hearing aid specialist.
 - (d) Two members who are representatives of the general public and have hearing disorders.
4. The Board has statutory authority to grant, refuse, revoke or suspend licenses of hearing aid specialists. NRS 637A.110(2). The Board also investigates consumer complaints about hearing aid specialists.
5. "Hearing aid" means any wearable instrument or device designed for or offered for the purpose of aiding or compensating for impaired human hearing and any parts, attachments or accessories, including earmolds, but excluding batteries and cords. NRS 637A.0217.

6. "Hearing aid specialist" means any person licensed pursuant to the provisions of NRS ch. 637A who offers to rent, lease, sell or otherwise transfer title to hearing aids. The term includes persons who make impressions of the ear, offer counseling to others concerning hearing aids, fit hearing aids or test the hearing of others. NRS 637A.022.
7. Mr. Van Hoose is a hearing aid specialist who engages in the sale of hearing aids and owns a Miracle-Ear hearing aid franchise in Reno, Nevada.
8. On September 10, 1990, Ms. Kim Rhude, filed a complaint concerning Miracle-Ear, a hearing aid franchise in Henderson Nevada, with the Board. Mr. Bob Olsen is the manager of the Miracle-Ear hearing aid franchise in Henderson, Nevada. Mr. Doug Finley is a hearing-aid specialist who was employed as a dealer at the Miracle-Ear hearing aid franchise in Henderson, Nevada. The Miracle-Ear franchise owned by Mr. Van Hoose in Reno was an entirely separate business entity from the Miracle-Ear franchise operated by Mr. Olsen in Henderson.
9. According to her letter of complaint, Ms. Rhude visited the Miracle-Ear hearing aid franchise in Henderson, Nevada, on July 7, 1990, where Mr. Finley conducted various tests upon her ears. Mr. Finley explained that due to nerve deafness, Ms. Rhude had lost 50% of her hearing in both ears. Mr. Finley told Ms. Rhude that if she did not promptly buy hearing aids to stimulate the nerves, she would be deaf by the time she was 30. After the examination, Ms. Rhude executed a fitting agreement for the purchase of hearing aids at a total cost of \$2,459.20. Ms. Rhude provided Mr. Finley \$1,000.00 in cash for the down-payment, leaving a balance of \$1,459.20. Mr. Finley told Ms. Rhude that she could fulfill the contract by providing installment payments of \$100.00 a month.
10. According to the terms of the contract, there was a 45-day trial period during which all but 10% of the total payments made for the purchase of hearing aids would be refunded at the customer's request. Such a "fitting fee" or "lab fee" clause was standard throughout the industry.
11. Approximately two weeks after her order for hearing aids was placed, Ms. Rhude went to the Miracle-Ear office in Boulder City, Nevada, where her order had been delivered. After learning that these hearing aids had not improved her condition, Mr. Finley ordered Ms. Rhude a new set.
12. Ms. Rhude does not wear the new hearing aids because they do not help her. Ms. Rhude requested a refund of the purchase price of her hearing aids after the 45-day trial period had expired.
13. Ms. Rhude wrote her letter of complaint to the Board on September 10, 1990, upon Mr. Finley's refusal to grant her request for a refund, and receipt of a bill in the amount of \$121.60 as monthly payment for her hearing aids. Ms. Rhude directed her letter to the attention of Mr. Van Hoose, complaining that because she had been intimidated by Mr. Finley into executing a contract for the purchase of hearing aids which she could not afford, and which had not improved her hearing, she was entitled to return of the entire \$1,000.00 she had provided to Mr. Finley as down-payment for the product.
14. At the time of Ms. Rhude's letter, the Board had no parameters, specific guidelines, or formal proceedings for investigating and resolving consumer complaints or achieving negotiations. The general practice was that once a consumer had registered a complaint with the Board, the Board would meet with the consumer and thereafter direct the consumer to contact the dealer. Thus the manner in which a complaint was resolved was left largely in the hands of the hearing aid specialist who was the subject of a complaint.
15. Believing that the Board's general practice in resolving complaints was not an appropriate method, and seeking to improve the complaint-handling process, Mr. Van Hoose had requested that all complaints be forwarded to himself. Upon receipt of calls from customers dissatisfied with Miracle-Ear hearing aid franchises or its products, Mr. Van Hoose would call the dispenser, ask questions, and then mediate a discussion between the aggrieved parties. Through mediation, the clients would have their problems taken care of by either receiving new instruments or a

refund. In was in this same manner that Mr. Van Hoose approached Ms. Rhude's concerns upon receipt of her letter dated September 10, 1990.

