

SUNSET REVIEW

BOARD of EXAMINERS in OPTOMETRY

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A PERFORMANCE REPORT
OF THE BOARD OF
EXAMINERS IN OPTOMETRY

July 1, 1980 - March 31, 1983

Audit Control Number
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Development

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Board of Examiners in Optometry

Chairman
Secretary
Member
Member
Member

Maynard Falconer, O.D.
John Demske, O.D.
Robert O'Connell, O.D.
Vacant
Vacant

STATE OF ALASKA

AUDIT DIVISION
FOUCH W
JUNEAU, ALASKA 99811

THE LEGISLATURE
BUDGET AND AUDIT COMMITTEE

March 31, 1983

Members of the
Legislative Budget and Audit Committee:

In accordance with the provisions of Titles 24 and 44 of the
Alaska Statutes (sunset legislation), the attached report is
submitted for your review.

A PERFORMANCE REPORT
ON THE BOARD OF
EXAMINERS IN OPTOMETRY

July 1, 1980 - March 31, 1983



Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit

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PURPOSE AND SCOPE OF THE REPORT

Purpose

In accordance with the intent of Titles 24 and 44 of the Alaska Statutes (sunset legislation), we have examined the activities of the Board of Examiners in Optometry for the past three fiscal years to determine if the Board has been operating in an efficient and effective manner.

Legislative intent requires consideration of this report during legislative oversight hearings to determine whether the Board of Examiners in Optometry should be reestablished. The law now specifies that the Board will terminate June 30, 1984, and have one year from that date to conclude its affairs.

Scope

The major areas of our examination were the licensing, examination, administration, complaint, and affirmative action functions of the Board. We reviewed and evaluated the following:

1. Applicable statutes and regulations.
2. Tests of files and documents of licensees.
3. Interviews with the license examiners.
4. Complaints filed with the Division of Occupational Licensing, Human Rights Commission, Equal Employment Opportunity Office, Attorney General's Office, and the Ombudsman's Office.
5. Discussions with Board members.
6. Minutes of Board meetings and Division correspondence files.
7. Attorney General's Opinions applicable to professional boards.

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ORGANIZATION AND FUNCTION

The Board of Examiners in Optometry is a regulatory board consisting of five persons; four optometrists and one public member, appointed by the Governor. Board members serve staggered terms of four years.

The Board regulates the practice of optometry. The Board sets the minimum standards to practice in Alaska by:

1. Examining and issuing licenses to qualified applicants.
2. Establishing, amending, or eliminating regulations controlling optometry practices.
3. Revoking, annulling, or suspending licenses in accordance with the Administrative Procedures Act when a person has violated optometry statutes or regulations.

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REPORT CONCLUSION

This review contains policy issues raised as a result of our evaluation of various Board practices. The final policy decisions affecting the practices are not within the scope of this report, but requires legislative consideration. In debating these issues, the oversight committees should take into consideration the findings and recommendations presented in this report so the potential impact of policy changes can be evaluated.

Report Conclusion

In our opinion, the Board of Examiners in Optometry should be reestablished. The regulation and licensing of qualified professionals is necessary to protect the public's health, safety, and welfare. The Board provides this service by establishing minimum educational and experience requirements that provide reasonable assurance that persons licensed are qualified. Also, assurance that those licensed act in a competent manner is provided by active investigation of complaints and revocation or suspension of licenses where appropriate.

However, the following findings describe areas where weaknesses or conflicts exist. We have made recommendations which, if implemented, will improve the efficiency and effectiveness of the Board.

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FINDINGS AND RECOMMENDATION

Recommendation No. 1

The Board of Examiners in Optometry should repeal its anti-competitive and restrictive regulations [12 AAC 48.070(a)-(e)].

We reviewed the Board's regulations to determine if they are anticompetitive and restrictive. Legislative Audit's 1978 report on the Board recommended repeal of 12 AAC 48.070 subsections (b) and (c) because of their restrictive and anti-competitive nature.

Regulation 12 AAC 48.063 requires certain information to be contained in advertising in the same type size as the main body of the advertisement. Regulation 12 AAC 48.070(a)(1), (2), (3), (6), and (8) limit advertising. Advertising is not allowable except as delineated by 12 AAC 48. This includes limitations on type size in ads, display of merchandise, shape and size of signs, and house-to-house solicitation.

Regulation 12 AAC 48.070(b), working for a corporation, states in part:

An optometrist may not practice the profession for a commercial establishment or business primarily engaged in trade or commerce for profit.

Similarly, regulation 12 AAC 48.070(c), prohibiting the practice of optometry and the advertising of same as an employee, lessee, sublessee of, or in connection with, a commercial or mercantile establishment, states in part:

It is unlawful for an optometrist to practice optometry as an employee, lessee, or sublessee of a commercial or mercantile establishment or to practice optometry in connection with one, or to advertise either in person or through a commercial or mercantile establishment.

