

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL)	
REGULATION, BOARD OF OPTOMETRY,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 83-527
)	
JOHN T. BECKUM, O.D.,)	
)	
Respondent.)	
_____)	

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted in this matter on June 9, 1983, in Gainesville, Florida. The following appearances were entered: Joseph W. Lawrence, II, Tallahassee, Florida, appeared on behalf of the Petitioner, Department of Professional Regulation, Board of Optometry; and Stephen Marc Slepín, Tallahassee, Florida, appeared on behalf of the Respondent, John T. Beckum, O.D.

On or about February 1, 1983, the Petitioner issued an Administrative Complaint against the Respondent. It is alleged in the complaint that the Respondent, a licensed optometrist, violated provisions of Florida statutes relating to the practice of optometry. The Respondent requested a formal administrative hearing, and the matter was forwarded to the office of the Division of Administrative Hearings. The final hearing was scheduled to be conducted as set out above by notice dated March 11, 1983.

At the final hearing, the Petitioner called the following witnesses: Karilyn Boggan Peterson, a former patient of the Respondent; Dr. William F. Guyton, an ophthalmologist licensed to practice in Florida; Paul Funderburk, a licensed optometrist; and Walter Hathaway, a licensed optometrist. The Respondent testified as a witness on his own behalf and called the following additional witnesses: Richard A. Griffin, a licensed optometrist; and Elaine Beckum, the Respondent's wife and receptionist. Joint Exhibits 1 through 8, 10 and 11; Petitioner's Exhibits 1, 2 and 4; and Respondent's Exhibits 2 through 6 were offered into evidence and received. Joint Exhibit 9, Petitioner's Exhibit 3 and Respondent's Exhibit 1 were offered into evidence and rejected.

The parties have submitted posthearing legal memoranda which include proposed findings of fact and conclusions of law. The proposed findings and conclusions have been adopted only to the extent that they are explicitly set out in the Findings of Fact and Conclusions of Law which follow. They have been otherwise rejected as not supported by the evidence, contrary to the better weight of the evidence, irrelevant to the issues, or unnecessary to a resolution of the proceeding, or contrary to law.

ISSUES

The ultimate issues to be resolved in this matter are whether the Respondent has violated provisions of law relating to the practice of optometry and, if so, what penalty should be imposed. The Respondent has been specifically charged with violating Section 463.016(1)(g), Florida Statutes, in connection with his examination and treatment of Karilyn Boggan Peterson. The Respondent contends that his treatment of Peterson was in accordance with accepted standards of optometric practice.

In resolving the issues, it has been necessary to resolve conflicting testimony given by the Respondent and Karilyn Boggan Peterson. In resolving the conflicting evidence, due regard has been given to the demeanor of the witnesses at the hearing and the extent to which their testimony is corroborated by other evidence. In most instances, the conflicting testimony has been resolved in favor of the witness Peterson and against the Respondent. The witness Peterson's testimony has been deemed credible. In many respects, the Respondent's testimony is not corroborated even by the Respondent's own records. His testimony has not been deemed credible.

FINDINGS OF FACT

1. At all times relevant to this proceeding, the Respondent has been licensed to practice optometry in the State of Florida. He holds License No. 0000668 issued by the Florida State Board of Optometry. The Respondent has practiced optometry in Gainesville, Florida, since 1960. He has a good educational background and is an active member in several professional organizations.

2. During June, 1979, Karilyn Boggan, who since then has married and changed her name to Karilyn Boggan Peterson, visited the Respondent's office in Gainesville, Florida. She had bought a pair of nonprescription sunglasses from the Respondent a year prior to that, and she wanted to purchase a new pair of sunglasses and to have her eyes examined. She had not previously worn prescription glasses. She was experiencing some difficulties with her eyes. When she read for long periods, her eyes would get irritated, and she would get drowsy. The problem appeared to be getting worse.

3. Boggan visited the Respondent's office on June 28, 1979, and related these problems to him. The Respondent examined Boggan and advised her that she had an astigmatism and that she would benefit from wearing prescription glasses. She asked if he would write a prescription so that she could have it filled at a place where glasses were available at less cost. Respondent advised her that he would need to charge her an additional \$15 if she did not buy the glasses from him. She then requested that the Respondent fill the prescription. Respondent advised Boggan that persons with astigmatisms were generally sensitive to light, and he asked if she wanted "tinted" or "photogray" lenses. She said that she did.

