

SUNSET EVALUATION REPORT
OPTOMETRISTS
Chapter 459, Hawaii Revised Statutes

A Report to the Governor and the Legislature of the State of Hawaii

Submitted by the
Legislative Auditor of the State of Hawaii

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FOREWORD

Under the "sunset law," licensing boards and commissions and regulated programs are terminated at specified times unless they are reestablished by the Legislature. Nationally, the first sunset law was passed in 1976. Within three years, 30 more states had enacted similar legislation. The rapid spread of sunset legislation reflects increasing public concern with what it sees as unwarranted government interference in everyday activities.

Hawaii's Sunset Law, or the Hawaii Regulatory Licensing Reform Act of 1977, terminated 38 occupational licensing programs over a six-year period. These programs are repealed unless they are specifically reestablished by the Legislature. In 1979, the Legislature assigned the Office of the Legislative Auditor responsibility for evaluating each program prior to its repeal.

This report evaluates the regulation of optometrists under Chapter 459, Hawaii Revised Statutes. It presents our findings as to whether the program complies with the Sunset Law and whether there is a reasonable need to regulate optometrists to protect public health, safety, or welfare. It includes our recommendation on whether the program should be continued, modified, or repealed.

Our approach to the evaluation of the regulation of optometrists is described in Chapter 1 of this report under "Framework for Evaluation." That framework will also serve as the framework for conducting subsequent evaluations. We used the policies enunciated by the Legislature in the Sunset Law to develop our framework for evaluation. The first and basic test we applied was whether there existed an identifiable potential danger to public health, safety, or welfare arising from the conduct of the occupation or profession being regulated. Then the other criteria for evaluation were applied.

We acknowledge the cooperation and assistance extended to our staff by the Department of Regulatory Agencies and other officials contacted during the course of our examination.

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Chapter 1

INTRODUCTION

The Hawaii Regulatory Licensing Reform Act of 1977, or Sunset Law, repeals statutes concerning 38 state licensing boards and commissions over a six-year period. Each year, six to eight licensing statutes are scheduled to be repealed unless specifically reenacted by the Legislature.

In 1979, the Legislature amended the law to make the Legislative Auditor responsible for evaluating each licensing program prior to its repeal and to recommend to the Legislature whether the statute should be reenacted, modified, or permitted to expire as scheduled. In 1980, the Legislature further amended the law to require the Legislative Auditor to evaluate the effectiveness and efficiency of the licensing program, even if he determines that the program should not be reenacted.

Objective of the Evaluation

The objective of the evaluation is: To determine whether, in light of the policies set forth in the Sunset Law, the public interest is best served by reenactment, modification, or repeal of Chapter 459.

Scope of the Evaluation

This report examines the history of the statute on licensing of optometrists and the public health, safety, or welfare that the statute was designed to protect. It then assesses the effectiveness of the statute in preventing public injury and the continuing need for the statute.

Organization of the Report

This report consists of three chapters: Chapter 1, this introduction and the framework developed for evaluating the licensing program; Chapter 2, background information on the regulated industry and the enabling legislation; and Chapter 3, our evaluation and recommendation.

Framework for Evaluation

Hawaii's Regulatory Licensing Reform Act of 1977, or Sunset Law, reflects rising public antipathy toward what is seen as unwarranted government interference in citizens' lives. The Sunset Law sets up a timetable terminating various occupational licensing boards. Unless reestablished, the boards disappear or "sunset" at a prescribed moment in time.

In the Sunset Law, the Legislature established policies on the regulation of professions and vocations. The law requires that each occupational licensing program be assessed against these policies in determining whether the program should be reestablished or permitted to expire as scheduled. These policies, as amended in 1980, are:

1. The regulation and licensing of professions and vocations by the State shall be undertaken only where reasonably necessary to protect the health, safety, or welfare of consumers of the services; the purpose of regulation shall be the protection of the public welfare and not that of the regulated profession or vocation.

2. Where regulation of professions and vocations is reasonably necessary to protect consumers, government regulation in the form of full licensure or other restrictions on the professions or vocations should be retained or adopted.

3. Professional and vocational regulation shall be imposed where necessary to protect consumers who, because of a variety of circumstances, may be at a disadvantage in choosing or relying on the provider of the services.

4. Evidence of abuses by providers of the services shall be accorded great weight in determining whether government regulation is desirable.

5. Professional and vocational regulation which artificially increases the costs of goods and services to the consumer should be avoided.

6. Professional and vocational regulation should be eliminated where its benefits to consumers are outweighed by its costs to taxpayers.