Regulation 12 AAC 48.070(d), which prohibits the practice of optometry on premises where any other materials are dispensed, states in part:

No optometrist may practice in or on premises where any materials other than those necessary to render his professional services are dispensed to the public.

Finally, regulation 12 AAC 48.070(e), which limits the nature of signs, states in part:

No optometrist may display a sign containing other than his name, profession, recognized specialty, and office hours. It may be used only on office windows or at an entrance to his office.

The point of view that these regulations are restrictive, anticompetitive, and absent of clear statutory policy to restrain competition is supported by memorandum A66-191-79A from the Attorney General's Office dated October 29, 1980. That memo states in part that:

There must exist clear statutory policy to restrain competition before a state regulatory agency may promulgate regulations to restrain competition if federal antitrust immunity is to occur, 12 AAC 48.063 may be construed to limit advertising to print media, and is anticompetitive and violative of antitrust law since no such restriction is found in the statute prohibiting false or misleading advertising. 12 AAC 48.070 subsections (a)(1), (2), (3), and (6) impede competition and go beyond what is necessary to limit false and misleading advertising, the only specific statutory prohibition, they are violative of antitrust law. Subsection (a)(8) is likewise anticompetitive. Subsection (b) restrains competitive opportunity among optometrists and there is an absence of specific statutory policy to support the regulation. Therefore, it is unlawful. Subsection (c) is violative of antitrust law on the same basis as subsection (b). Subsection (d) clearly limits competitive opportunity and has no basis in specific statutory authority. It is, therefore, violative of antitrust law. Subsection (e) is anticompetitive, without statutory authorization, and, consequently, violative of antitrust law.

In a memorandum dated October 6, 1978 addressing 12 AAC 48.070 (b) and (c), the attorney for the Legislative Affairs Agency states that those subsections may be unauthorized and restrictive.

In addition, if no action is taken by the Board, we recommend that the State Legislature consider the repeal of the regulations.

ANALYSIS OF PUBLIC NEED

Limited Analysis

The following analyses indicate both positive and negative factors as they relate to the public need as defined in the "sunset" law. These analyses are not intended to be comprehensive, but to address those areas we were able to cover during our examination.

- I. The extent to which the board, commission or program has operated in the public interest.
 - A. The Board has expanded regulations governing continuing education requirements for license renewal.
 - B. The Board has adopted regulations concerning working for a corporation and leasing of commercial property which unduly restricts the practice of optometry by licensed, qualified optometrists which may be in violation of antitrust laws (see Recommendation No. 1).
- II. The extent to which the operation of the board, commission, or agency program has been impeded or enhanced by existing statutes, procedures, and practices which it has adopted, and any other matter, including budgetary, resource, and personnel matters.
 - A. The Governor has not appointed the public member to the Board. It has been operating for almost a year with only four members.
- III. The extent to which the board, commission, or agency has recommended statutory changes which are generally of benefit to the public interest.
 - A. The Board recommended CSSB 551 to help clarify the optometry law by requiring the written portion of the exam to be the National Board of Examiners in Optometry examination.
- IV. The extent to which the board, commission, or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of service, economy of service, and availability of service which it has provided.
 - A. The Board placed advertisements requesting input on proposed regulation changes.

- V. The extent to which the board, commission, or agency has encouraged public participation in the making of its regulations and decisions.
- A. The Board's meetings and examinations are advertised in newspapers by OL to encourage public participation.
- VI. The efficiency with which public inquiries or complaints regarding the activities of the board, commission, or agency filed with it, with the department to which a board or commission is administratively assigned, or with the Office or the Ombudsman have been processed and resolved.
- A. The Office of the Ombudsman and the Attorney General's Office has no consumer complaints regarding the Optometry Board.
- VII. The extent to which a board or commission which regulates entry into an occupation or profession has presented qualified applicants to serve the public.
- A. A low number of complaints were filed with OL against optometrists in the last three years.
- B. We found no instances where the Board had licensed unqualified practitioners.
- VIII. The extent to which State personnel practices, including affirmative action requirements, have been complied with by the board, commission, or agency to its own activities and the area of activity or interest.
- A. Applications for licensure require information and photographs which the Division of Equal Employment Opportunity (EEO) believes may not be necessary to determine the qualifications of the applicant.
- IX. The extent to which statutory, regulatory, budgeting, or other changes are necessary to enable the agency, board, or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.

Please refer to the previous section, Findings and Recommendation.

