

STATE OF CONNECTICUT
BOARD OF EXAMINERS FOR OPTICIANS

1988 0127 057 003

DEPARTMENT OF HEALTH SERVICES

v.

STERLING OPTICAL CO., DANBURY, O.P. NO. 1357
STERLING OPTICAL CO., FARMINGTON, O.P. NO. 1243
STERLING OPTICAL CO., TRUMBULL, O.P. NO. 1376

MEMORANDUM OF DECISION

The Connecticut Board of Examiners for Opticians was presented with seven Statements of Charges by the Department of Health Services, dated May 10, 1988, brought against Sterling Optical Co. of Danbury, Sterling Optical Co. of Farmington, Sterling Optical Co. of Trumbull, Diane Greco, L.O., Richard Pethick, L.O., Robert Rymeski, L.O. and Steven Schoenig, L.O. The Statements of Charges alleged violations of §§ 20-153, 20-154 and 20-160 of the Connecticut General Statutes.

Notices of Hearing dated June 13, 1988 were issued to Respondents, by which a hearing on all Statements of Charges was scheduled for August 1, 1988. Attached to all notices were copies of the Department's Statement of Charges. A second day of

hearing was held on November 21, 1988. Respondents appeared on August 1, 1988 and November 21, 1988 represented by Attorney William H. Champlin, III. At all times Respondents had the opportunity to present evidence and cross-examine witnesses.

Prior to the initiation of the instant charges, all Respondents were given the opportunity to show compliance with all lawful requirements for the retention of their licenses pursuant to Conn. Gen. Stat. § 4-182(c).

FINDINGS OF FACT

1. Sterling Optical Co., Danbury, at all pertinent times was operating under an optical permit granted by the State of Connecticut, Department of Health Services.

2. Sterling Optical Co., Farmington, at all pertinent times was operating under an optical permit granted by the State of Connecticut, Department of Health Services.

3. Sterling Optical Co., Trumbull, at all pertinent times was operating under an optical permit granted by the State of Connecticut, Department of Health Services.

4. Diane Greco, at all pertinent times was licensed as an optician by the State of Connecticut, Department of Health Services.

5. Richard Pethick, at all pertinent times was licensed as an optician by the State of Connecticut, Department of Health Services.

6. Robert Rymeski, at all pertinent times was licensed as an optician by the State of Connecticut, Department of Health Services.

7. Steven Schoenig, at all pertinent times was licensed as an optician by the State of Connecticut, Department of Health Services.

8. On May 20, 1987 Sterling Optical Co. of Danbury mall was open without a licensed optician on duty.

9. On October 10, 11, 12, 13, 14 and 15 of 1987 and December 11, 1987 Sterling Optical Co. of Westfarms Mall was open without a licensed optician on duty.

10. On December 9, 1987 Sterling Optical Co. of Trumbull Shopping Park was open without a licensed optician on duty.

11. On December 9, 1987 Rene R. Rivard, L.O., was given professional advice at Sterling Optical of Trumbull Shopping Park, when a licensed optician was not on duty.

DISCUSSIONS AND CONCLUSIONS

Respondent argues that because Board member Rene Rivard brought the petition against the Respondent, that the proceedings have been unfairly tainted by Mr. Rivard's direct involvement. A substantial showing of personal bias is required to obtain a ruling that a hearing is unfair. Until the contrary is shown, it is presumed that public officers have performed their duty and have acted fairly with proper motives and upon valid reasons.

Rene Rivard has recused himself from participating in the Board deliberations and voting on these charges. The Board's opinion has not been tainted; and its decision in this case is based solely upon the record of the hearing of August 1, 1988, and November 21, 1988.

Connecticut General Statutes § 20-154 provides in pertinent part that:

The certificate of registration, permit or license of any optician or of any optical permittee may be revoked, suspended or annulled or any action taken under section 19a-17 upon decision after notice and hearing by the board for any of the following reasons: ... violation of any provision of this chapter or any regulations adopted hereunder

Connecticut General Statutes § 20-153 provides in pertinent part that:

The department may grant annually, upon the filing of an application as required by it, an optical permit to any optical establishment, office, department or store conducted under the personal and direct supervision of a licensed optician, for permission to sell, dispense or supply to the ultimate wearer optical aids to vision, instruments, applicances, eyeglasses, spectacles and other kindred products. (Emphasis added.)

