

DEC 14 2004



RICHARD J. CODEY  
Acting Governor

*New Jersey Office of the Attorney General*

Division of Consumer Affairs  
New Jersey State Board of Optometrists  
124 Halsey Street, 6<sup>th</sup> Floor, Newark, NJ 07102



PETER C. HARVEY  
Attorney General

RENI ERDOS  
Director

November 29, 2004

By Certified and Regular Mail

Howard Sherman, O.D.  
202 Raritan Ave  
Highland Park, NJ 08904

Mailing Address:  
P.O. Box 45012  
Newark, NJ 07101  
(973) 504-6440

Re: Modified Offer of Settlement In Lieu of Filing a Formal Disciplinary Complaint

Dear Dr. Sherman:

This is to confirm that the New Jersey State Board of Optometrists (Board) had an opportunity at its October 20, 2004 meeting to review the response that you drafted to the offer of settlement issued by the Board on August 31, 2004 as submitted by your attorney, James Schragger.

Upon review and consideration of your arguments, the Board has agreed to delete paragraphs #1 and #2 on page 2 as the Board is in agreement that the issues in these two paragraphs are incorporated in paragraph 3. The Board did not agree to insert the phrase "in this instance" to the end of paragraph 4 as suggested as the issues raised in the settlement offer refer to the examination that was performed on July 23, 2003. Additionally, the Board has rejected your request to reduce the penalty but will permit you to enter into an installment payment agreement as explained below. The modifications discussed have been made to the settlement letter included herein.

This letter is to advise you that the Board has had an opportunity to review information concerning the optometric services that you provided to J.C. Specifically, the information reviewed revealed that you performed an eye examination on J.C. on or about July 23, 2003 and that at the time of the examination you were provided information from another optometrist, Dr. Vicci, regarding a visual analysis performed in January 2000 on J.C. which found this patient to have increased myopia in both eyes. The complaint submitted by J.C.'s mother alleged that the eye glass lense prescription that you provided to the patient was incorrect as J.C. was unable to see with this prescription.

Upon review of the information in this matter, including the patient record and the testimony that you provided at the investigative inquiry before the Board on February 13,

2004, the Board has preliminarily found that probable cause exists to support a finding that you violated N.J.S.A. 45:1-21(e) and N.J.A.C. 13:28-2.1 in that the examination provided demonstrates professional misconduct as you failed to refract J.C.. as the refraction of the right eye was off at least 7 diopters. Additionally, you failed to perform dilation of the patient's eyes. Further, a review of the patient records revealed deficiencies in that you also failed to perform keratometry, the patient's history was inadequate, the examination of the internal eye was inadequate, the information in the patient record failed to differentiate which eye it applied to, no subjective refractive findings or tonometry readings were made or indicated on the record. Furthermore, upon direct testimony you stated that if a dilation is performed you do not indicate in the records the name of the specific drops that were used. Therefore, the minimum requirements for an eye examination were not met as required by the Board's regulations.

At this juncton, the Board has preliminarily concluded that the above violations are sufficient to warrant the initiation of formal disciplinary proceedings against you. Notwithstanding that decision, however, the Board has determined that it will first offer you an opportunity to settle this matter, and thereby avoid the initiation of disciplinary proceedings, should you consent to:

1. Ensure that the minimum requirements for an eye examination pursuant to N.J.A.C. 13:38-2.1 are met and recorded in all patient records.
2. The issuance of a formal reprimand for violation of N.J.S.A. 45:1-21(e) and N.J.A.C. 13:38-2.1 for engaging in professional misconduct by failing to met the minimum requirements for an eye examination.
3. Pay a penalty in the amount of \$5000.00 This amount consists of a penalty of \$2500 for violation of N.J.S.A. 45: 1-21(e) and \$2500.00 for violation of N.J.A.C. 13:28-2.1 to be paid in installment payments over a period of 18 months which shall begin the month immediately preceding your signing of the acknowledgment at the bottom of this letter. Installment payments shall be made by certified check or money order to the NJ State Board of Optometrists, attention Susan Gartland, P.O. Box 45012 , Newark, New Jersey, 07101.
4. Pay costs in the amount of \$166.50 made payable within thirty (30) days to the NJ State Board of Optometrists using the same procedure set forth in paragraph 4. Also enclosed is a certification of costs.
5. Reimburse to patient the cost of the eye examination in the amount of \$61.00. The reimbursement of the refund shall be made by certified check or money order made payable to the patient's parent and sent to the Board upon signing of this letter. The Board shall forward the payment to the complainant.

If you are willing to settle this matter on the offered settlement terms, you may do so by signing the acknowledgment at the bottom of this letter, and returning it to the Board office. Upon your signature, this letter will be a matter of public record.

In the event you are unwilling to settle this matter on the offered terms, it will be referred to the Attorney General's office for the initiation of appropriate enforcement action. In such event you will be afforded an opportunity to defend against the alleged violations. If an evidentiary hearing is deemed warranted the Board will either conduct the hearing at a date and time to be scheduled or refer the matter to the Office of Administrative Law. You are advised, however, that in the event formal charges are filed, the Board may assess civil penalties in an amount greater than that herein offered in settlement should any charges against you be sustained. Additionally, the Board may, if the facts are found to so warrant, enter an order, requiring you to reimburse certain monies and /or requiring you to pay costs incurred by the Board. Should you have any questions concerning this letter or the settlement offer herein, I suggest that you have your attorney, James Schragger contact Deputy Attorney General, Carmen A. Rodriguez, who may be reached at (973) 648-3696.

If you elect to settle this matter, you should sign the acknowledgment at the bottom of this letter and return it to the Board within fifteen (15) days following your receipt of this letter. In the event the Board receives no response from you within fifteen (15) days, the Board's settlement offer will be withdrawn, and the matter will be referred to the Attorney General's Office for the initiation of appropriate enforcement proceedings.

NEW JERSEY STATE BOARD of OPTOMETRISTS

By: Susan Gartland  
Susan Gartland  
Executive Director

ACKNOWLEDGMENT: I, Howard Sherman, O.D., hereby acknowledge that I have read and reviewed the settlement proposal set forth in the above letter. I acknowledge the conduct which has been charged. I am aware that, by signing this acknowledgment, I am waiving any rights that I may have to defend myself against any charges or wrongdoing at an administrative hearing. I am also aware that the action taken against me by the Board is a matter of public record, and that this letter is a matter of public record. I hereby agree to pay a penalty in the amount of \$5000.00 in installments and costs in the amount of \$166.50 to be paid within thirty days of the signing of this acknowledgment), and to reimburse the patient the amount of \$61.00 in the time and manner stated herein.

Howard Sherman O.D.  
Howard Sherman, O.D.

Dated:

cc: James Schragger, Esquire  
Carmen A. Rodriguez, Deputy Attorney General