APPENDIX

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APPENDIX A

BOARD OF EXAMINERS IN OPTOMETRY
REVENUES COMPARED WITH EXPENDITURES
For the Fiscal Year Ended 1982
(UNAUDITED)
(Note 1)

Average Revenue (Note 2)	\$ 6,515
Expenditures (Note 3)	<u>34,514</u>
Excess of Expenditures Over Revenues	<u>\$ (27,999)</u>

Schedule 1
Types of Revenues

<u>Revenues</u>	<u>Amount</u>	<u>Collection Time</u>
Examination Fee	\$ 50	With application
Reexamination Fee For Written Portion	\$ 50	With application for reexamination
Waiver of Examination Fee	\$ 50	With application
Certificate Fee	\$100	With issuance of license
Renewal Fee	\$200	Every four years
Branch Office Registration Fee	\$100	Every four years
Late Fee Fine	\$ 10	With late payment

Note 1

This revenue/expenditure comparison was prepared from available records and discussions with Occupational Licensing personnel. The records were not audited by us and, accordingly, we do not express an opinion on the Board's Revenues Compared with Expenditures.

Note 2

The majority of the revenues collected are composed of license renewal fees. These fees are collected by most boards once every two or four years and causes revenues in one year to be much greater than the revenues collected in the next year. Therefore, we calculated and reported an average for the revenues collected in Fiscal Years 1981 and 1982 in order to obtain a more accurate representation of collected revenues.

Note 3

Expenditures include those made by board members, such as travel and per diem, and an allocated percentage (estimated) of total administrative expenses of the Division of Occupational Licensing. They do not include expenditures for efforts of other departments such as the Department of Law, assisting the boards and the Division.

DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT

POUCH D
JUNEAU, ALASKA 99811
PHONE: 465-2500

OFFICE OF THE COMMISSIONER

August 12, 1983

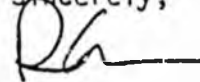
Mr. Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit
Pouch W
Juneau, Alaska 99811

Dear Mr. Wilkerson:

Thank you for the opportunity to comment on the preliminary findings of your audit of the State Board of Examiners in Optometry.

The department has reviewed your findings regarding the anticompetitive nature of certain regulations and we concur with your recommendations. Thank you again for this opportunity to comment.

Sincerely,



Richard A. Lyon
Commissioner

RAL/mc5/3b
812a

Board of Examiners in Optometry

Current Number of Licensees - 81

FY '83 - Allocated 6.2 (Board Travel and Per Diem)

Revenues (7/1/82 - 7/1/83)	1.4	
Contractual	9.4	
Board Travel and Per Diem		3.1
**Personal Services		5.0
*Contractual		<u>1.3</u>
	Total	9.4

FY '84 - Allocated 3.4 (Board Travel and Per Diem)

Revenues (7/1/83 - 2/1/84)	1.2	
Contractual	5.2	
Board Travel and Per Diem		1.4
**Personal Services (7/1/83 - 2/1/84)		3.1
*Contractual		<u>.7</u>
	Total	5.2

FY '85 - Board Component - Division Budget Total - 95.0
Board of Optometry Allocation - 1.9

- * The above items are funded in the division's budget under the Administrative component.
- ** Personal services are 1/5 of one licensing examiner's position.

SOLDOTNA OPTOMETRY CLINIC
JOHN A. DEMSKE, O.D.
DOCTOR OF OPTOMETRY
WOODRUEF BLDG. - SUITE 202, 155 SMITH WAY
SOLDOTNA, AK 99669

TELEPHONE (907) 262-3168

March 6, 1982

The Honorable Richard Eliason
Alaska State Senate
Pouch V
Juneau, Ak. 99811

Dear Senator Eliason,

Per our conversation during the hearing of last week concerning SB 437, Continuation of the Board of Examiners in Optometry, I have discussed the issue of the application photograph with the other members of the board.

Both board members expressed a desire to retain the applicants photograph for proof of identification. The photograph is our only method to ensure that the individual sitting for the exam is indeed the applicant who filed the required documents by mail. The only other alternative that we can think of is to have fingerprints.

If you have an alternative that is more agreeable with the EEO, we would appreciate your recommendations. Thank you for your time in this matter.

Sincerely,



cc: Maynard Falconer, O.D.
Chairman, Optometry Board

Wanda Fleming, Licensing Examiner

Member

American Optometric Association

(E) ocular motility and neurological integrity;

(F) a far point subjective examination, a static retinoscopy, and a subjective refraction;

(G) a near point subjective examination, a dynamic retinoscopy and a subjective refraction;

(H) tests of accommodation and convergence and binocular coordination at far and near, preferably made with a phoropter; and

(I) confrontation fields and tonometry tests;

(2) if contact lenses are prescribed, a routine vision examination includes, in addition to the requirements of subsection (1)

(A) a slit lamp evaluation;

(B) a fluorescein examination;

(C) a diagnostic evaluation when soft lenses are prescribed; and

(D) evaluation within three months in the case of firm lenses and within six months in the case of soft lenses. (Eff. 2/14/78, Reg. 65; am 4/22/83, Reg. 86)

