

**WRITTEN TESTIMONY OF THE NORTH DAKOTA
BOARD OF OPTOMETRY BEFORE THE
ADMINISTRATIVE RULES COMMITTEE
ON JUNE 11, 2008**

INTRODUCTION

I am attorney, Mary Nordsven. I represent the North Dakota Board of Optometry as a Special Assistant Attorney General. I will answer the following questions posed to Dr. Alan J. King, Secretary of the North Dakota Board of Optometry, by John Walstad, Code Revisor with the North Dakota Legislative Council.

DISCUSSION

1. Whether the rules resulted from statutory changes made by the Legislative Assembly?

The rules, in part, resulted from changes made by the Legislative Assembly in House Bill 1123 to Section 43-13-22-(7) and Section 43-13-28 N.D.C.C.

2. Whether the rules are related to any federal statute or regulation. If so, please indicate whether the rules are mandated by federal law or explain any options your agency had in adopting the rules?

The North Dakota Board of Optometry was not mandated by federal law to implement any federal statute or regulation. However, Section 56-02-04-03 incorporates federal law at 15 U.S.C. § 7602, which provides:

“A prescriber may require payment of fees for an eye examination, fitting, and evaluation before the release of a contact lens prescription, but only if the prescriber requires immediate payment in the case of an examination that reveals no requirement for ophthalmic goods for purposes of the preceding sentence, presentation of proof of insurance coverage for that service shall be deemed to be a payment.”

3. A description of the rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.

An Abbreviated Notice of Intent to Adopt and Amend Administrative Rules was published in each official county newspaper one time. A public hearing was held on the proposed rules at the Doublewood Inn Best Western, Bismarck, North Dakota, on October 20, 2007 at 10:00 a.m./CT. Three (3) persons testified at the public hearing. Subsequent to the public hearing, written comments were received. In all, comments were received from seven (7) commentators.

4. Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules. If so, describe the concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint. Please summarize the comments of any person who offered comments at the public hearings on these rules.

The Board responded to comments and concerns raised by the commentators, as follows:

GENERAL COMMENTS

The proposed rules exceeded the Board's authority

Two of the commentators suggested that the proposed rules exceeded the Board's authority. One commentator asserted that for the rule making to be a valid exercise of authority, the rules must fall within the confines of duties delegated to the Board by the legislature. The commentator asserted that the proposed amendments to Rule 56-02-03-03 contained very broadly defined and/or undefined prohibitions presumably directed at assuring that optometrists remain independent and not be controlled by persons not licensed to practice optometry. As such, the rules were not reasonable for the purpose of protecting the citizens of the state.

Another commentator suggested that to the extent that the proposed rules restricted employment relationships authorized by House Bill 1123, the proposed rules exceeded the authority of the Board.

The Board believed that its rule making was within the authority granted to it by the Legislative Assembly in Section 43-13-13 NDCC and was consistent with its historic regulatory activities. Section 43-13-28 NDCC provides, “It is unlawful for any person who is not the holder of a license to practice optometry, to engage in the practice of optometry directly or indirectly, by employing or hiring upon a salary, commission, or other profit sharing arrangement, a licensed optometrist except as permitted by the rules and regulations of the Board.” (emphasis supplied) Clearly the legislature authorized the Board to regulate in this area.

Proposed Rule 56-02-03-03 was drafted to clarify the prohibition set forth in Section 43-13-28 NDCC. Based upon comments received, the Board determined that the responsibility for maintaining independence should be placed on the optometrist contracting with persons who are not physicians licensed under Chapter 43-17, a hospital or a clinic operated by licensed optometrists or by licensed physicians. This approach resulted in the amendment to Section 56-02-03-02 and the deletion of the language in Section 56-02-03-03. The amendments to Section 56-02-03-02 further clarified that the employment relationships authorized by House Bill 1123, now Section 43-13-22 NDCC, were not restricted.

Was the Board’s rule making an attempt to address consumer complaints?

One commentator inquired whether the Board was attempting to address existing problems with the proposed changes. The commentator asserted that if there were recurring and documented consumer complaints or complaints from optometrists regarding independent contractors and the entities with which they contracted regarding unprofessional behavior other than advertising issues, these complaints had not been made public. The commentator inquired whether the proposed rules were tailored to meet or eliminate the problems.

The Board acknowledged that it had received consumer complaints regarding independent contractors who failed to maintain independence with respect

to their optometric responsibilities, as set forth in Section 56-02-03-02 (a) (f). This raised concerns that the entities with whom the optometrists contracted were practicing optometry without a license in violation of Section 43-13-28 NDCC. Board discussions of consumer complaints were conducted at regularly scheduled board meetings, which had been open to the public.

This rule making was a result of the Board's initiative to clarify the law relative to employment practices. Prior to passage of House Bill 1123, the law was ambiguous as to what employment practices were acceptable. Section 43-13-22 NDCC authorized the Board of Optometry to revoke or suspend any license granted by it, if the holder of the license is engaged in the practice of optometry by being directly or indirectly employed by any person other than one who holds a valid unrevoked license as an optometrist in this state and who has an actual legal residence within this state. The statutory language suggested that an optometrist could not be employed by an entity that was not a licensed optometrist. However, the Administrative Code, Title 56, suggested that an optometrist could be employed by a professional corporation whose members are optometrists and by a physician.

