

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN  
BEFORE THE HEARING AND SPEECH EXAMINING BOARD

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IN THE MATTER OF THE APPLICATION :  
FOR A LICENSE TO PRACTICE AS A : FINAL DECISION  
HEARING INSTRUMENT SPECIALIST : AND ORDER  
: Case No. LS 0801252HAD  
: 08 HAD 001  
MICHAEL FITZPATRICK, :  
APPLICANT :  
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The parties to this action for purposes of Wis. Stats. § 227.53 are:

Michael Fitzpatrick  
3789 Windemere Drive  
Colgate, WI 53017

Department of Regulation & Licensing  
Division of Enforcement  
P.O. Box 8935  
Madison, WI 53708

Hearing and Speech Examining Board  
Department of Regulation & Licensing  
P. O. Box 8935  
Madison, WI 53708-8935

**PROCEDURAL HISTORY**

An evidentiary hearing was held in the above-captioned matter on February 27, 2008. Atty. James E. Polewski appeared on behalf of the Division of Enforcement. Atty. Patrick R. Russell appeared on behalf of Michael Fitzpatrick. The Administrative Law Judge issued her proposed decision on March 25, 2008. The Board considered the proposed decision at its meeting on April 14, 2008.

**FINDINGS OF FACT**

1. Michael Fitzpatrick (dob 9/10/53) applied for a license as a hearing instrument specialist on or about April 4, 2007. Mr. Fitzpatrick currently resides at 3789 Windemere Drive in Colgate, Wisconsin.

2. On November 9, 2007, the Hearing and Speech Examining Board denied Mr. Fitzpatrick's application for a hearing instrument specialist license on the basis of his two convictions. Mr. Fitzpatrick was convicted of Theft in the First Degree on March 20, 2002. He was also convicted of Theft in the First Degree on April 11, 2002.

3. Mr. Fitzpatrick made a timely request for hearing on the denial of his application for a license as a hearing instrument specialist.

4. From approximately September 1991 to May of 1999, Mr. Fitzpatrick was a full-time sales representative for Olympus which distributes and sells laparoscopic equipment to hospitals. From approximately June 1999 to December 2001, Mr. Fitzpatrick was a full-time sales representative for Merit Medical. At Merit, Mr. Fitzpatrick sold cardio/interventional radiology equipment to laboratories.

5. At various times in 1999, Mr. Fitzpatrick stole medical equipment from at least 5 hospitals in Iowa. Those hospitals included St. Luke's in Cedar Rapids; Mercy Hospital in Cedar Rapids; University Hospital in Algona; Palo Alto County Hospital in Emmetsburg, and Mercy Hospital in Iowa City. The estimated replacement value of the equipment that Mr. Fitzpatrick stole from St. Luke's, Mercy Hospital (Cedar Rapids) and Mercy Hospital in Iowa

City, was almost \$35,000. That figure does not include the purchase price or replacement value of the equipment that Mr. Fitzpatrick stole from the University Hospital in Algona and the Palo Alto County Hospital in Emmetsburg. Some or all of the medical equipment that Mr. Fitzpatrick stole from the hospitals were sold to hospitals in Central and South America.

6. In March of 1999, Mr. Fitzpatrick stole medical equipment (an intubating fiber optic scope) from Mercy Hospital in Iowa City, Iowa. At that time, the original purchase price of the fiber optic scope was \$6,489. The estimated replacement cost of the fiber optic scope was \$10,000. On April 11, 2002, Mr. Fitzpatrick pled guilty to and was convicted of Theft in the First Degree, a felony, for stealing the fiber optic scope. Mr. Fitzpatrick was ordered to pay restitution in the amount of \$14,449.48.

7. In October of 1999, Mr. Fitzpatrick stole medical equipment (an Olympus flexible bronchoscope and an Olympus 3-chip camera controller) from St. Luke's and Mercy Hospital in Cedar Rapids, Iowa. The Criminal Complaint filed in that matter alleged that Mr. Fitzpatrick took over \$10,000 in medical equipment from St. Luke's Hospital and Mercy Hospital. At that time, the estimated replacement cost of the bronchoscope was \$15,200. The estimated replacement cost of the camera controller was \$9,000. On March 20, 2002, Mr. Fitzpatrick pled guilty to and was convicted of Theft in the First Degree, a felony, for the theft of the equipment. At the time that Mr. Fitzpatrick stole the Olympus equipment from St. Luke's Hospital and Mercy Hospital, he was no longer a sales representative for Olympus.

