

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, )  
BOARD OF DENTISTRY, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 94-6366  
 )  
BRIAN LLOYD WEBER, O.D., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A hearing was held in this case in Tampa, Florida, on September 23, 1997, before Arnold H. Pollock, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Alexandria E. Walters, Esquire  
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For Respondent: Grover Freeman, Esquire  
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STATEMENT OF THE ISSUES

The issue for consideration in this case is whether

Respondent's license as an optometrist in Florida should be

disciplined because of the matters alleged in the Administrative Complaint filed herein.

PRELIMINARY MATTERS

By a three-count Administrative Complaint dated February 8, 1992, Nancy Snurkowski, then chief attorney for the Florida Department of Professional Regulation, on behalf of the Board of Optometry, charged Respondent, Brian L. Weber, O.D., with multiple violations of Sections 463.014(1) and 463.016(1), Florida Statutes, by engaging in the practice of optometry with a corporation comprised of individuals other than licensed optometrists; by entering into a corporate arrangement which permitted an unlicensed person or entity to practice optometry through the Respondent; and by holding himself out to the public as available to render professional services in a manner which implies he is professionally associated with an entity which itself is not a licensed practitioner. Respondent requested formal hearing on the allegations, and after a series of delays, some at the behest of Petitioner and some at the behest of Respondent, this hearing ensued. In the interim, the Board of Optometry was transferred from the Department of Business and Professional Regulation to the Agency for Health Care Administration, and then to the Department of Health. The prosecution of allegations of misconduct of regulated health care professionals, however, remains the responsibility of the Agency for Health Care Administration.

At the hearing, Petitioner presented the testimony of Anthony D. Record, a licensed optician, and president of 29/49 Optical, Inc., the organization with which Respondent is alleged to have practiced inappropriately; Drs. Richard Ingrahm and Andrew Walkowiak, licensed optometrists and associates of Respondent in Brian L. Weber and Associates; the Respondent and Dr. Peter D. Liane, a licensed optometrist and expert in the field of optometry. Petitioner also introduced Petitioner's Exhibits 1 through 4, 6 and 8. Petitioner's Exhibit 5 for Identification was withdrawn, and Petitioner's Exhibit 7 for Identification was not admitted. The latter is appended to the record as a proffer of evidence, however.

Respondent also testified in his own behalf and introduced Respondent's Exhibits A through F.

A transcript of these proceedings was provided, and subsequent to the receipt thereof, counsel for both parties submitted written argument and other proper matters which were considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. At all times pertinent to the issues herein, the Petitioner, Board of Optometry, was responsible for the licensing of optometrists and the regulation of the practice of optometry in this state. Respondent was licensed as an optometrist in Florida, practicing under license number OP0001451, originally issued on September 21, 1978.

2. Some time prior to or during 1987, Respondent, Dr. Brian L. Weber, dissatisfied with what he found to be the practice of large optical dispensers with regard to pressuring optometrists to prescribe lenses, decided to open a facility where patients needing glasses could receive an eye examination from a licensed optometrist and also, if the patient so desired, obtain the eye wear prescribed. Consistent with what he perceived to be the rules of the Board of Optometry at that time, Dr. Weber entered into a business venture with Mr. Record, a licensed optician, through which a patient could do just that.

3. In 1990, Dr. Weber and Mr. Record changed the name of the business to 29/49 Optical, Inc., and as of March 2, 1990, operated five separate stores under that name. Dr. Weber and Mr. Record incorporated the company within which each ultimately owned 50 percent of the stock of the corporation. Dr. Weber provided the funds to start the business, and Mr. Record, the "sweat equity." Mr. Record was made president of the company because he had the experience in opticianry and was responsible for operations. Weber was the "money man," and provided the overall business goals and strategy. Once the corporation was established and the initial filing was completed, Mr. Record was responsible for recurring filings as a matter of course.

4. The firm, 29/49 Optical, Inc., was in the business of providing optician services. The leases for the stores were taken out in the name of the company which, in essence, provided

a "turn-key" office to a licensed optometrist who was one of those individuals associated with Respondent in the optometry practice known as Brian L. Weber and Associates. Each of the optometrists in the association was an independent contractor, associated in practice with Respondent. None of them were employees of 29/49 Optical, Inc.

5. In each of the offices of 29/49 Optical, Inc., was a display area where glass frames were displayed and fitted, a waiting room used both by customers of the optical shop and patients of the resident optometrist, a storage room, and, for the exclusive use of an optometrist, an examining room equipped with those items and supplies necessary for the accomplishment of eye examinations. As was the custom in the profession at the time, this office, owned or leased by 29/49 Optical, Inc., was furnished to the optometrist at little or no cost. Though it was hoped that the optometry patients would choose to have their prescriptions for glasses or contact lenses filled at 29/49 Optical, Inc., they were under no obligation to do so, and many did not.

