STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF OPTOMETRY,	)	
Petitioner,	)	
vs.	)	Case No. 00-0853
SHANNON DEWAYNE FOWLER,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings by its designated Administrative Law Judge, Ella Jane P. Davis, held a disputed-fact hearing in the above-styled case on January 9, 2001, in Destin, Florida.

APPEARANCES

For Petitioner: Mary Denise O'Brien, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Building 3
Tallahassee, Florida 32308

For Respondent: Matthew W. Burns, Esquire
Post Office Box 1226
Destin, Florida 32540

STATEMENT OF THE ISSUES

Whether Respondent violated Section 463.014, Florida Statutes, by violating Rule 64B13-3.008(15)(a), Florida Administrative Code; violated Section 463.014, Florida Statutes,

by violating Rule 64B13-3.008(15)(f), Florida Administrative Code; violated Section 463.016(1)(h), Florida Statutes, by violating Rule 64B13-3.009(2)(b), Florida Administrative Code; and violated Section 463.016(1)(f), Florida Statutes, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On September 2, 1999, the Department of Health, Board of Optometry, filed the initial Administrative Complaint against Respondent Shannon Dewayne Fowler alleging that he had violated the foregoing sections of the Optometry Practice Act. The initial Administrative Complaint had an additional count that charged a violation of Rule 64B13-3.008(15)(k), Florida Administrative Code. On July 27, 2000, the Administrative Complaint was amended to delete this particular count.

A Second Amended Administrative Complaint was filed on November 29, 2000, to correctly cite the appropriate statutory sections. Rule 64B13-3.0089(15), Florida Administrative Code, specifically states that if a licensed practitioner commits the acts described in subparagraphs (a) - (p), it shall constitute evidence of a violation of Section 463.014, Florida Statutes.

On December 29, 2000, Respondent filed a Motion to Dismiss and Refer for Probable Cause Determination. That Motion was argued and denied on January 9, 2001, immediately prior to commencement of the disputed-fact hearing on the merits. 1/

Petitioner presented the oral testimony of Michael Fregger, O.D., James Andrews, O.D., and Respondent, and had three exhibits admitted in evidence.

Official recognition was taken of Rules 64B13-3.008 and 64B13-3.009, Florida Administrative Code.

Respondent testified on his own behalf and presented the oral testimony of Robert Patrick, C.P.A. Respondent had one exhibit admitted in evidence.

A Transcript was filed on January 22, 2001. Each party timely filed a Proposed Recommended Order, each of which has been considered.

FINDINGS OF FACT

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

2. On or about April 19, 1998, Respondent entered into a lease agreement captioned "Equipment License," with U.S. Visions, Corp., to lease space and equipment as an optometric office in the J. C. Penney retail store on Mary Esther Avenue, Mary Esther, Florida. This location also constitutes the Santa Rosa Mall. Respondent paid $100.00 monthly rent for this office space.

3. At all times material, Respondent also maintained a separate office for the practice of optometry under the name "Coastal Vision Center" in rental space in Destin, Florida.

Respondent paid $2,900.00 monthly rent for the Destin office space.

4. Respondent practiced in both locations during 1998. Respondent practiced under a professional corporation, named Shannon Fowler, O.D., P.A.

5. Respondent's office space at the J.C. Penney location was inside the J.C. Penney retail store. Adjacent to Respondent's office space was the "J.C. Penney Optical Center," in which an optometrist practiced, and in which eyeglasses, contact lenses, and other optical merchandise could be purchased.

6. Respondent personally placed a sign at the entrance to his office space at the J.C. Penney location identifying himself by name, stating that an independent practice of optometry was located there, and stating that he was not affiliated with the J.C. Penney retail store.

7. During the time he practiced at the leased office space located in the J.C. Penney store, Respondent maintained telephones listed in his name at both his office locations. The telephone number for his office in J.C. Penney was different than the telephone number for his Destin office.

8. Only Respondent, himself, answered Respondent's telephone at the J.C. Penney location. This telephone and

telephone number were separate and had a different telephone number from the telephones for the J.C. Penney Optical Center.

9. The receptionist at the J.C. Penney Optical Center occasionally made appointments with Respondent for persons who walked into the J. C. Penney Optical Center or who telephoned the J. C. Penney Optical Center telephone, but all such appointments were subject to confirmation by Respondent.

10. There was no formal arrangement or agreement for the J. C. Penney Optical Center receptionist to make appointments over the Optical Center telephone for Respondent, and Respondent did not pay the receptionist. However, Petitioner benefited if the appointments she made were confirmed by him and actually kept by the patient.