8. The crimes for which Mr. Fitzpatrick was convicted substantially relate to the practice of fitting and dealing in hearing aids.

### **CONCLUSIONS OF LAW**

1. The Hearing and Speech Examining Board has jurisdiction in this matter pursuant to Wis. Stats., §§ 111.335 (1) (c) 1., and 459.06.

2. Under Wis. Stats., § 111.335 (1) (c) 1., the crimes for which Mr. Fitzpatrick was convicted of on March 20, 2002 and April 11, 2002, as described in Findings of Fact 4-7 herein, substantially relate to the practice of fitting and dealing in hearing aids.

### **ORDER**

**NOW, THEREFORE IT IS ORDERED** that the application of Michael Fitzpatrick for a license and a temporary permit to practice as a hearing instrument specialist be, and hereby is, Denied.

This order is effective on the date it is signed by a designee of the Board.

### **EXPLANATION OF VARIANCE**

#### **I. Applicable Law**

Wis. Stats. § 459.01 (introd.), (3), (5), (6) and (7) read as follows:

**459.01 Definitions.** As used in this subchapter, unless the context clearly indicates a different meaning:

(3) "Hearing instrument specialist" means any person who is or is required to be licensed under s. 459.05 to engage in the practice of dealing in or fitting hearing aids.

(5) "Practice of fitting and dealing in hearing aids" means the measurement of human hearing by means of an audiometer or by any other means accepted by the examining board solely for the purpose of making selections, adaptations or sales of

hearing aids intended to compensate for impaired hearing. This term also includes making impressions for ear molds.

(6) "Sell" or "sale" means a transfer for a consideration of title or of the right to use.

(7) "Trainee permit" means a temporary permit issued while the applicant is in training to become a licensed hearing instrument specialist.

Wis. Stats. § 459.02 read as follows:

459.02 License required to sell and fit hearing aids. (1) No person may engage in the practice of selling or fitting hearing aids or display a sign or in any other way advertise or represent himself or herself as a person who practices the fitting or sale of hearing aids unless he or she holds a valid license issued under this subchapter or a valid license or permit to practice audiology issued under subch. II. ...

Wis. Stats., § 459.06 (1), states, in part, that applicants may obtain a license by successfully passing a qualifying examination, provided that the applicant is 18 years of age or older and does not have an arrest or conviction record, subject to §§ 111.321, 111.322 and 111.335.

Wis. Stats., §§ 111.321 and 111.322 prohibit a licensing agency from discriminating against an individual on the basis of an arrest or conviction record.

Wis. Stats., § 111.335 (1) (c) 1., states, in part, that notwithstanding s. 111.322, it is not discrimination because of conviction record to refuse to license any individual who has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular licensed activity.

## **II. Variance**

The Board accepts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, but adds Findings of Fact 4-8 and Conclusions of Law 2. The Board also modifies the proposed Order of the Administrative Law Judge. The basis of the Board's decision is discussed below.

### **A. Findings of Fact 4-8:**

The Board adds Findings of Fact 4 to reflect Mr. Fitzpatrick's employment status at the time that he stole the hospital equipment for which he was convicted. The Board adds Findings of Fact 5-7, to reflect that the crimes for which Mr. Fitzpatrick was convicted are serious crimes, felonies, which involved the theft of expensive medical equipment from hospitals that had given him free and open access to their facilities. The Board adds Findings of Fact 8 to state that the crimes for which Mr. Fitzpatrick was convicted substantially relate to the practice of fitting and dealing in hearing aids.

### **B. Conclusions of Law 2:**

The Board adds Conclusions of Law 2 to reflect its conclusion that under Wis. Stats., § 111.335 (1) (c) 1., the crimes for which Mr. Fitzpatrick was convicted substantially relate to the practice of fitting and dealing in hearing aids.

### **C. Order**

The Administrative Law Judge recommended that the Board grant a limited license to Mr. Fitzpatrick. The Board modifies the proposed Order to state that the applicant's request for a license is denied.

## **III. Explanation**

Mr. Fitzpatrick has an arrest and a conviction record, as defined in Wis. Stats., § 111.322. He admitted in his application materials, and during his testimony at the hearing, that he was convicted of First Degree Theft in Cedar Rapids, Iowa in March 2002

and of First Degree Theft in Iowa City, Iowa in April 2002.