6. Patients seen by an optometrist in the 29/49 Optical, Inc. offices were billed by the optometrist for the optometry services and by the optical company for the cost of any glasses or contact lenses purchased. The two charges were paid separately, the payments placed in separate accounts. Payments for eye examinations by an optometrist were deposited to the

account of Brian L. Weber, optometrist. Payments for glasses or lenses were deposited to the accounts of 29/49 Optical, Inc. The funds were neither mixed nor co-mingled, and funds placed in the account of Brian L. Weber were not used to pay the expenses of the 29/49 Optical, Inc. stores. Each optometrist maintained his or her own patient records which were stored in a filing cabinet maintained for that purpose separate and apart from the files relating to the operation of the 29/49 Optical, Inc. stores. Only the optometrists made entries to those records.

7. Since the optometrists who manned the offices in the 29/49 Optical, Inc., stores were independent contractors, within basic guidelines as to routine procedures and office hours, they were free to work such hours as they chose and to charge what they believed to be appropriate fees for other than routine procedures. They were paid with funds drawn from the account of Brian L. Weber, into which the patient fees for optometry services were deposited. In addition to the associates who practiced at the individual shops, Dr. Weber also practiced at each and all of the shops periodically. Mr. Record was paid from the checking account maintained by 29/49 Optical, Inc., on which account either Record or the Respondent could write checks.

8. Dr. Weber is quick to admit that the advertisement for 29/49 Optical, Inc., which appeared in the March 1, 1990, edition of the St. Petersburg Times is a poorly worded advertisement. So much of the advertisement which implies a total price to be paid

to 29/49 which includes examination and glasses is admittedly inappropriate, and when he saw the proof prior to publication, he claims to have made appropriate changes which would have corrected the deficiencies. However, the corrections dictated by Respondent were not made, and the inappropriate advertisement was published. His immediate complaint to the newspaper after the first publication date resulted in an immediate correction.

9. Respondent claims that when the disciplinary action was initiated against him in 1992, he immediately contacted the newspaper and requested a letter which would clarify the situation. He did not tell the paper what to say, and the subsequent letter from the paper relates to a failure to have his name appear in the March 1, 1990, advertisement. This is not the defect in the advertisement of which the Board complains.

10. Dr. Liane, a Board certified optometric physician, a former Chairman of the Board of Optometry and now an expert for and consultant to the Board, reviewed the case file in this matter for the Board, along with the transcripts of other cases relating to Dr. Weber. None of the other matters was based on disciplinary action. To his recollection, the Board's rule on corporate practice was promulgated in 1986, at the time he was a member of the Board. At that time, the Board conducted numerous workshops around the state to advice practitioners of the standard of practice in that regard. Dr. Liane was also on the Board's legislative committee when Chapter 463, Florida Statutes,



was enacted.

11. The Board of Optometry was concerned with the protection of the public from the danger of allowing opticians or unlicensed entities to have input into whether lenses were needed. The Board, and the legislature, wanted to allow optometrists to practice with other licensed health care practitioners, but not with unlicensed opticians. After the legislation was passed, the Board promulgated its Rule 210-3.008, which outlines factors which must be shown in order to prove corporate practice.

12. One of the prohibitions in the rule relates to any practice or pronouncement which "implies" that the corporate or unlicensed entity is providing professional services. In the instant case, Dr. Liane is of the opinion that the original advertisement in question implies that 29/49 Optical, Inc., is offering a complete eye examination. As was noted previously, Respondent agrees, and it is so found.

13. Having considered all the evidence available to him, including the advertisement of March 2, 1990, and the assumption of the lease arrangements existing prior and up to 1990, Dr. Liane concluded that Respondent was involved in an unauthorized corporate practice. While a side-by side practice between optometrists and opticians is common and approved, it may not be within a corporate practice by the same individuals who are in business together.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. Section 120.57(1), Florida Statutes.

15. Petitioner seeks to discipline Respondent's license based on its allegations that Respondent violated the provisions of Section 463.014(1), Florida Statutes, by (1) engaging in the practice of optometry with a corporation comprised of individuals other than licensed optometrists; and (2) entering into a corporate agreement which permitted an unlicensed person or entity to practice optometry through the Respondent. The Board also alleges that Respondent violated Rule 21Q-3.009(2)(a), Florida Administrative Code by holding himself out to the public,

(through advertisement), as available to render professional services with an entity which itself is not a licensed practitioner.

16. Section 463.016(1), authorizes the Board of Optometry to discipline a license for "a violation or repeated violations of the provisions of this chapter, or of chapter 455, and any rules promulgated pursuant thereto." Section 463.014(1)(b), Florida Statutes, provides:

(b) No licensed practitioner shall engage in the practice of optometry with any corporation, organization group, or lay individual. This provision shall not prohibit licensed practitioners from employing, or from forming partnerships or professional associations with, licensed practitioners licensed in this state or with other licensed health care professionals, the primary objective of whom is the diagnosis and treatment of the human body.

