

March 17, 1977

BOARD OF EXAMINERS OF OPHTHALMIC
DISPENSERS AND OPHTHALMIC TECHNICIANS
Division of Consumer Affairs
1100 Raymond Boulevard
Newark, New Jersey

FORMAL OPINION 1977 — No. 4.

Dear Members of the Board:

You have asked for an opinion as to whether the statutory prohibition on the price advertising of ophthalmic goods by ophthalmic dispensers (opticians) and technicians set forth in N.J.S.A. 52:17B-41.17* is constitutional in light of the decision of the United States Supreme Court in *Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Council, Inc., et al.*, 425 U.S. 748 (1976). You are hereby advised that the statutory ban on the advertising of the price of ophthalmic goods by ophthalmic dispensers and technicians is an unconstitutional infringement of the public's First Amendment right to the free flow of commercial information.

In *Virginia State Board* the Court invalidated a Virginia statute which had declared it unprofessional conduct for a licensed pharmacist to advertise the price of prescription drugs. The Virginia statute which prohibited the dissemination of information concerning the cost and availability of prescription drugs was held to be beyond the bounds of permissible state restriction of commercial speech and violative of the First and Fourteenth Amendments to the United States Constitution. The Court noted:

“*** Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, and at what price. So long as we preserve a predominantly freeenterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable” 425 U.S. at 765.

The Court, in addition, stated that the removal of an advertising ban on prescription drugs would have no adverse effect on the state's interest in the professional standards of the pharmacist, since “high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject.” 425 U.S. at 768.

It is therefore clear that the comparable ban on the advertising of prices of ophthalmic goods by ophthalmic dispensers and technicians is similarly violative of the First Amendment's protection of the free flow of commercial information. The ophthalmic dispenser and technician, like a pharmacist, dispense a standardized product solely on the written prescription of a physician or licensed optometrist. In this regard, ophthalmic frames and finished lenses are products which are similar to prescription drugs. There would be, in our opinion, no justification for the continuing validity of a statutory ban on the price advertising of ophthalmic goods beyond those considered by the Court in *Virginia State Board*. You have therefore advised that the

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statutory ban on the advertising of prices of ophthalmic goods under N.J.S.A. 52:17B-41.17 is an unconstitutional infringement of the First and Fourteenth Amendments to the United States Constitution and all enforcement procedures of the Division of Consumer Affairs pertaining to that statute should be terminated.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

* That statute provides in pertinent part:

"It shall be lawful for an ophthalmic dispenser or ophthalmic technician to advertise; *provided*, that no mention shall be made, either directly or indirectly by any means whatsoever, of a discount, any definite or indefinite price or credit terms on corrective ophthalmic lenses, frames, complete prescription or corrective glasses; . . ."

April 15, 1977

G. THOMAS RITI, *Director*
Division of Public Welfare
3525 Quakerbridge Road
Trenton, New Jersey

FORMAL OPINION 1977—No. 5.

Dear Director Riti:

You have asked whether county and municipal shares of public welfare assistance may be excluded from the limitation on local government spending imposed by the Local Government Cap Law, N.J.S.A. 40A:4-45.1 *et seq.* (P.L. 1976, c. 68, amended by P.L. 1977, c. 10), as "[e]xpenditures mandated after the effective date of [that] act pursuant to State or Federal law." For the following reasons you are advised that while such expenditures may not be excluded as expenditures mandated after the effective date of the Local Government Cap Law pursuant to state or federal law, the financial share of a municipality in a public assistance program may be excluded from the municipal spending limitation as expenditures for "[p]rograms funded wholly or in part by Federal or State funds. . . ." You are also advised, however, that there is no similar authorization for the exclusion of the matching share of a county in a federal or state funded welfare program, and those expenditures must be included in the county spending limitation.

The purpose of the Local Government Cap Law is to limit increases in local government spending to 5% over the previous year's expenditures, except where specifically authorized, and to restrain increases in local property taxes. The exclusions for "[e]xpenditures mandated after the effective date of this act pursuant to State or Federal law" under sections 3(g) and 4(e) of the Act were intended to exclude expen-