The only issue to be determined is whether the crimes for which Mr. Fitzpatrick was convicted substantially relate to the practice of fitting and dealing in hearing aids.

Based upon the record in this proceeding, the Board concludes that the circumstances of the crimes for which Mr. Fitzpatrick was convicted, theft of hospital property, substantially relate to the practice of fitting and dealing in hearing aids.

First, in reference to the "practice of fitting and dealing in hearing aids", that term is defined in Wis. Stats. § 459.01 (5) to mean "the measurement of human hearing by means of an audiometer or by any other means accepted by the examining board solely for the purpose of making selections, adaptations or sales of hearing aids intended to compensate for impaired hearing. The term also includes making impressions for ear molds". This definition makes it clear that the practice of fitting and dealing in hearing aids includes the sale of hearing aids.

It is also clear under Wis. Stats. § 459.02 that the sale of hearing aids is included in the practice of fitting and dealing in hearing aids. That provision states, in part, that "no person may engage in the practice of selling or fitting hearing aids or display a sign or in any other way advertise or represent himself or herself as a person who practices the fitting or sale of hearing aids unless he or she holds a valid license issued under this subchapter or a valid license or permit to practice audiology issued under subch. II".

Second, in reference to Mr. Fitzpatrick's convictions for theft, Mr. Fitzpatrick admitted to stealing medical equipment in 1999 from at least 4 hospitals in Iowa. Those hospitals included St. Luke's in Cedar Rapids; University Hospital in Algona; Palo Alto County Hospital in Emmetsburg, and Mercy Hospital in Iowa City. Mr. Fitzpatrick also stole medical equipment from a 5th hospital, which was Mercy Hospital in Cedar Rapids, Iowa. That theft was included in the Criminal Complaint that resulted in his first conviction on March 20, 2002. Transcript p. 37; Exhibit 1.

From September 1991 to May of 1999, Mr. Fitzpatrick was a full-time sales representative for Olympus. He sold laparoscopic equipment to hospitals. Mr. Fitzpatrick was working as a sales representative at Olympus at the time he stole the medical equipment from Mercy Hospital (Iowa City) in April of 1999. From June 1999 to December 2001, Mr. Fitzpatrick was a full-time sales representative for Merit Medical. He sold radiology equipment to laboratories. Mr. Fitzpatrick was working as a sales representative at Merit Medical at the time he stole the Olympus equipment from St. Luke's and Mercy Hospital (Cedar Rapids) in October of 1999.

In reference to the March 1999 theft, the Criminal Complaint filed in that matter states that, on April 5, 1999, Mercy Hospital reported the theft of an intubating fiber optic scope having an estimated replacement cost of \$10,000 (the original purchase price was \$6,489). According to information contained in the Criminal Complaint, Mr. Fitzpatrick admitted to stealing the scope along with other hospital equipment at the University Hospitals, Kossuth Regional Health Center (Algona), Palo Alto County Hospital (Emmetsburg) and St. Luke's Hospital in Cedar Rapids. In April 2002, Mr. Fitzpatrick pled guilty to and was convicted of Theft in the First Degree in the Iowa District Court, Johnson County. As part of sentencing, Mr. Fitzpatrick was ordered to pay restitution in the amount of \$14,559.48. Mr. Fitzpatrick was discharged from probation in June 2004. Exhibit 1.

In reference to the October 1999 theft, the Cedar Rapids Police Department Incident Report and Supplement states that, on October 7, 1999 the Director of Security at Mercy Hospital reported that someone removed equipment from the hospital. Someone took a flexible Brocho Scope valued at \$15,200, and a 3-chip camera controller valued at \$9,000. Based on the Criminal Complaint that was filed in the matter, between October 1, 1999 and October 31, 1999, Mr. Fitzpatrick took over \$10,000 in medical equipment from St. Luke's Hospital and Mercy Hospital in Cedar Rapids, Iowa. In March 2002, Mr. Fitzpatrick pled guilty to and was convicted of Theft in the First Degree in the Iowa District

Court, Linn County. The amount of restitution that Mr. Fitzpatrick was ordered to pay, if any, is not contained in the record of this proceeding. Mr. Fitzpatrick was discharged from probation in June 2004. Exhibit 1.