7. Regulation shall not unreasonably restrict entry into professions and vocations by all qualified persons.

We translated these policy statements into the following framework for evaluating the continuing need for the various occupational licensing statutes.

Licensing of an occupation or profession is warranted if:

1. There exists an identifiable potential danger to public health, safety, or welfare arising from the operation or conduct of the occupation or profession.
2. The public that is likely to be harmed is the consuming public.
3. The potential harm is not one against which the public can reasonably be expected to protect itself.
4. There is a reasonable relationship between licensing and protection of the public from potential harm.
5. Licensing is superior to other optional ways of restricting the profession or vocation to protect the public from the potential harm.
6. The benefits of licensing outweigh its costs.

The potential harm. For each regulatory program under review, the initial task is to identify the purpose of regulation and the dangers from which the public is intended to be protected.

Not all potential dangers warrant the exercise of the State's licensing powers. The exercise of such powers is justified only when the potential harm is to public health, safety, or welfare. "Health" and "safety" are fairly well understood. "Welfare" means well-being in any respect and includes physical, social, and economic well-being.

This policy that the potential danger be to the public health, safety, or welfare is a restatement of general case law. As a general rule, a state may exercise its police power and impose occupational licensing requirements only if such requirements tend to promote the public health, safety, or welfare. Under particular fact situations and statutory enactments, courts have held that licensing requirements for paperhangers, housepainters, operators of public dancing schools, florists, and private land surveyors could not be justified.¹ In Hawaii, the State Supreme Court in 1935 ruled that legislation requiring photographers to be licensed bore no reasonable relationship to public health, safety, or welfare and constituted an unconstitutional encroachment on the right of individuals to pursue an innocent profession.² The court held that mere interest in

1. See discussion in 51 *American Jurisprudence*, 2d., "Licenses and Permits", Sec. 14.

2. *Terr. v. Fritz Kraft*, 33 Haw. 397.

maintaining honesty in the practice of photography or in ensuring quality in professional photography did not justify the use of the State's licensing powers.

The public. The Sunset Law states that for the exercise of the State's licensing powers to be justified, not only must there be some potential harm to public health, safety, or welfare, but also the potential harm must be to the health, safety, or welfare of that segment of the public consisting mainly of consumers of the services rendered by the regulated occupation or profession. The law makes it clear that the focus of protection should be the consuming public and not the regulated occupation or profession itself.

Consumers are all those who may be affected by the services rendered by the regulated occupation or profession. Consumers are not restricted to those who purchase the services directly. The provider of services may have a direct contractual relationship with a third party and not with the consumer, but the criterion set forth here may be met if the provider's services ultimately flow to and adversely affect the consumer. For example, the services of an automobile mechanic working for a garage or for a U-drive establishment flow directly to his employer, but his workmanship ultimately affects the consumer who brings a car in to his employer for repairs or who rents a car from his employer. If all other criteria set forth in the framework are met, the potential danger of poor workmanship to the consuming public *may* qualify an auto mechanic licensing statute for reenactment or continuance.

Consumer disadvantage. The consuming public does not require the protection afforded by the exercise of the State's licensing powers if the potential harm is one from which the consumers can reasonably be expected adequately to protect themselves. Consumers are expected to be able to protect themselves unless they are at a disadvantage in selecting or dealing with the provider of services.

Consumer disadvantage can arise from a variety of circumstances. It may result from a characteristic of the consumer or from the nature of the occupation or profession being regulated. Age is an example of consumer characteristic which may cause the consumer to be at a disadvantage. Highly technical and complex nature of the occupation is an illustration of occupational character that may result in the consumer being at a disadvantage. Medicine and law fit into the latter illustration. Medicine and law were the first occupations to be licensed on the theory that the general public lacked sufficient knowledge about medicine and law to enable them to make judgments about the relative competencies of doctors and lawyers and about the quality of services provided them by the doctors and lawyers of their choice.

However, unless otherwise indicated, consumers are generally assumed to be knowledgeable and able to make rational choices and to assess the quality of services being provided them.

Relationship between licensing and protection. Occupational licensing cannot be justified unless it reasonably protects the consumers from the identified potential harm. If the potential harm to the consumer is physical injury arising from possible lack of competence on the part of the provider of service, the licensing requirement must ensure the competence of the provider. If, on the other hand, the potential harm is the likelihood of fraud, the licensing requirements must be such as to minimize the opportunities for fraud.