Furthermore, prior to its amendment, Section 43-13-28 NDCC, pertaining to the unlawful practice of optometry, provided, "It is unlawful for any corporation, limited liability company, organization, association, group or individual who is not the holder of a license to practice optometry, to engage in the practice of optometry, directly or indirectly, by employing or hiring upon a salary, commission or other basis or by associating upon a lease or any other profit sharing arrangement with a licensed optometrist or licensed physician. The provisions of this section do not apply to cooperative or non-profit associations or non-profit corporations." The language implied that an optometrist could be employed by a cooperative or a non-profit association or corporation.

Because of the inconsistency between Section 43-13-28 NDCC, Section 43-13-22

NDCC and Title 56 of the North Dakota Administrative Code, the Board took the initiative to have the statutes amended so that it was clear that an optometrist could be employed by licensed optometrists, physicians, clinics operated by licensed optometrists or licensed physicians and hospitals. The reason for this rule making was to implement the new statutory language and clarify the responsibilities of an optometrist practicing optometry as an independent contractor in a setting that is not a hospital or clinic operated by optometrists or physicians.

Statutory Citations

One commentator noted there were incorrect statutory cross references. Corrections were made as necessary.

Specific Comments

Section 56-02-01-02 - Examination questions concerning optometric jurisprudence.

No comments were received regarding the proposed amendment.

Section 56-02-02-01 - Postgraduate educational requirements.

No comments were received regarding the proposed amendment.

Section 56-02-03-02 - Code of ethics.

Section 56-02-03-02 (7)

No comments were received regarding the proposed amendment to Subsection 7.

Section 56-02-03-02 (8)(h)

One commentator expressed concern that the proposed amendment could impose restrictions or conditions on employment or other relationships which were authorized under House Bill 1123. House Bill 1123 at Section 43-13-28 NDCC provided that it is unlawful for any person who is not the holder of a license to practice optometry, to engage in the practice of optometry directly or indirectly, by employing or hiring upon a salary, commission or other profit-sharing arrangement, a licensed optometrist except as permitted by the rules and regulations of the Board. The statutory provision does not apply to a physician licensed under Chapter 43-17, a hospital, or a clinic operated by

licensed optometrists or by licensed physicians. The commentator requested that the following language be added to Chapter 56-02-03-02 for clarification:

“Nothing in this chapter, including the provisions of Section 56-02-03-03, may be interpreted to impose any restriction or condition on the employment or other arrangement between a licensed optometrist and a physician licensed under Chapter 43-17, a hospital, or a clinic operated by licensed optometrists or licensed physicians. This chapter does not apply to employment or any other arrangements between a licensed optometrist and a physician licensed under Chapter 43-17, a hospital, or a clinic operated by licensed optometrists or licensed physicians.”

The commentator expressed the opinion that unless this clarification was added to the rules, Paragraph 11 of Section 56-02-03-03 could be interpreted to cover employment arrangements with clinics, hospitals and physicians which would be contrary to Section 43-13-28 NDCC.

The Board consistently took the position that it's proposed rules were not intended to impose restrictions or conditions on employment arrangement with clinics, hospitals and physicians. Although the Board understood the commentator's concern, it chose not to incorporate the proposed language. It believed that the amendment to Section 56-02-03-02 alleviated the problem presented by the commentator.

The same commentator noted that the language of Section 56-02-03-02 (h)(5) was awkward and misleading. The commentator noted that, “Physicians don't hold licenses to practice optometry; Eye MD's are specifically trained and licensed as physicians to provide the full spectrum of eye care, from prescribing eyeglasses and contact lenses to complex eye surgeries.” The Board concluded that the comment was meritorious and as a consequence, Section 56-02-03-02(8)(h)(5) of the proposed rule, now Section 56-02-03-02 (9) (e), was amended to read: “As a member of a group composed of optometrists or physicians licensed in the State of North Dakota.”

Additionally, in reviewing Section 56-02-03-02, it was determined that since the provisions of the proposed amendment, at Section 56-03-02-(8)(h), did not pertain to advertising, the subject of paragraph "8", they should be placed in a separate paragraph "(9)". The amended language now appears at Section 56-02-03-02(9).

Section 56-02-03-03 - The unlicensed practice of optometry prohibited.

There were numerous comments made to the proposed rule. One commentator noted that Section 56-02-03-03 (1) purported to describe legislative intent by agency rule and that the procedure of using legislative intent statements was strongly discouraged by the legislative counsel as the purpose of a properly drafted rule should be self evident. The proposed rules as amended addressed this concern by deleting Section 56-03-03-03.

Several commentators expressed concern with the paragraphs listed under Subsection 11 of Section 56-02-03-03. One commentator noted that as long as the corporate entity has no control over the decisions or actions of the optometrist, it is unnecessary to legislate a separate entrance, a separate telephone number or separate staff. These separations do not offer increased protections to the public, nor do they affect the decisions made by the optometrist. Causing this separation will lead to patient confusion, which will in no way improve the welfare of the patient.

