

**STATE OF VERMONT
BOARD OF OPTOMETRY**

In re: Michael Gallagher	}	
License No. 030-219	}	Docket No. OD01-1107
	}	2007-386

**Decision on
UNPROFESSIONAL CONDUCT CHARGE**

Board Members Participating:

Lois M. Shiozawa, OD
Daniel Dapolito, OD
Raymond McCandless

Appearances:

for Petitioner, State of Vermont: Edward G. Adrian
for Respondent: Pro se

Presiding Officer: Larry S. Novins

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

The Vermont Board of Optometry held a hearing in the above matter on September 30, 2009 at the Office of Professional Regulation hearing room in the National Life Building in Montpelier, Vermont.

The prosecution has the burden of proof in this matter. To prevail on any unprofessional conduct charge, it must prove the charge by a preponderance of the evidence.

Background

The prosecution alleges in its Specification of Charges that the manner in which Dr. Gallagher told a patient that she needed to see an ophthalmologist and physician as soon as possible was unprofessional, that he failed to give the patient a prescription when asked, and that Dr. Gallagher failed to make the patient's records available to her and improperly stored records preventing patient access to them, and that there were variations between a "reconstructed chart" and the original chart.

Findings of Fact

Based upon the evidence presented, the Board finds as follows:

1. Dr. Gallagher was licensed by and is therefore subject to the disciplinary authority of this Board. 26 V.S.A. § 1708(a)(2), 3 V.S.A. §§ 129, 129(a), 3 V.S.A. § 814(d), the Rules of

the Board of Optometry, and the rules of the Office of Professional Regulation. Dr. Gallagher's license expired in 2008.

2. Dr. Gallagher practiced optometry at Sears Optical in Rutland, Vermont in 2007.
3. Dr. Gallagher gave a routine eye examination to patient M.Z. on August 30, 2007.
4. At that time, Dr. Gallagher found that M.Z. had narrow angles, a possible sign of glaucoma. He also saw indications which could mean she had a possible melanoma and heart condition. He told M.Z. all these things. Dr. Gallagher believed that the way he conveyed his observations to the patient was within accepted guidelines. M.Z. believed that Dr. Gallagher stated as fact that she had melanoma and a heart condition. There appears to have been a misunderstanding between them. Neither may have realized it at the time. The testimony of Dr. Gallagher and M.Z. on exactly what was said, while not wholly inconsistent, was not sufficiently clear to allow us find exactly what Dr. Gallagher did say to M.Z. Thus, we can not find that the manner in which Dr. Gallagher imparted the information fell below acceptable standards.
5. On August 30, 2007 M.Z. asked for her prescription. He did not provide it to her. Her prescription was apparently no different from a previous prescription. Dr. Gallagher said no, that the prescription "would be on file." There was no reason Dr. Gallagher could not have provided the prescription to M.Z. at the time.
6. Some time, not long after Dr. Gallagher saw M.Z. he left his position at Sears. Because he was an independent contractor, he took his patient records with him. He could not leave the records unattended in that retail area. He took his patient records with him to his home in Massachusetts. There was no evidence of what arrangements Dr. Gallagher made, if any, to enable his patients to obtain their records if they wanted them. We find that he did not take adequate steps to allow his patients to access their records if they wanted them.
7. M.Z. came to Sears after Dr. Gallagher left his employment there. She asked for her prescription, but it was not there.
8. When Dr. Gallagher was given some information about the complaint against him, he attempted to find M.Z.'s chart at his home, but was unable to do so. He prepared a "reconstructed" chart based on the information provide OPR by M.Z. He sent the "reconstructed" chart with a cover letter explaining how and why he prepared it. Although the cover letter described his attempts to recreate what would have been in M.Z.'s chart, the "reconstructed" chart entry was not labeled as such. That omission was not a good exercise of judgment. The reconstructed entry, unlabeled as it was, could potentially be misleading. The "reconstructed" chart was remarkably similar to the actual chart which Dr. Gallagher did find two days later. The Board declines to find that creation of the reconstructed chart was a failure to practice competently.

Conclusions of Law

1. **Re: Alleged Violation of 3 V.S.A. § 129a(b)(1) and (2):** The State has proved by a preponderance of the evidence that Dr. Gallagher failed to practice competently. We find that Dr. Gallagher's failure to provide a means for patients to obtain their records as found above constitutes a failure to conform to the essential standards of acceptable and prevailing practice. This charge is unprofessional conduct.

2. **Re: Alleged Violation of 26 V.S.A. § 129a(a)(3):** 3 V.S.A. § 129a(a)(3) defines unprofessional conduct to include failing to comply with provisions of federal or state statutes or rules governing the practice of the profession. Any allegation of failure to comply with statutes or rules has been addressed above. This statute does not provide an independent grounds for discipline. There is no violation of this statute. This charge is dismissed.
3. **Re: Alleged failure to comply with 26 V.S.A. § 1719(b)(3)(A).** The State has proved by a preponderance of the evidence that Dr. Gallagher failed to give to the buyer a copy of the buyer's spectacle lens prescription immediately after the eye examination was completed. This is unprofessional conduct.

Order

To protect the public health, safety and welfare. Thus, we find that the appropriate sanction is that Dr. Gallagher's license be **warned**.

APPEAL RIGHTS

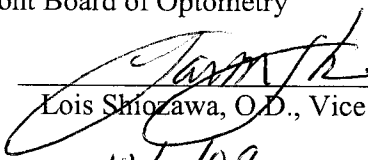
This is a final administrative determination by the Vermont Board of Optometry.

A party aggrieved by a final decision of a board may appeal this decision by filing a written Notice of Appeal with the Director of the Office of Professional Regulation, Vermont Secretary of State, National Life Bldg., North, FL2, Montpelier, VT 05620-3402 within 30 days of the entry of this order.

If an appeal is filed, the Director of the Office of Professional Regulation shall assign the case to an appellate officer. The review shall be conducted on the basis of the record created before the board. In cases of alleged irregularities in procedure before the board, not shown in the record, proof on that issue may be taken by the appellate officer. 3 V.S.A. §§ 129(d) and 130a. To request a stay of the Board's decision, please refer to the attached stay instructions.

Vermont Board of Optometry

By:


Lois Shiozawa, O.D., Vice Chair

Dated:

10/1/09

OFFICE OF PROFESSIONAL REGULATION

DATE OF ENTRY:

10/4/09