11. All of Respondent's patients at either location were advised that Respondent maintained an office in Destin, and all of his patients were advised to call a third telephone number, Respondent's cell phone number, for after-hours or emergency matters. All after-hours matters were handled at the Destin office by Respondent.

12. However, patient files for patients that Respondent saw solely at the J.C. Penney location were stored by Respondent at that location. Respondent had no after-hours access to the J.C. Penney store. If there were an emergency, Respondent would have to obtain the patient's file the following day.

13. At both office locations, Respondent, alone, determined which patients to see, what examinations and procedures to conduct, what optometry services to render, and what fees to charge any patients for his services.

14. The lease agreement for Respondent's office space at J.C. Penney contained provisions precluding U.S. Visions Corp. from interfering with, or regulating, Respondent's independent practice of optometry in the office space he had leased. The lease agreement also contained a provision by which U.S. Vision Corp. covenanted not to violate Florida law.

15. Respondent's lease with U.S. Visions Corp. prohibited his selling "frames, contacts, and related items" at the J.C. Penney location.

16. Respondent did maintain inventory, employ an optometrist, and sell eyeglasses, lenses and frames at the Destin location.

17. Respondent worked out of the J.C. Penney location three half-days per week on Mondays, Tuesdays, and Wednesdays.

18. When requested by the patient, Respondent accepted the J.C. Penney credit card as payment for optometric services rendered at that location. When such card was used by a patient to pay for Respondent's services, J.C. Penney processed the payment and billed the patient directly. J.C. Penney rendered accounting and payment in full to Respondent for services

charged on the credit cards on a bi-monthly basis. There is no evidence as to whether payment to Respondent was, or was not, affected by a delinquent payment by a patient to J.C. Penney.

19. Respondent also accepted payment for his services rendered to patients at either location by check, cash, and Visa, Mastercard, and American Express credit cards. The patient elected which manner of payment to tender. Respondent's business records indicate that all of these forms of payment were utilized by patients at both locations.

20. J.C. Penney charged a two-percent (2%) processing fee for the collection and accounting of services charged by patients on their J.C. Penney credit card. This fee, and the manner in which J.C. Penney processed the payments charged to the J. C. Penney credit card, are comparable to, and do not materially differ from, the typical arrangements between small business merchants and issuers of the other major credit cards which Respondent accepted.

21. Unrefuted testimony of a certified public accountant employed by Respondent was to the effect that the financial records of Respondent's two optometry offices for 1998 show no indication that J.C. Penney exercised any influence or control over Respondent's independent practice of optometry or billing practices, and in fact, indicate that J.C. Penney did not.

22. There is no evidence that the Respondent ever used prescription forms or any other forms referring to J.C. Penney at either of his office locations.

23. On July 12, 1998, an advertisement appeared in the Sunday supplement to the "Northwest Florida Daily News" under the heading "J.C. Penney Optical Center," advertising a "FREE eye exam & 50% off frames." In very small print, the advertisement said, "we'll pay for your eye exam for eyeglasses by deducting up to $40 from your prescription eyeglass purchase." The advertisement specified "Santa Rosa Mall."

24. The J.C. Penney Optical Center is not a licensed optometrist. A corporation can never hold an optometrist license. Only an individual can be licensed as an optometrist in Florida.

25. The record is silent as to who or what entity placed the advertisement.

26. Respondent was not named in the advertisement. Respondent did not place the advertisement. There is no evidence that Respondent had any involvement in the text or publication of the advertisement. Respondent did not have any prior knowledge that the advertisement was going to be published. U.S. Visions Corp. had never published any advertisement prior to July 1998, and Respondent did not foresee that the subject advertisement would be published. Respondent

had no opportunity or means to prevent the publication of the advertisement. Respondent did not approve of, or consent to, the publication or content of the advertisement. Respondent had no opportunity to review the advertisement prior to publication.

27. The lease for the J.C. Penney office location did not provide for U.S. Vision Corp. to do any advertising for Respondent. Respondent had no arrangements for advertising with either U.S. Vision Corp. or J.C. Penney. Respondent did not contemporaneously see the advertisement. He learned about it only through service of notice of the Department of Health's investigation into the advertisement, which ultimately resulted in this case.

28. No patient or potential patient ever brought the advertisement or the coupon in the advertisement to Respondent or ever requested that the Respondent provide optometry services in accordance with the advertisement or the coupon. Respondent did not provide any optometry services in accordance with the advertisement or coupon, and would not have done so if requested. Respondent received no benefit from the advertisement.

