STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF OPTOMETRY,	)	
Petitioner,	)	
vs.	)	CASE NO. 82-2193
LOUIS A. SCHWARTZ,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its undersigned Hearing Officer, William E. Williams, held a final hearing in this cause on October 20, 1983, in Gainesville, Florida. The issue for determination at the hearing was whether disciplinary action should be taken against Respondent's license as an optometrist.

APPEARANCES

For Petitioner: Joseph W. Lawrence, II, Esquire
Department of Professional Regulation
130 North Monroe Street
Tallahassee, Florida 32301

For Respondent: F. Philip Blank, Esquire
Suite 320, Lewis State Bank Building
Tallahassee, Florida 32301

By Administrative Complaint dated July 12, 1982, Respondent was charged with violating Section 463.014(1)(a) Florida Statutes. Specifically, it was alleged in the Administrative Complaint that Respondent was practicing optometry under the trade name "Sears Contact and Lenses Center," at 420 Northwest 23rd Boulevard, Gainesville, Florida, in violation of the aforementioned statute, and, as a result, was subject to disciplinary action pursuant to Section 463.016(1)(h) Florida Statutes. No specific dates for the alleged offenses were set forth in the Administrative Complaint and, as a result, for purposes of this proceeding it will be assumed that the offenses for which the Respondent is allegedly chargeable arose prior to July 12, 1982, the date of the Administrative Complaint.

In support of the allegations of the Administrative Complaint, Petitioner presented the testimony of Evelyn McNeely, and Petitioner's Exhibits 1 through 11, which were received into evidence. The Respondent testified in his own behalf, presented the testimony of Eileen Roberts, and offered Respondent's Exhibits 1 through 5, which were received into evidence.

Both Petitioner and Respondent have submitted proposed findings of fact for consideration by the Hearing Officer. To the extent that those proposed

findings of fact are not included in this Recommended Order, they have been specifically rejected as either being irrelevant to the issues involved in this cause, or as not having been supported by evidence of record.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence produced at hearing, the following relevant facts are found:

1. At all times pertinent to this proceeding, Respondent was licensed to practice optometry by the State of Florida, Board of Optometry.

2. On or about May 8, 1980, Respondent entered into a lease agreement with Cole National Corporation to lease 154 square feet of space as an optometric office in the location of the retail store of Sears, Roebuck and Co. at 1420 Northwest 23rd Boulevard, Gainesville, Florida. Respondent practiced in that location approximately two days per week until on or about October 1, 1982.

3. Respondent's optometric office was located in a Sears, Roebuck retail store next door to the "Sears Optical Department," in which eyeglasses and contact lenses and other optical merchandise could be purchased. Respondent's office was identified by a large sign overhead reading "Optometrist," in the same print as the sign above the Sears Optical Department. In addition, a small plaque on the door leading into Respondent's examination room read "Dr. L. A. Schwartz, Optometrist."

4. During the time he practiced at the 1420 Northwest 23rd Boulevard location of Sears, appointments could be made with Respondent by calling the Sears Optical Department telephone number. The phone was answered "Sears Contact and Lenses Center" by employees of Cole National Corporation, which controlled and owned the Sears Optical Department. The Cole employees were not paid for this service by Respondent. Respondent had no telephone listing in either the yellow or white pages of the Gainesville, Florida, telephone directory between May, 1980, and July 12, 1982, the date of the Administrative Complaint. The Cole National Corporation employees maintained Respondent's scheduling book and made tentative appointments for his prospective patients, although Respondent customarily would call the patient back to confirm the date and time of the appointment prior to the time of the scheduled visit. Respondent's hours of service and fee information were also given to prospective optometric patients by Cole National personnel.

5. Respondent accepted the Sears, Roebuck and Co. credit card as payment for optometric services. Sears then billed the patients directly and Respondent received monies billed to the patients in full through Sears on a monthly basis, regardless of whether the patient paid the bill fully monthly or carried the debt over to succeeding months.

6. Respondent, pursuant to his lease with Cole National Corporation, was precluded from selling optometric supplies to his patients. Rather, Respondent would in all cases issue prescriptions for optometric goods and supplies, such as glasses and contact lenses, which in most cases were placed on a prescription blank bearing his name. At times, however, when Respondent did not have prescription forms available bearing his own name, he would use such a form from the Sears Optical Department, crossing out all references to Sears and inserting his name and address in place of that of Sears Optical Department.

