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Licensing requirements
for employees of
optometrists

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On August 2, 1989, the former director of the Division of Occupational Licensing (division) requested our opinion on whether the Board of Examiners in Optometry (board) could adopt regulations concerning optometrists' employees. Please excuse the long delay in responding to this request. The short answer to this question is that in our opinion, the board may not adopt these regulations.

Questions Presented

In 1988 the board proposed a regulations project allowing optometrists' employees to perform dispensing optician tasks, at the direction of the optometrist. The division posed four questions in relation to the proposed regulations. The questions and our summary answers are set out below.

1. When, at the direction of an optometrist, his or her ancillary personnel "adapts, fits, and adjusts lenses, eyeglasses, contact lenses and appurtenances," does that constitute the practice of a dispensing optician as defined in AS 08.71.240(4)? If so, is the employee of an optometrist who performs any of these services required to be licensed as a dispensing optician?

Yes, however, there is a limited exception allowing registered optician's apprentices to perform these tasks.

2. If not required to be licensed under AS 08.71, can ancillary personnel perform these services under the supervisory and liability umbrella of a doctor of optometry licensed under AS 08.72?

No.

3. Does the Board of Examiners in Optometry have the authority under AS 08.72 to adopt regulations delegating certain health care procedures to ancillary personnel in the absence of any specific statutory acknowledgment of

optometric assistants?

No.

4. Does the distinction between dispensing opticians and optometric assistants differ in any way from the distinction made between dental hygienists and dental assistants by Mary B. Pinkel, Assistant Attorney General, in her July 7, 1988, memorandum to the division?

Not really, as is more fully explained below.

Discussion

The reasoning and conclusion in Mary Pinkel's memorandum 1/ supports the conclusion of this memorandum. In addition, a 1972 memorandum 2/ prepared by this office explaining that physician and physician assistants need not be licensed as optometrists to practice optometry also supports the conclusion in this memorandum.

Generally, the legislature has defined the scope of professions and exemptions to professional licensure throughout Title 8. For that reason, we do not think that a board is authorized to create a class of licenses within a profession in the absence of a specific statute creating that class of licenses. For example, there is a specific statute authorizing the profession of physician assistants while there is no statute authorizing optometrists' assistants.

Applicable Statutes

AS 08.71.240(4) defines "dispensing optician" as follows:

(4) [A] person who, on written prescription from a licensed physician or optometrist, prepares and dispenses to the intended wearer or person who writes the prescription, original or duplicate lenses, eyeglasses, contact lenses, and appurtenances to them, and interprets, measures, adapts, fits, and adjusts lenses, eyeglasses, contact lenses, and appurtenances to them in accordance with the

1/ See 1988 Inf. Op. Att'y Gen. (July 7; 661-88-0298). A copy of this memorandum is attached for your information.

2/ See 1972 Inf. Op. Att'y Gen. (Nov. 24; Preston). A copy of this memorandum is attached for your information.

written prescription, to the face for the aid or correction of visual or ocular anomalies of the human eye.

AS 08.71.080 requires that a person acting as a dispensing optician be licensed:

A person may not act as a dispensing optician in the state unless the person is licensed under this chapter. . . .

AS 08.71.230 sets out exemptions from the requirement that opticians be licensed:

This chapter may not be construed to

(1) limit or restrict a licensed physician or optometrist from the practices enumerated in this chapter, and each licensed physician and optometrist has all the rights and privileges which may accrue under this chapter to dispensing opticians licensed under it.

In addition, AS 08.71.160 sets out a limited exception from the requirement of licensure for dispensing optician's apprentices:

(a) A person may be employed by or serve under a licensed dispensing optician as an apprentice. An apprentice shall register with the department before beginning employment or service as an apprentice, shall be designated as such in the records of the board, and shall be in training and under the direct supervision of a licensed physician, optometrist, or dispensing optician. Under this section a person may not apprentice for longer than six years unless the board determines that the person is prevented by circumstances beyond the person's control from obtaining a license as a dispensing optician within that time.

(b) No more than two apprentices may be under the direct supervision of one licensed dispensing optician at the same time. 3/

3/ We note that there is an inconsistency between the first and second sentences of AS 08.71.160(a). However, a common sense reading of this statute indicates that apprentices may be employed by or serve under those authorized to supervise these apprentices, i.e., optometrists and physicians. This reading is further

Statutory Interpretation

The primary guide to the interpretation of statutory schemes is the language used, construed in light of the purpose of the enactment. CFEC v. Apokedak, 680 P.2d 486, 489-90 (Alaska 1984). The Alaska Supreme Court has consistently held that it will not construe a statutory provision in a manner inconsistent with the express objective of that very legislation. J & L Diversified v. MOA, 736 P.2d 349, 351 (Alaska 1987); Wien v. Arant, 592 P.2d 352 (Alaska 1979). The legislative history of the Alaska optician statutes indicates that employees of an optometrist are not exempt from optician licensing laws.

In 1973, the legislature first enacted legislation relating to the licensing of dispensing opticians, sec. 1, ch. 45, SLA 1973. AS 08.71.230, "exemptions from and limitations on the application of this chapter," set out in sec. 1, ch. 45, SLA 1973, provided in pertinent part:

This chapter may not be construed to

(1) Limit or restrict a licensed physician or optometrist or employees working under the personal supervision of a licensed physician or optometrist from the practices enumerated in this chapter, and each licensed physician and optometrist shall have all the rights and privileges which may accrue under this chapter to dispensing opticians licensed under it.

(Emphasis added.) At that time, employees of optometrists acting as opticians were explicitly exempt from the requirement of optician licensure.

In 1980 the legislature enacted sec. 12, ch. 56, SLA 1980, amending the optician licensing scheme. As part of this amendment the legislature deleted from AS 08.71.230 the above underlined language concerning optometrists' employees. The legislature thus removed the exemption from optician licensure previously allowed for employees of optometrists. This amendment (...continued)

supported by AS 08.71.230(1), providing in pertinent part that

[e]ach licensed physician and optometrist has all the rights and privileges which may accrue under this chapter to dispensing opticians licensed under it.

indicated legislative intent that employees of an optometrist not be exempt from optician licensure. 1A N. Singer, Sutherland Statutory Construction § 22.30 (4th ed. 1984), provides that

[t]he courts have declared that the mere fact that the legislature enacts an amendment indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one. Therefore, any material change in the language of the original act is presumed to indicate a change in legal rights.

It is clear that the legislature intended to change the original law by removing the exemption from optician licensure for employees of optometrists.

Optician's Apprentices

Although the legislature removed the exemption from optician licensure for employees of optometrists, it did not repeal AS 08.71.160 allowing for optician's apprentices. Under this statute and the applicable regulation (12 AAC 30.110), a person registered as an optician's apprentice may be supervised by an optician, optometrist, or physician. Therefore, it appears that a person may work under an optometrist as a registered optician's apprentice and perform tasks normally requiring optician licensure.

Conclusion

The legislative history of AS 08.71.230 as well as the plain language of AS 08.71 et seq. and AS 08.72 et seq. indicate that employees of optometrists who perform tasks within the scope of AS 08.71.240(4) are not exempt from optician licensure. Because the legislature has chosen not to exempt these persons from licensure, it is our conclusion that the board may not adopt a regulation that effectively allows this exemption. Although the board may not adopt these regulations it appears that optometrists may employ optician's apprentices. Under AS 08.71.160 these employees may perform optician tasks as registered apprentices even though they are unlicensed as opticians.