29. Respondent provided no "FREE" eye exams. The Respondent charged $49 per eye exam.

30. The agency's expert witness, a licensed optometrist and former member of the Board of Optometry, testified that he

believed that, on its face, the advertisement implied an association or affiliation between Respondent and J.C. Penney; that an optometrist practicing at J.C. Penney could be expected to benefit from the advertisement because of the content of the advertisement; that the advertisement was misleading because a person reading it would expect an eye exam to be "FREE"; and that when there is a lessor-lessee relationship of the type presented in this case, the Respondent optometrist has a responsibility to ensure that advertisements conform to the optometry statute and rules.

31. The same expert witness testified that Chapter 463, Florida Statutes, does not prohibit optometrists from commercial establishments.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding, pursuant to Sections 120.569, 120.57(1) and 381.0065, Florida Statutes, and Chapter 64E-6, Florida Administrative Code.

33. Petitioner has the duty to go forward with the burden of proving by clear and convincing evidence that Respondent has violated the rules and statutes under which he has been charged. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

34. Count I of the Second Amended Administrative Complaint alleges that Respondent is subject to discipline pursuant to Section 463.014, Florida Statutes (no subsection specified) by violating Rule 64B13-3.008(15)(a), Florida Administrative Code, by holding himself out to the public as available to render professional services in any manner which suggests that the licensed practitioner is professionally associated, or affiliated with, or employed by, an entity which itself is not a licensed practitioner.

35. Count II alleges that Respondent is subject to discipline pursuant to Section 463.014, Florida Statutes (no subsection specified) by violating Rule 64B13-3.008(15)(f), Florida Administrative Code, by allowing, permitting, encouraging, forbearing, or condoning any advertisement including those placed in a newspaper, magazine, brochure, flier or telephone directory which implies or suggests that the licensed practitioner is professionally associated or affiliated with an entity which itself is not a licensed practitioner.

36. In fact, Section 463.014, Florida Statutes, provides numerous types of violations, but Rules 64B13-3.008(15)(a) and (f), provide:

> Rule 64B13-3.008(15), Florida Administrative Code states:

> The following shall constitute evidence that the licensed practitioner has violated Section 463.014, Florida Statutes:
>
> (a) Holding him/herself out to the public, or allowing him/herself to be held out to the public, as available to render professional services in any manner which states, implies, or suggests that the licensed practitioner is professionally associated or affiliated with, or employed by, an entity which itself is not a licensed practitioner;
>
> (f) Allowing, permitting, encouraging, forbearing, or condoning any advertisement, including those placed in a newspaper, magazine, brochure, flier, telephone directory, or on television or radio, which implies or suggests that the licensed practitioner is professionally associated or affiliated with an entity which itself is not a licensed practitioner;

37. Count III of the Second Amended Administrative Complaint alleges that Respondent is subject to discipline pursuant to Section 463.016(1)(h), Florida Statutes, by violating Rule 64B13-3.009(2)(b), Florida Administrative Code, by causing an advertisement to mislead or deceive because in its content, or in the context in which it is presented, it makes only a partial disclosure of relevant fact.

38. In fact, Section 463.016(1)(h), Florida Statutes, and Rule 64B13-3.009(2)(b), Florida Statutes, provide as follows:

> Section 463.016 Grounds for disciplinary action; action by the board.

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

* * *

(h) A violation or repeated violations of provisions of this chapter, or of chapter 456, and any rules promulgated pursuant hereto.

Rule 64B13-3.009 False, Fraudulent, Deceptive, and Misleading Advertising Prohibited; Policy; Definitions; Affirmative Disclosure.

(2) 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:

(b) Has the capacity or tendency to mislead or deceive because in its content or in the context which it is presented makes only a partial disclosure of relevant facts;

39. Count IV alleges that Respondent is subject to discipline pursuant to Section 463.016(1)(f), Florida Statutes, by advertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content.

40. In fact, Section 463.014(1)(f), Florida Statutes, provides as follows:

463.016 Grounds for disciplinary action; action by the board.

> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
>
> * * *
>
> (f) Advertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content.

41. It is worrisome that Respondent's patient files in the J. C. Penney location were not accessible to him, in emergencies, but he has not been charged with any violation that relates to that situation. Petitioner raised that issue only in its Proposed Recommended Order. Moreover, that situation in no way relates to how Respondent held himself out to the public, since the public had no reason to know about it.