7. On or about February 22, 1982, the Sears Optical Department mailed letters to various consumers in the Gainesville area. These letters, in part, advised that Respondent, an independent doctor of optometry, was available for eye examinations in his private office in the Sears building and that he could be reached for appointments at a telephone number which was listed in the telephone directory for Sears Optical Department.

8. The evidence in this cause establishes that Respondent's office location at all times material hereto was maintained separately from both Sears, Roebuck and Co. and the Sears Optical Department. In addition, the record in this cause fails to in any way establish that Respondent ever held himself out as an employee or representative of either Sears, Roebuck and Co. or the Sears Optical Department. In fact, the record clearly establishes that both Respondent and employees of the Sears Optical Department always indicated to the consuming public that Respondent was an independent optometric practitioner.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57(1) , Florida Statutes.

10. Respondent is charged with violation of Section 463.014(1)(a), Florida Statutes, which provides as follows:

> (1)(a) No optometrist shall practice or attempt to practice under a name other than his own or under the name of a professional association. No optometrist shall practice under the name of any company, corporation, trade name, business name, or other fictitious entity.

11. Section 463.014(d), Florida Statutes, provides that:

> [n]o rule of the [Board of Optometry] shall forbid the practice of optometry in or on the premises of a commercial or mercantile establishment.

12. Evidence of record in this proceeding wholly fails to establish that Respondent in any way violated the provisions of Section 463.014(1)(a), Florida Statutes. Respondent's office was always clearly marked with his name, prescription blanks and other stationery always clearly indicated that his practice was conducted in his own name, and when stationery other than his own was used it was always altered by deleting the name of "Sears Optical Department" and substituting the name of the Respondent. As far as can be determined from this record, when appointments were made with Respondent through "Sears Optical Department" efforts were always made to advise prospective patients that Respondent's practice was independent of "Sears Optical Department" and the prospective patient would be recontacted by Respondent in order to confirm an appointment.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a Final Order be entered by the Department of Professional Regulation, Board of Optometry, dismissing the Administrative Complaint herein.

DONE AND ENTERED this 1st day of March, 1983, at Tallahassee, Florida.

WILLIAM E. WILLIAMS
Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32301
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of March, 1983.

COPIES FURNISHED:

Joseph W. Lawrence, II, Esquire
Department of Professional
Regulation
130 North Monroe Street
Tallahassee, Florida 32301

F. Philip Blank, Esquire
Tucker & Blank, P.A.
320 Lewis State Bank Building
Tallahassee, Florida 32301

Mildred Gardner, Executive Director
Board of Optometry
Department of Professional
Regulation
130 North Monroe Street
Tallahassee, Florida 32301

Fred M. Roche, Secretary
Department of Professional
Regulation
130 North Monroe Street
Tallahassee, Florida 32301

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF OPTOMETRY

DEPARTMENT OF PROFESSIONAL
REGULATION,

Petitioner,

vs. Case No. 82-2193

LOUIS A SCHWARTZ, O.D.,

Respondent.
_____/

FINAL ORDER

This matter came for final action by the Board of Optometry on May 13, 1983, in Orlando, Florida. An administrative hearing held pursuant to the provisions of Section 120.57(1), F.S., resulted in the issuance of a Recommended Order (attached hereto as Exhibit A). Petitioner filed Exceptions to said Order. Both Petitioner and the Respondent appeared before the Board. Following a review of the complete record in the proceeding, it is ORDERED:

1. The Findings of Fact in the Recommended Order are approved and adopted and incorporated herein by reference. However the Board also makes the following additional findings of fact, as suggested in Petitioner's exceptions, and finds these additional findings of fact to be supported by the record:

a. Paragraph 8 of the Findings of Fact of the Recommended Order is amended to add the underscored language:

The evidence in this cause establishes that Respondent's office location at all times material hereto was maintained separately from both Sears, Roebuck and Co. and the Sears Optical Department. In addition, the record fails to In any way establish that Respondent ever directly held himself out as an employee or representative of either Sears, Roebuck and Co. or the Sears Optical Department. In fact, the record clearly establishes that both Respondent and employees of the Sears Optical Department always indicated to the consuming public that Respondent was an independent optometric practitioner, when asked.