4. On July 14, 1979, Boggan returned to the Respondent's office to be fitted for her new glasses. The only instructions that the Respondent gave her about the glasses were that she should wash them in soap and water. Boggan paid the Respondent for the examination and the glasses. Approximately one month later, Boggan contacted the Respondent by telephone and advised him that she did not notice a lot of difference in her vision when she used the prescription glasses. She asked the Respondent if she should wear them at all times, or just when she read. The Respondent advised Boggan that she should wear the glasses

all of the time. Prior to then, Boggan had been wearing the glasses irregularly. Thereafter, she wore them faithfully nearly all of the time. Boggan visited the Respondent's office on one or two occasions thereafter to have the frames adjusted. Other than that, she had no further contact with the Respondent.

5. Except for the tinting, things appeared the same to Boggan with or without the glasses. Nonetheless, she continued to wear them until May, 1982. At that time, she was working as a proofreader and was having the same symptoms she experienced before, only more profoundly. A coworker suggested that she visit an ophthalmologist. She visited an ophthalmologist on May 21, 1982. The ophthalmologist examined her and the glasses that had been prescribed by Respondent. He concluded that she had a muscle control problem which he called "convergence insufficiency." He advised her that the glasses were of no benefit to her, and he sent her to an orthoptist, a person trained in treating eye muscle problems. The orthoptist prescribed an eye muscle exercise program. Boggan has followed the program, albeit not vigorously, and has observed some lessening of the symptoms she experienced.

6. The Respondent's testimony about his examination of Boggan is not supported by his own records, and his testimony about it has not been deemed credible. The Respondent did determine that she exhibited slight farsightedness and a slight astigmatism. He determined that she had a slight exophoria at distance, which was nothing to be concerned about, and a normal vertical phoria at distance. The Respondent did some near point testing to determine near point phorias and the accommodative capacity, which he determined to be normal.

7. The Respondent utilized a "fogging technique" to determine the maximum amount of plus lens that Boggan could utilize, both distance and near, without experiencing blurry vision. He determined that she could wear a +.12 diopter lens on her right eye and a +.37 diopter lens on her left eye without experiencing blurriness. A "diopter" is a measurement of the refractive correction in a lens. The Respondent sold Boggan glasses with that prescription. He did not suggest the need for any follow-up visits.

8. Generally, lenses with a refractive correction of +1 diopter or less are considered low power lenses. Lenses of +.12 diopter and +.37 diopter are very low power lenses which offer very little corrective value. Except for the tint in the glasses the Respondent sold Boggan, the glasses served no function at all for her. They did not correct any visual deficiency, nor does it appear that they were designed to do that. The Respondent prescribed the glasses solely on the basis of Boggan's complaints that her eyes would get irritated and drowsy when she read a lot and upon the "fogging test" which determined the maximum plus lens that she could wear without experiencing blurriness.

9. There is a legitimate difference of opinion among practicing optometrists as to the value of low plus power glasses. Some optometrists would never prescribe them; others prescribe them routinely. Whatever the philosophy of a given optometrist, the prescribing of low plus power glasses would be justified only if numerous tests were conducted and the results evaluated. A proper eye examination conducted by an optometrist in 1979 in Gainesville, Florida, would have begun with the taking of the patient's medical history and a consideration of the patient's complaints. The patient's visual acuity would be measured to get an objective determination of refractive error. Muscle balance is tested either through a "cover test," or through "phorias" to determine the position of one eye relative to the other. This is done at distance, infinity and at near. If these findings are normal, a "vertical phoria" is done to

determine the position of the eyes in a vertical position, as opposed to a horizontal position. The "amplitude of accommodation" is then tested by changing lenses in front of the patient's eyes and making the patient focus, or by having the patient fixate on small print and moving it toward the patient and asking him when it gets blurry. An "ophthalmoscopy" is conducted to observe the inside of the eye, and the outside is observed. A "slit lamp examination" is conducted to evaluate the interior portion of the eyes, the cornea, the iris and the lens. A tonometry is done to measure the pressure inside the eye. A "cover test" is also used to determine whether there is any area in the patient's field of vision where he cannot see.

10. The minimum procedures for a vision analysis conducted by an optometrist have been prescribed by a rule adopted by the Department of Professional Regulation, Board of Optometry. Rule 210-3.07, Florida Administrative, Code, prescribes these minimum procedures. The rule was not in effect at the time that the Respondent conducted his examination of Boggan. The minimum procedures set out in the rule are, however, in concert with the minimum standards followed by optometrists in the State of Florida, including Gainesville, Florida, during 1979. The Respondent's examination and prescription of glasses for Boggan did not comport with these minimum requirements.