16. Mr. Van Hoose commenced investigation of Ms. Rhude's complaint by calling Ms. Rhude to request further information. Ms. Rhude informed him that she wanted her money back. Mr. Van Hoose subsequently contacted Mr. Finley and Mr. Olsen to obtain their explanations regarding the circumstances of Ms. Rhude's purchase of hearing aids at the Henderson Miracle- Ear hearing aid franchise.

17. Mr. Olsen disputed the basis for Ms. Rhude's complaint but agreed to give Ms. Rhude a refund of all of her money less \$200 .00 for a fitting fee on the condition that she draft a retraction to a complaint concerning her experience with the franchise that she had disseminated to several agencies. When Mr. Olsen discovered that her letter of retraction contained a charge against him, he refused to give Ms. Rhude a refund as she had not communicated her dissatisfaction to, nor had she provided the franchise any opportunity to correct the concerns she may have had in regard to promises she had made in the purchase agreement.

18. Mrs. Rhude telephoned Mr. Van Hoose to ask if it was fair that the Henderson Miracle-Aid franchise be permitted to retain \$200.00 of the money she had paid for her hearing aids. Mr. Van Hoose informed her that since he had not seen the purchase agreement, he could not definitely answer her question, but that it was not an uncommon practice for hearing aid offices throughout the state to charge a fee of some type. Ms. Rhude then forwarded to Mr. Van Hoose for his review, a new request for a refund that she planned to direct to Mr. Olsen's attention. Mr. Van Hoose informed Ms. Rhude that this letter was acceptable.

19. Upon receipt of Ms. Hoose's letter, Mr. Olsen agreed to refund \$800.00 of the \$1,000.00 paid by Ms. Rhude. On October 16, 1990, Ms. Rhude's \$1,000.00 down-payment was refunded by check in the amount of \$800.00, with the remaining \$200 retained by the provider for expenses and fittings. After Ms. Rhude received her refund, she called Mr. Van Hoose to thank him for his assistance. On October 17, 1990, Ms. Rhude wrote a letter to the Board, directed to Mr. Van Hoose's attention, in which she stated she was returning the hearing aids; she understood that \$200.00 of the \$1,000.00 paid was being retained as a fitting fee; and that she "consider[ed] the matter totally resolved."

20. In April 1993, Ms. Rhude disseminated a letter to the news media, in which she repeated her allegations against the Miracle- Ear hearing aid franchise and accused Mr. Van Hoose of having had a conflict of interest in resolving her complaint. Ms. Rhude claimed that at the time she wrote a letter of complaint and request for return of money from the Miracle-Ear hearing aid franchise to Mr. Van Hoose in his capacity as Chairman of the Board, she was unaware that Mr. Van Hoose also sold Miracle-Ear hearing aids. According to Ms. Rhude, although she had desired a refund of the entire \$1,000.00 payment provided to Miracle-Ear, she had written and signed a disclaimer letter in which she asserted satisfaction with an \$800.00 refund and the treatment she received, only because she been forced to do so under threat of lawsuit by Mr. Finley, Mr. Olsen and Mr. Van Hoose.

21. Subsequent to receipt of Ms. Rhude's letter of October 17, 1990, Mr. Van Hoose traveled to Las Vegas on a business trip. Upon his arrival at McCarran Airport, he discovered reporters from Dateline, a network television news program, were waiting there to interview him, and learned that Ms. Rhude was ready to testify against him on national television.