b. The following additional findings of fact are adopted:

a. The Respondent's optometric practice telephone was answered "Sears Contact and Lenses Center" a trade name, and Respondent had no telephone listing under his own name;

b. The practice location was within a Sears, Roebuck retail store with no designation that he was not associated with or practicing for said establishment.

c. The Sears Optical Department employees were the ones who arranged during most hours of operation the appointments for optometric service of the Respondent.

d. Sears, Roebuck and Co. credit cards were accepted as payment by Respondent and said company would bill the patient for the optometric services provided by Respondent, with monthly bills by Sears itself.

e. Prescription forms of Sears Optical Department were utilized at times by Respondent;

f. Sears, Roebuck and Co. advertised Respondent's availability as an optometrist to its clientele.

2. The Conclusions of Law set forth in paragraphs 1, 2, and 3 of the Recommended Order are hereby approved and adopted and incorporated herein by reference. The Board rejects paragraph 4 of the Conclusions of Law as an erroneous interpretation of the law, and hereby adopts Petitioner's Exceptions to said conclusion of law and finds:

Section 463.014(1)(a), Florida Statutes, states:

> (1) Except as otherwise provided in this section:
> (a) No optometrist shall practice or attempt to practice under a name other than his own or under the name of a professional association. No optometrist shall practice under the name of any company, corporation, trade name, business name, or other fictitious entity.

The Legislature has expressly observed in Section 463.01, Florida Statutes, that "it is difficult for the public to make an informed choice when selecting an optometrist, and that the consequences of a wrong choice could severely endanger the public health and safety." The public has the right to make a knowledgeable choice about optometric care, and that the public is entitled to make this decision in an atmosphere free of deceptive or potentially misleading practices. See also, Section 463.016(1)(f), Florida Statutes.

Section-463.014(1)(a), Florida Statutes, is consistent with the expression of legislative intent outlined above. The United States Supreme Court in upholding the constitutionality of a similar Texas Statute imposing a ban upon the use of trade names by optometrists pointedly observed:

> Here, we are concerned with a form of commercial speech that has no intrinsic meaning. A trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality.

> Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public.
>
> The possibilities for deception are numerous. The trade name of an optometrical practice can remain unchanged despite changes in the staff of optometrists upon whose skill and care the public depends when it patronized the practice. Thus, the public may be attracted by a trade name that reflects the reputation of an optometrist no longer associated with the practice. A trade name frees an optometrist from dependence on his personal reputation to attract clients and even allows him to assume a new trade name if negligence or misconduct casts a shadow over the old one. By using different trade names at shops under his common ownership, an optometrist can give the public the false impression of competition among the shops. The use of a trade name also facilitates the advertising essential to large-scale commercial practices with numerous branch offices, conduct the State rationally may wish to discourage while not prohibiting commercial optometrical practice altogether. Friedman v. Rogers, 440 U.S. 1, 12-13 (1979)

See also, Parker v. Board of Dental Examiners, 14 P.2d 67 (Calif. 1932); Texas State Board of Examiners v. Carp, 412 SW 2d 307 (Texas 1967); State ex rel. Standard Optical Co. v. Superior Court for Chelan County, 135 P.2d 839 (Wash. 1943). See, e.g., Ritholz v. Commonwealth, 35 S.E. 378 (Mass. 1940); Fisher v. Schumacher, 72 So.2d 804 (Fla. 1954); and State Board of Optometry v. Gilmore, 3 So.2d 708 (Fla. 1941).

Based upon the factual predicate, it is clear that Respondent has violated Section 463.014(1)(a), Florida Statutes and as such, Section 463.016(1)(h), Florida Statutes.

3. The Recommendation in the Recommended Order is rejected as inappropriate in light of the above findings of fact and conclusions of law. THEREFORE,

It is order and adjudged that the Respondent be and is hereby officially reprimanded, and that he pay a Five Hundred Dollar civil penalty.

DONE and ORDERED this 1st day of June , 1983.

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GEORGE A. PENA, O.D.
Chairman

cc: Joseph W. Lawrence, II, Esquire

F. Philip Blank, Esquire