Finally, §§ 111.321 and 111.322, Stats., prohibits a licensing agency from discriminating against an individual on the basis of a conviction record. Section 111.335 (1) (c), Stats., provides that notwithstanding s. 111.322, it is not discrimination because of conviction record to terminate from licensing any individual who has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the licensed activity.

The purpose of the exception structured by the Legislature in s. 111.335 (1) (c), Stats., was discussed by the Wisconsin Supreme Court in County of Milwaukee v. Labor and Industry Review Commission, 139 Wis. 2d 805, 407 N.W. 2d 908 (1987). Although the Court's discussion focused on the employment area, the societal interests discussed are relevant to the licensing area. The Court stated, Id. at 821, that:

It is evident that the legislature sought to balance at least two interests. On the one hand, society has an interest in rehabilitating one who has been convicted of crime and protecting him or her from being discriminated against in the area of employment. Employment is an integral part of the rehabilitation process. On the other hand, society has an interest in protecting its citizens. There is a concern that individuals, and the community at large, not bear an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime. This concern is legitimate since it is necessarily based on the well-documented phenomenon of recidivism.

In reference to assessing the risk of recidivism, the Supreme Court stated, Id. at 823-824, that:

In balancing the competing interests, and structuring the exception, the legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances, of the offense and the particular job, are substantially related. ...

Assessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed, is the purpose of the test. ...

It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.

The Board concludes that if Mr. Fitzpatrick is licensed as a hearing instrument specialist, he would have ample opportunity to engage in criminal activity similar to that for which he was convicted. In reference to character traits, the Board concludes that Mr. Fitzpatrick's convictions for theft reflect that he is dishonest and untrustworthy.

First, in reference to the opportunity for criminal behavior, as a hearing instrument specialist Mr. Fitzpatrick would have easy access to client deposits. According to Mr. Fitzpatrick, down payments for hearing aids are "as little as \$500.00". In addition, Mr. Fitzpatrick would have the opportunity to misrepresent the need for or benefits of a particular hearing aid. He testified that, as a hearing instrument specialist, he would advise clients, primarily the elderly, on whether their hearing requires or could benefit from a particular hearing aid. He said that his advice would have a direct result on his income. The higher the price of the hearing aid that he would recommend to a client, the higher his commission fee would be. Exhibit 1; Transcript p. 13, 15-17, 28-31.

Second, in reference to character traits, Mr. Fitzpatrick's convictions for theft reflect that he is dishonest and untrustworthy. He stole medical equipment from hospitals that had given him free and open access to their facilities. Although Mr. Fitzpatrick was no longer a sales representative for Olympus in October of 1999, he was able to walk into Mercy Hospital (in Cedar Rapids) and steal Olympus equipment without being stopped. He left his employment at Olympus in May of 1999. There was no legitimate reason for him to take possession of or handle the Olympus equipment at that time. Also, when the staff at Mercy Hospital asked Mr. Fitzpatrick about the missing equipment, he lied to them. He told the hospital staff that he was not at or near the hospital on the day the equipment was taken. Exhibit 1.

In addition, Mr. Fitzpatrick lied to the Hearing and Speech Examining Board in October of 2007 when he stated in his application materials that most of the equipment he stole "was obsolete and of little value to the hospital". In fact, Mr. Fitzpatrick admitted during his testimony at the hearing that, at the time that he stole the medical equipment (the flexible bronchoscope) from Mercy Hospital ( Cedar Rapids) in October 1999, the equipment was still being used by the hospital. He said the scope still worked and that it was perfectly adequate for the purposes that the hospital was using it for. It should be noted that, the estimated replacement value of the equipment that he stole from St. Luke's, Mercy Hospital ( Cedar Rapids) and Mercy Hospital in Iowa City, was almost \$35,000. That figure does not include the purchase price or replacement value of the equipment that Mr. Fitzpatrick stole from the University Hospital in Algona and the Palo Alto County Hospital in Emmetsburg. According to Mr. Fitzpatrick, although the equipment that he stole had little value, he said that a former associate of his had connections to a repair company that refurbished the instruments and sold them to hospitals in Central and South America. Exhibit 1; Transcript p. 22-24.

Finally, the Board concludes that, based upon the record of this proceeding, Mr. Fitzpatrick is dishonest, untrustworthy and that he would be incapable of practicing as a hearing instrument specialist in a manner that would safeguard the interest of the public.

Dated this 31<sup>st</sup> day of July, 2008

By: Okie Allen  
A Member of the Board