The Board concluded that the language of the statute requires that an optician be on the premises at all times. The Board also concluded that a practical reason for the requirement is that there is a high probability that when an optical shop is open, a customer will have services performed which should be done under the direct supervision of the licensed optician even when no licensed optician is in fact on the premises.

The Appellate Court in U.S. Vision, Inc. v. Board of Examiners for Opticians, 15 Conn. App. 205 (1988) has upheld the Board's interpretation of Conn. Gen. Stat. § 20-153.

Section 20-153's mandate that a store be conducted under the "personal and direct supervision" of a licensed optician requires that an optician be present on the premises whenever the store is open. The statutory language grants no

exceptions. Once a store is opened for business and given a permit it has to be under the direct and personal supervision of a licensed optician at all times. Sterling Optical's argument that its stores were not open for business because procedures were established to prevent sales is unavailing. A regulated entity or professional cannot decide on its own what measures it can take to override the statutory requirements. The licensee or permittee's obligations are defined when the license or permit is issued. Setting up shop in a mall which requires that a store be open six days a week does not obviate the need to either hire extra opticians, or to close the shop for the day that an optician cannot be present. Therefore, Sterling Optical Co., Danbury, Sterling Optical Co., Farmington, and Sterling Optical Co., Trumbull are in violation of Conn. Gen. Stat. §§ 20-153 and 20-154.

Sterling Optical's arguments are merely a variation of U.S. Vision's claim attempting to differentiate "regulated" and "non-regulated" activities that would take place when an optical shop is open. The Appellate Court put that claim to rest in U.S. Vision.

Although it may be technically feasible to operate an optical establishment without actually conducting regulated services, the facts of this case illustrate the practical impossibility of walking such a fine

line....The operator of a regulated business is not entitled to decide for himself when he will engage in such activity.(Cite omitted). If we were to construe §20-153 as the plaintiff proposes, there would be no obstacle to operating optical establishments five days each week without a licensed optician on the premises. We cannot conclude that the legislature intended such a bizarre and irrational result when it enacted §20-153. (Cite omitted). Nor can we conclude that the legislature intended that the health department would be required to police such an unwieldy regime.

15 Conn. App. at 217.

A continuation of the hearing was held on November 21, 1988 in order to establish what opticians were responsible for which stores at the times referred in the statement of charges, and whether any communication had taken place between department personnel and individual licensed opticians.

The Board found insufficient evidence to find the Respondent individual licensed opticians who manage each store guilty of violating Conn. Gen. Stat. §§ 20-153, 20-154 or 20-160. Therefore, all charges against Diane Greco, Richard Pethick, Robert Rymeski, and Steven Schoenig are dismissed.

The Board would caution the Respondent individuals in this case that if a question as to the interpretation or applicability of any statutory provision arises, the appropriate officials to contact are the Board. The Board may issue declaratory rulings pursuant to Conn. Gen. Stat. § 4-176.

The Board members who have participated in the final decision of this case have heard the case.

ORDER

Pursuant to its authority under Conn. Gen. Stat. § 19a-17, the Board of Examiners for Opticians hereby orders the following:

(1) That Sterling Optical Co. of Danbury be assessed a civil penalty of one thousand dollars (\$1,000.00) for violating Conn. Gen. Stat. §§20-153 and 20-154.

(2) That Sterling Optical Co. of Farmington be assessed a civil penalty of one thousand dollars (\$1,000.00) for violating Conn. Gen. Stat. §§ 20-153 and 20-154.

(3) That Sterling Optical Co. of Trumbull be assessed a civil penalty of one thousand dollars (\$1000.00) for violating Conn. Gen. Stat. §§ 20-153 and 20-154.

(4) That Sterling Optical discontinue its current practice of allowing their optical shops to be open when a licensed optician is not on the premises.

(5) That failure of Sterling Optical to comply with the terms of this order will result in further disciplinary action.

(6) That all civil penalties be paid to:

Treasurer, State of Connecticut
Department of Health Services
Public Health Hearing Office
150 Washington Street
Hartford, Connecticut 06106

Payment of civil penalties by certified check shall be made within thirty (30) days from the date of the mailing of this decision to the Respondents, which date is noted below.

CONNECTICUT BOARD OF EXAMINERS
FOR OPTICIANS

12/8/88
(Date)

By:

E. Craig Fritz
Chairman

Date of mailing of this decision to the Respondents.

December 12, 1988
(Date)

Celia B. Carroll
Celia B. Carroll, Liaison
to the Connecticut Board
of Examiners for Opticians