Authority: AS 08.72.050
AS 08.72.060

12 AAC 48.070. UNPROFESSIONAL CONDUCT. (a) An optometrist may not engage in unprofessional conduct within the meaning of AS 08.72.240(3). Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) except as provided by sec. 63 of this chapter, soliciting patients by advertising of any nature or description regardless of means or media employed; however, upon the opening, reopening or removal of any office for the practice of optometry, an optometrist may publish, in local newspapers, an announcement, which announcement is limited to a statement of his name, title, profession, degrees, specialty, address, telephone number and office hours; the announcement may not be published for more

than 90 days after the opening, reopening, or removal of the office; the announcement may not exceed eight square inches in area;

(2) displaying any spectacle, eyeglasses or eyeglass or spectacle frames or mountings, goggles, lenses, prisms, spectacle or eyeglass cases, ophthalmic material of any kind, optometric instruments or optical tools or machinery, or any merchandise, material or displays of a commercial nature in office windows or reception rooms or display cases outside the office, where the display of the merchandise, material or display would make it visible from outside the office;

(3) using display or boldface type or type that is in any way dissimilar in size, shape or color to that used for others of the healing arts in the same directory;

(4) using any false, deceptive, or misleading representation in connection with any advertising concerning ophthalmic prosthetic products or optometric services;

(5) using "bait" advertising;

(6) using signs whether painted, neon, decalcomania, colored or otherwise, and whether constructed in the form of eyes or structures resembling them, or frames or mountings for any type of lenses or other ophthalmic prosthetic products displayed in any manner or place connected with the practice of optometry;

(7) using publicly, a sign, card, stationery, or other publicity medium which fails to clearly identify the individual optometrist or optometrists engaged in practice in an office or practice location, or using a name other than the name under which the optometrist is licensed including such designations as "optical company," "optical laboratory," or words or phrases of like import which are out of keeping with the use of the title "Doctor of Optometry" and the practice of optometry as a profession;

(8) soliciting, personally or through agents, from house to house for the rendering of optometric services or sale of ophthalmic prosthetic products;

(9) advertising self-styled superiority or the performance of services in a manner presumed to be superior, or the making of untruthful, improbable or impossible claims regarding treatments, cures, or values;

(10) lending, leasing, renting, or in any other manner placing a certificate of registration at the disposal of or in the service of any person not licensed to practice optometry in this state.

(b) An optometrist may not practice the profession on a salary or commission basis for a commercial establishment or business primarily engaged in trade or commerce for profit, or associate with such an establishment or business for the practice of optometry. However, this subsection does not prohibit professional incorporation under the Professional Corporation Act, AS 10.45. The fact that an officer, trustee, director, agent, or employee of a commercial establishment or business is an optometrist does not permit the establishment or business to do the acts prohibited in this subsection, nor is that fact a defense to board action against any of the persons mentioned in this subsection for a violation of this subsection. However, this subsection does not apply to a partnership of two or more registered and licensed optometrists who practice under their own names.

(c) It is unlawful for an optometrist to practice optometry as an employee, lessee, or sublessee of a commercial or mercantile establishment or to practice optometry in connection with one, or to advertise either in person or through a commercial or mercantile establishment that he is a registered practitioner and is practicing or will practice optometry as an employee, lessee, or sublessee of a commercial or mercantile establishment or in connection with one. Nothing in this subsection prohibits the rendering of professional services to the officers and employees of a person, firm, or corporation by an optometrist, whether or not the compensation for the services is paid by the officers and employees or by the employer or jointly by all or any of them.

(d) No optometrist may practice in or on premises where any materials other than those necessary to render his professional services are dispensed to the public.

(e) No optometrist may display a sign containing other than his name, profession, recognized specialty, and office hours, which sign may be used only on office windows or at an entrance to his office. Letters may not be luminous or illuminated.

(f) No optometrist may represent himself or herself as a specialist in an optometric field unless he or she is certified, as a diplomate of the American Academy of Optometry or as a fellow of the College of Vision Development, in a recognized specialty. The board recognizes American Academy certification in contact lenses, binocular vision, geriatric care, and low vision, and College of Vision Development fellowships in vision training and developmental vision. (In effect before 7/28/59; am 9/10/65, Reg. 21; am 4/24/71, Reg. 37; am 2/14/78, Reg. 65; am 7/6/78, Reg. 67; am 6/14/80, Reg. 74)

Authority: AS 08.72.050(4)
AS 08.72.060(e)
AS 08.72.240(3)

12 AAC 48.080. DEFINITIONS. Unless the content in this chapter otherwise states:

(1) "Act," "law," or "statute" refers to AS 08.72.;

(2) "regulations" referred to are those made by the board in keeping with AS 08.72.;

(3) "registration" means registration under AS 08.72.;

(4) "chain exploitation" means establish-