11. An organization known as the Optometric Extension Program ("OEP") advocates the prescription of low plus power glasses. The Respondent is a member of that organization and agrees with its philosophy. To justify a low power prescription under the OEP theory, numerous near point tests need to be conducted. The results of these tests are placed in a formula, and a prescription is determined based upon the formula. The Respondent did not arrive at his prescription for Boggan in this manner. The prescribing of very low power glasses based solely upon a patient's complaints and upon a "fogging test" is not in accord with the OEP system. If the results of other tests show no abnormalities as they did for Boggan insofar as the tests were conducted, there would be no justification other than a commercial one for prescribing glasses and selling them. The prescribing and selling of glasses to Boggan does not comport with generally accepted and prevailing standards of optometric practice in Florida and specifically in Gainesville, Florida, at the present or at the time that the Respondent examined and prescribed glasses for Boggan. Prescribing glasses in that manner constitutes incompetence and misconduct in the practice of optometry.

12. The manner in which the Respondent prescribed glasses for Karilyn Boggan was not an isolated occurrence in the Respondent's practice. The Respondent would conduct the same sort of examination and, with the same complaints and the same test results, issue the same prescription today. It is the sort of examination and prescription that the Respondent routinely makes in his practice.

13. A "probable cause panel" of the Florida State Board of Optometry was convened to consider whether an administrative complaint should be issued in this matter. The panel determined that probable cause existed to justify issuing an administrative complaint against the Respondent. The attorney who prosecuted this matter on behalf of the Department of Professional Regulation appeared at the probable cause panel meeting. The attorney made recommendations to the panel, some of which were followed. It does not appear that the attorney was providing legal services to the probable cause panel, but rather that he was making recommendations as a prosecutor. To the extent that his recommendations could be considered the providing of legal services to the panel, it does not

appear that the fairness of the probable cause proceeding nor the correctness of the action they took was impaired.

14. During 1978, the Board of Optometry issued an Administrative Complaint against the Respondent in a different proceeding. The attorneys for the Board and the attorney for the Respondent entered into a stipulation through which the Respondent agreed to reimburse a patient; that the charges against him, if true, constituted unprofessional conduct; to pay a fine and costs; and to submit to a period of probation for one year. The stipulation was executed on January 26, 1979. The file before the Division of Administrative Hearings was closed based upon the stipulation. It does not appear that the Board of Optometry ever approved the stipulation, nor that the Respondent actually paid the fine, nor that the period of probation ever commenced. It cannot be determined, based upon the evidence presented, whether the Respondent was on probation at the time that he examined Karilyn Boggan.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding. Sections 120.57(1), 120.60, Florida Statutes.

16. During the course of the proceeding, the Respondent moved to strike allegations in the Administrative Complaint that charged a violation of Section 463.016 (1)(n) , Florida Statutes. It appears that the probable cause panel that considered whether a complaint should be issued against the Respondent determined that probable cause existed to charge a violation of Section 463.016(1)(g), Florida Statutes. No determination was made with respect to Section 463.016(1)(n). A license revocation proceeding is required to be based upon a probable cause determination made by a probable cause panel of a pertinent regulatory board. Section 455.225, Florida Statutes. Since no probable cause was ever determined with respect to a violation of Section 463.016(1)(n), Florida Statutes, the allegation in the Administrative Complaint of a violation of that provision was inappropriate. Accordingly, the motion to strike was granted by Order issued June 3, 1983.

17. The Administrative Complaint charges that the Respondent's conduct with respect to the examination and treatment of Karilyn Boggan violated the provisions of Section 463.016(1)(g), Florida Statutes. The Section provides that fraud or deceit, negligence or incompetency, or misconduct in the practice of optometry constitutes grounds for which disciplinary action can be taken against a licensed optometrist. The Respondent's treatment and prescription of very low power glasses to Karilyn Boggan constitutes incompetency and misconduct in the practice of optometry. The examination that the Respondent conducted and the tests that he administered to the patient Boggan do not justify the prescription the Respondent issued. It could not be determined from the Respondent's examination that Boggan would have benefited from the prescription. The Respondent's examination actually revealed that Boggan did not need glasses.