22. After reviewing the information provided to it by Mr. Van Hoose, Dateline did not make Mr. Van Hoose primary focus of its story. A segment of Dateline featuring Ms. Rhude was aired on September 22, 1993.

23. Mr. Van Hoose received no remuneration for mediation services or other income resulting from mediation.

24. Mr. Van Hoose's tenure on the Board was scheduled to expire on October 1, 1993.

OPINION

At the time of the hearing in this matter, Mr. Van Hoose was a public officer as defined in NRS 281.4365(1).

The question presented by the Mr. Van Hoose was whether, while performing his public responsibilities as Chairman of the Board, he was prohibited by the Nevada Ethics in Government Law from discussing, counseling, mediating, or otherwise acting with respect to a payment dispute between a Miracle-Aid franchise in southern Nevada and one of its customers, because, in his private capacity, he had an ownership interest in a Miracle-Aid hearing aid franchise in northern Nevada.

A public officer may not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his household, or any business entity in which he has a significant pecuniary interest or any other person. (NRS 281.481(2)).

The alleged conflict of interest is stated to have arisen because Mr. Van Hoose had a pecuniary interest or a commitment to others in the sale of hearing aid instruments, and a professional interest in his own Miracle-Ear hearing aid business, which would financially benefit from the purchase of hearing aids from any Miracle-Ear franchise.

However, there was no evidence to indicate that Mr. Van Hoose used his position to benefit himself or any another person when he assisted Ms. Rhude with her complaint. Mr. Van Hoose had no personal or financial interest in the southern Nevada Miracle-Ear franchise that was the subject of Ms. Rhude's complaint. The fact that Mr. Van Hoose owns a Miracle-Ear franchise in Reno, Nevada, bears no relation to the Miracle-Ear franchise in Henderson, Nevada, because the two businesses are separate and distinct with a geographically segregated client base potential. Mr. Van Hoose would not have any private personal or pecuniary gain as a result of profits generated in the Henderson Miracle-Ear franchise. Consequently, Mr. Van Hoose did not use his position in government to secure or grant unwarranted privileges or advantages for himself, any member of his household or any business entity in which he had a financial interest, regarding his actions in resolving Ms. Rhude's complaint.

Mr. Van Hoose handled Ms. Rhude's complaint in the same fashion as he had handled other cases that did not involve Miracle-Ear franchise owners or employees. Mr. Van Hoose disposed of Ms. Rhude's problems in compliance with the Board policy to protect the consumer and ensure that the people who dispensed hearing aid instruments in the State of Nevada were qualified, knowledgeable, and ethical.

The Commission determined that there was no evidence in the record with respect to any pecuniary interest or commitment to the interest of others to suggest that Mr. Van Hoose be required to make disclosures or abstain from taking action to resolve Ms. Rhude's problems, nor any facts presented to the Commission which would suggest that an ethical violation occurred within the definition of NRS 281 concerning the complaint filed against him by Ms. Rhude.

Mr. Van Hoose had not acted inappropriately as alleged by Ms. Rhude; he did not have a financial interest in the southern Nevada Miracle-Ear franchise and he did not use his position to benefit himself or another under the circumstances addressed in this opinion.

Based upon the record, the Commission saw no evidence of conflict, violation of the Code of Ethical Standards, or any inappropriate conduct in connection with Mr. Van Hoose's mediation of the dispute concerning refund of payments for hearing aids that did not meet a customer's satisfaction.

CONCLUSION

James Van Hoose, while serving as a Chairman of the Board, did not violate the Code of Ethical Standards by mediating a dispute between a Miracle-Ear hearing aid franchise and a dissatisfied customer by virtue of his ownership of a separately owned Miracle-Ear franchise.

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific circumstances, and may not apply to other circumstances. The provisions of the NRS as quoted and discussed above must be applied on a case-by-case basis, with results which will vary depending on the specific facts and circumstances involved.

DATED: October 2, 1995.

NEVADA COMMISSION ON ETHICS

By: /s/ THOMAS R. C. WILSON, Chairman