One commentator recommended that the Board clearly provide that independent relationships are acceptable and permitted under the regulation.

One commentator indicated that the proposed regulations adversely affected optometrists contracting with retail optical stores and did not enhance patient safety or ensure independence. The commentator felt that the proposed rules would affect the cost of doing business for a certain segment of optometrists and probably increase the costs of services to the public.

One commentator asserted that numerous provisions, could be construed to restrict employment arrangements with clinics, hospitals and physicians contrary to

Section 43-13-28 NDCC.

One commentator objected to an interpretation of the rules that would require each optometrist to hire their own employees to set up appointments.

One commentator asserted that requiring doctor ownership, new office designs and private telephone numbers would not necessarily improve patient care or assist doctors in better performance. The commentator suggested that the change unfairly affected those retail outlets with an open office design.

The intent of proposed rule Section 56-02-03-03 was to ensure that optometrists entering into contracts with entities not authorized by Section 43-13-28 NDCC remain independent in their optometric practice in order to safeguard the public and maintain high standards in the profession. After reviewing the comments, the Board determined that much of the proposed Rule 56-02-03-03 was unnecessary and did not accomplish the goals of the Board. The Board elected to amend Rule 56-02-03-02 by incorporating provisions of Subsection 10 of proposed Rule 56-02-03-03. The amendment provided that an optometrist practicing under an independent contract in a setting which is not a hospital or clinic operated by licensed optometrists or licensed physicians must maintain responsibility for optometric services and patient care. The remaining provisions of Section 56-02-03-03 were deleted. By doing so, the Board believes it has addressed the concerns of the various commentators.

Section 56-02-04-03 - Minimum prescription and fee requirements.

Two commentators suggested that the language did not comport with federal law, 15 USC §7601 et seq., and recommended that more appropriate language be drafted to bring Section 56-02-04-03 into compliance with federal law. One commentator recommended that language be included to ensure that presentation of proof of insurance coverage for the service provided would be deemed to be a payment. The Board determined that the comments were meritorious and Section 56-02-04-03 was amended to read accordingly.

5. The approximate cost of giving public notice and holding any hearing on the rules and the approximate cost (not including staff time) of developing and adopting the rules.

The approximate cost of giving public notice and holding a hearing on the rules was \$1,797.00.

6. An explanation of the subject matter of the rules and the reasons for adopting those rules.

Rule 56-02-01-02-06 changes one of the examination questions concerning optometric jurisprudence to coincide with the new statutory language adopted by the Legislative Assembly in House Bill 1123 at Section 43-13-22(7) N.D.C.C. It inquires whether the applicant realizes that under North Dakota law, the applicant can only be employed by a licensed optometrist, a physician licensed under Chapter 43-17, a hospital or a clinic operated by licensed optometrists or by licensed physicians.

Rule 56-02-02-01 provides that as a condition of the annual renewal of the license to practice optometry, every registered optometrist is to have fifty (50) classroom hours of optometric educational programs. The 50 classroom hour requirement had been adopted in a previous rule making with a prospective effective date, (January 1, 2001). The new rule deletes the language regarding prospective application, because it is no longer necessary.

Rule 56-02-03-02-(7) states that it is the duty of holders of certificates of registration to practice optometry in North Dakota to refuse to be employed by a person other than a licensed optometrist, a physician licensed under Chapter 43-17, a hospital or a clinic operated by licensed optometrist or by licensed physicians. The Rule was adopted to implement the amendments to Section 43-13-28 N.D.C.C.

Rule 56-02-03-02-(9) sets forth the settings that a licensed optometrist may practice in. It authorizes the practice of optometry under an independent contract in a setting which is not a hospital or clinic operated by licensed optometrists or licensed

provided that the optometrist is responsible for the following:

- (1) The type, extent, availability and quality of optometric services.
- (2) The type of ophthalmic materials available, prescribed or dispensed.
- (3) Files and records relating to patients in the optometric practice.
- (4) Optometric prescriptions.
- (5) Scheduling and availability of optometric services.
- (6) Time limitations on patient examinations.
- (7) Volume of optometric patients.
- (8) Fees schedules for optometric services and materials, and the establishment thereof, including billing methods.
- (9) Information disseminated to the public regarding optometric services.

Rule 56-02-04-03 clarifies when an optometrist may require payment of fees prior to release of a contact lens prescription. The Rule incorporates federal law.

7. Whether a regulatory analysis was required by North Dakota Century Code (NDCC) Section 28-32-08 and whether that regulatory analysis was issued? Please provide a copy.

No regulatory analysis was required.

8. Whether a regulatory analysis or economic impact statement of impact on small entities was required by NDCC Section 28-32-08.1 and whether that regulatory analysis or impact statement was issued. Please provide copies.

No regulatory analysis or economic impact statement of impact on small entities was required.

9. Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. Please provide a copy if one was prepared.

No constitutional takings assessment was prepared.

10.If these rules were adopted as emergency (interim final) rules under NDCC Section 28-32-03, provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support that declaration and provide a copy of the Governor's approval of the emergency status of the rules.

These rules were not adopted as emergency rules.