18. The Respondent has contended that his prescription of low plus power glasses is reflective of a philosophical difference between optometrists who believe that such glasses are helpful and optometrists who believe otherwise, The fact that a mode of treatment has not received endorsement by a majority of a regulated profession does not in itself justify a conclusion that prescribing the treatment would constitute incompetency or misconduct. *Rogers v. Board of Medical Examiners*, 371 So.2d 1037 (1 DCA Fla. 1979). While there is a philosophical difference that exists in the field of optometry as to the value

of low plus power glasses, the Respondent's prescription to Boggan is not reflective of that controversy. Rather, the Respondent's prescription is reflective of a sale of glasses to a patient without justification.

19. Respondent has contended that the Administrative Complaint should be dismissed because of irregularities that occurred during proceedings conducted by the probable cause panel of the Board of Optometry that considered whether an administrative complaint should be issued against the Respondent. This contention is not supported by the evidence. It is inappropriate for a probable cause panel to receive legal services with respect to a matter from an attorney who is employed by the Department of Professional Regulation to prosecute the matter. Section 455.221(2), Florida Statutes; Department of Professional Regulation v. LeBaron, Case No. 82-1863 before the Division of Administrative Hearings (Order of Dismissal entered December 8, 1982). While it does appear that the attorney employed to prosecute this matter made recommendations to the probable cause panel, it does not appear that he provided legal services. To the extent that he did, it does not appear that the fairness of the proceeding or the correctness of the action taken by the panel was impaired. Dismissing the complaint would therefore be inappropriate. Section 120.68(8), Florida Statutes.

20. Section 463.016(2), Florida Statutes, provides that when the Board of Optometry finds a licensee guilty of misconduct, it may impose one or more of the following penalties:

- (b) Revocation or suspension of a license.
- (c) Imposition of an administrative fine not to exceed \$1,000 for each count or separate offense.
- (d) Issuance of a reprimand.
- (e) Placement of the optometrist on probation for a period of time and subject to such conditions as the board may specify . . .

In determining what penalty should be imposed upon the Respondent for his violation of the provisions of Section 463.016(1)(g) Florida Statutes, it is appropriate to consider the gravity of the violation and the fact that the violation does not appear to be an isolated occurrence, but rather reflects the manner in which the Respondent conducts examinations and issues prescriptions. The Petitioner has contended that it should be further considered that the Respondent was on probation at the time that the violation occurred. This contention is not supported by the evidence. A suspension of the Respondent's license for a period of six months and an administrative fine in the amount of \$1,000 is an appropriate penalty.

RECOMMENDED ORDER

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

RECOMMENDED:

That the Board of Optometry enter a final order finding the Respondent, John T. Beckum, O.D., guilty of violating the provisions of Section 463.016(1)(g), Florida Statutes, as alleged in the Administrative Complaint;

suspending the Respondent's license to practice optometry for a period of six months; and imposing a fine in the amount of \$1,000 against the Respondent.

RECOMMENDED this 19th day of August, 1983, in Tallahassee, Florida.

G. STEVEN PFEIFFER
Division of Administrative Hearings
Department of Administration
2009 Apalachee Parkway
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(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this day of 19th day of August, 1983.

COPIES FURNISHED:

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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. 83-527

JOHN T. BECKUM, O.D.,

Respondent.

_____/

FINAL ORDER

This cause came before the Board of Optometry on September 10, 1983 in Tallahassee, Florida for consideration of a Recommended Order entered August 19, 1983 by Hearing Officer G. Steven Pfeiffer. Pursuant to its consideration of the Recommended Order the Board hereby:

1. Rejects the exceptions as set forth by Respondent in each paragraph of Respondent's exceptions to the Recommended Order.
2. Adopts the Findings of Fact as set forth in the Recommended Order.
3. Adopts the Conclusions of Law as set forth in the Recommended Order.
4. Reduces the recommended penalty set forth in the Recommended Order from payment of a \$1,000.00 fine and six months suspension of license to payment of a \$1,000.00 fine only.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED THAT:

Respondent pay an administrative fine in the amount of \$1,000.00, such fine to be paid to the Department of Professional Regulation within 30 days from rendition of this Order.

Respondent may appeal this Final Order within 30 days from rendition pursuant to the Florida Rules of Appellate Procedure and Section 120.68, F.S.

DONE and ORDERED this 28th day of September, 1983.

FLORIDA BOARD OF OPTOMETRY

By: _____
Dr. Frank J. Altieri, O.D.
Chairman

cc: Joseph W. Lawrence, II, Esquire
Stephen Marc Slepian, Esquire