17. Rule 21Q-3.008(1), Florida Administrative Code provides:

No corporation, lay body, organization, or individual other than a licensed practitioner shall engage in the practice of optometry through the means of engaging the services, upon a salary, commission, or other means of inducement, of any person licensed to practice optometry in this state. For purposes of this rule, the phrase, "other means of inducement" shall include, but not be limited to, the provision of equipment or leased space to a licensed practitioner, if the provision of such leased space or equipment is dependent upon the licensed practitioner's agreement to any conditions relative to the practice of optometry. Such conditions shall include, but not be limited to, the establishment of fee schedules for optometric services and materials, or the

establishment of time limitations on patient examinations or any limitations on the type of optometric services or ophthalmic materials available, prescribed or dispensed. No licensed practitioner shall enter into any agreement which adversely affects the licensed practitioner's exercise of free, independent and unlimited professional judgment and responsibility, or which permits any unlicensed person or entity to practice optometry through the licensed practitioner by controlling and/or offering optometric services to the public. The professional judgment of a licensed practitioner shall be exercised solely for the benefit of his patients and free from any compromising influences and loyalties.

18. Rule 21Q-3.009(2)(a) provides that a licensed practitioner shall not disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive or misleading. Any advertisement or advertising shall be deemed by the Board to be fraudulent, false, deceptive or misleading if it, inter alia, contains a misrepresentation of facts.

19. The burden in this case rests with the Board to establish Respondent's guilt of the matters alleged by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

20. The Board contends that because Respondent is a 50 percent owner of 29/49, and because, through Brian L. Weber and Associates, he practices optometry at retail outlets operated by the corporation, he is in violation of the provisions of the cited statute and Rule 21Q-3.008(1). The evidence of record to

establish that position, however, is neither clear nor convincing.

21. The evidence presented by the parties, taken in its entirety, demonstrates that Respondent practices optometry through Brian L. Weber and Associates, a group practice comprised solely of licensed optometrists. Brian L. Weber and Associates conducts the physical practice in facilities owned by 29/49, a corporation which is half-owned by Mr. Record, an optician. The evidence of record also shows, however, that the optometric practice in each 29/49 facility is kept separate and apart from the operation of 29/49. Patient records are kept separately; services are billed separately and aside from the fact that the two entities share a waiting room, there is no inappropriate connection between the two. No evidence was presented to establish that personnel from 29/49 were permitted to engage or participate in an optometric practice, or that optometry patients were obligated to purchase their eye wear from 29/49.

22. The evidence does show, however, and Respondent admits, that the advertisement complained of, placed in the St. Petersburg paper by 29/49, which refers or implies a single price for examination and eye wear, was inappropriate. It appeared only once, and the evidence is clear that when Respondent learned of it he had it withdrawn immediately. Nonetheless, the inappropriate advertisement was published and constitutes a violation of Rule 21Q-3.009(2)(a). A violation of a Department

rule constitutes a violation of Section 436.016(1)(h), Florida Statutes.

23. Petitioner seeks to impose an administrative fine of \$3,000 fine, to reprimand Respondent's license, to suspend his license for six months and to place his license on probation for one year under such terms and conditions as the Board deems appropriate. Had Respondent been shown to be guilty of all offenses alleged, with clear evidence of aggravation demonstrated, such a severe penalty might be appropriate. This is not the case here, however. The only misconduct by Respondent proven in this case is his advertisement, defined by Rule 21Q-15.002(2) as a "Major Administrative Violation," and even there, no aggravating circumstances were shown to exist. In fact, as soon as the inappropriate advertisement appeared one time, Respondent had it cancelled, a task which he had unsuccessfully attempted upon review before the advertisement was published.

24. Under the provision of the rules dealing with quantum of punishment, 21Q-15.002 and 21Q-15.003, a major administrative violation may result in the imposition of a reprimand and an administrative fine of \$3,000. In light of the fact that the offense proven deals with an advertisement and not inappropriate practice; in light of the fact that the evidence shows Respondent tried to prevent its appearance when he reviewed it prior to publication; and in light of the fact that Respondent had the offending advertisement removed after only one appearance,

clearly the imposition of the maximum penalty is not appropriate here.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Board of Optometry enter a Final Order dismissing Counts I and II of the Administrative Complaint; finding him guilty of Count III thereof and imposing an administrative fine of \$250.00.

DONE AND ENTERED this 3rd day of November, 1997, in Tallahassee, Leon County, Florida.

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ARNOLD H. POLLOCK  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
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COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.