42. The evidence in this cause establishes that Respondent's office location at all times material was maintained separately from the J. C. Penney retail store or its Optical Center. The record fails to establish that Respondent ever held himself out in any way as an employee or representative of either J. C. Penney or its Optical Center. In fact, the record establishes that Respondent always indicated to the consuming public that he was an independent optometric practitioner. To the degree any misunderstanding concerning appointments made by the Optical Center receptionist might have occurred, Petitioner at least had the opportunity to correct them when he confirmed or refused the appointment. There was no

evidence that any customer confusion occurred. There was no evidence that an incorrect inference had been drawn by any customer, let alone implied by Respondent. Respondent's J. C. Penney's office was clearly marked with his name and profession. Respondent did not share prescription blanks with the J. C. Penney Optical Center. Telephones and telephone numbers were not shared. Credit arrangements with J. C. Penney were no more misleading than credit arrangements with Visa, Mastercard, or American Express, which credit arrangements do not seem to trouble the Board.

43. Respondent admitted that the advertisement was inappropriate. It appeared only once, and it appeared without any collusion by Respondent. Based on the terms of Respondent's lease prohibiting U.S. Visions Corp. from violating Florida law, and his experience with both U.S. Visions Corp. and J. C. Penney prior to the surprise publication of the inappropriate advertisement, Respondent could not have reasonably guessed he had to prohibit the advertisement in advance. He derived no benefit therefrom.

44. As to Count I, Respondent's situation is different from prior cases wherein a violation was determined to exist upon similar, but not identical, facts in that Respondent herein personally placed a sign clearly identifying his independent status and his lack of affiliation with the J. C. Penney retail

store and its Optical Center. In the instant case, the only touchstone which could reasonably have been misconstrued by a member of the public occurred when the J. C. Penney Optical Center receptionist at her own volition, answered that entity's phone and made appointments on Respondent's behalf. In line with the assessment in Department of Health, Board of Dentistry [sic] v. Weber, DOAH Case No. 94-6366 (Recommended Order to the Board of Optometry dated November 1997), Respondent may be subject to discipline on the basis of the appointments made for him through the J. C. Penney Optical Center.

45. As to Counts II, III, and IV, there is no evidence that Respondent committed any active, intentional, or volitional act which led to the publication of the advertisement. There is no evidence that Respondent knew or had reason to know the advertisement was going to be published. Notwithstanding the subjective beliefs of the agency expert and the reasoning of the Final Order in Department of Business and Professional Regulation, Board of Optometry v. Schwartz, DOAH Case No. 82-2193 (Final Order dated June 1, 1983), which determined upon similar, but not identical, facts that a violation had occurred, and Lens Express, Inc., and Mordechai Golan v. Department of Business and Professional Regulation, Board of Optometry, et.al., 18 FALR 817 (Fla. Dep't. of Bus. & Prof. Reg. 1996), aff'd, 688 So. 2d 404 (Fla. 1st DCA 1997), which explains

the purpose behind Rule 64B13-3.008, Florida Administrative Code, a professional should not be punished simply for not anticipating the advertisement herein. In the instant case, a commercial enterprise which had never before published an advertisement concerning Respondent's services seems to have done so without notifying Respondent first. To hold Respondent guilty of violating the cited rules in such a situation would be akin to holding someone liable for receiving unsolicited mail. The commission of fraud requires an intentional act. Here, there was not even a volitional act by Respondent. For this case, the better reasoning is to be found in the March 3, 1983, Recommended Order in Department of Business and Professional Regulation, Board of Optometry v. Schwartz, DOAH Case No. 82-2193 (overruled by the Final Order dated June 1, 1983).

46. Therefore, Counts II, III, and IV should be dismissed due to the lack of clear and convincing evidence, and accordingly, the $3,000 penalty ($1,000 per Count) sought by the Agency should be denied.

47. Count I may be sustained only upon the evidence that Respondent allowed appointments to be made for him through the Optical Center receptionist. However, since he personally either confirmed or rejected these appointments, it is clear he mitigated or eliminated any suggestion of affiliation.

Therefore, this element is not worthy of a $1,000 fine as requested. A reprimand is sufficient under the circumstances.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED:

That the Board of Optometry enter a final order dismissing Counts II, III, and IV, finding Respondent guilty of Count I of the Second Amended Administrative Complaint, and issuing a reprimand.

DONE AND ENTERED this 2nd day of March, 2001, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of March, 2001.

ENDNOTE

1/ Two exhibits were offered with regard to this issue: Agency for Health Care Administration Exhibit 1 (Probable Cause Panel No. 1), and Agency for Health Care Administration Exhibit 2 (Probable Cause Panel No. 2). Ultimately, the rule violations listed in the Memorandum of Finding Probable Cause signed by the

Chairman of the Probable Cause Panel of the Board of Optometry are the same rule violations charged in the Second Amended Administrative Complaint. Only the statutory reference was corrected. There was no lack of notice or lack of procedural compliance.

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.