Alternatives. Depending on the harm to be protected against, licensing may not be the most suitable form of protection for the consumers. Rather than licensing, the prohibition of certain business practices, governmental inspection, or the inclusion of the occupation within some other existing business regulatory statute may be preferable, appropriate, or more effective in providing protection to the consumers. Increasing the powers, duties, or role of the consumer protector is another possibility. For some programs, a nonregulatory approach may be appropriate, such as consumer education.

Benefit-costs. Even when all other criteria set forth in this framework are met, the exercise of the State's licensing powers may not be justified if the costs of doing so outweigh the benefits to be gained from such exercise of power. The term, "costs," in this regard means more than direct money outlays or expenditure for a licensing program. "Costs" includes opportunity costs or all real resources used up by the licensing program; it includes indirect, spillover, and secondary costs. Thus, the Sunset Law asserts that regulation which artificially increases the costs of goods and services to the consumer should be avoided; and regulation should not unreasonably restrict entry into professions and vocations by all qualified persons.

Chapter 2

BACKGROUND

Chapter 459, Hawaii Revised Statutes, regulates the practice of optometry. The practice of optometry is statutorially defined as: "the recognition and analysis of visual dysfunction of the human eye; the employment of trial frame and trial lenses, and any objective or subjective means or methods, other than the use of drugs, medicine, or surgery, for the purpose of determining the refractive powers, visual and muscular anomalies of human eyes; and the prescribing or employment of any lenses, prisms frames, mountings, or orthoptic exercises for the correction or relief of the visual or muscular insufficiencies of human eyes."

Under the statute, it is unlawful for any person to practice optometry without first obtaining and holding an unrevoked certificate of registration. The statute does not apply to or prohibit a duly licensed physician or surgeon from practicing optometry. It does not prohibit a certified optician from "the mere mechanics of repairing, replacing, or duplicating . . . ophthalmic lenses, frames, fittings, or other optic materials,"¹ nor does it prohibit an orthoptist from giving visual training, including exercises, while working under the supervision of an oculist or optometrist.

The records of the Department of Regulatory Agencies (DRA) show that as of March 1980, there were 114 registered optometrists, of which 98 were Hawaii resident licensees and 16 were out-of-state licensees not practicing in Hawaii at that time.

Occupational Characteristics

Optometrists examine the eye and related structures to determine the presence of vision problems, eye diseases, or other abnormalities. They prescribe and adapt lenses or other optical aids and may use visual training aids (orthoptics) when indicated, to preserve or restore maximum efficiency of vision. They do not prescribe drugs, make definitive diagnosis of or treat eye diseases, or perform surgery.

1. In our *Sunset Evaluation Report, Dispensing Opticians, Chapter 458, Hawaii Revised Statutes*, we recommended that this exemption be amended to include the filling of prescriptions by dispensing opticians, pp. 15-17 and 21.

In addition to optometrists, other professions and occupations involved in visual health care include ophthalmologists, dispensing opticians, optical technicians, ophthalmic assistants, and orthoptists. The services provided by these professions and occupations are briefly described as follows:²

OPHTHALMOLOGISTS (oculists) are physicians who specialize in the diagnosis and treatment of all eye diseases and abnormal conditions including refractive errors. They may prescribe drugs, lenses, or other treatment, or perform surgery to remedy these conditions.

DISPENSING OPTICIANS [also called opticians, ophthalmic dispensers, or contact lens technicians] make, fit, supply, and adjust eyeglasses according to prescriptions written by optometrists or physicians to correct a patient's optical defects. They do not examine eyes or prescribe treatment.

Mechanical grinding and polishing of the lenses and assembling in a frame are done by OPTICAL TECHNICIANS who follow the work order prepared by the dispensing optician.

OPHTHALMIC ASSISTANTS take histories, assist in refractions, administer local medications, apply surgical dressings, fit and adjust spectacles, and neutralize lenses. In some states they are also permitted to test visual acuities, make visual field examinations, test for binocular vision, and perform tonography.

A special category of ophthalmic assistants is ORTHOPTISTS. Orthoptists work under the direction of the ophthalmologist in the specialized field of diagnosis and treatment of eye muscle and fusion anomalies. The orthoptist teaches patients certain exercises which help to overcome the handicap of crossed eyes, or, in other patients, to train eyes which are not working well as a pair, to work together efficiently.

Optometry education. An optometrist is a graduate of an optometry school with a Doctor of Optometry (O.D.) degree. This degree requires completion of a four-year professional program. In the United States, there are 13 accredited schools and colleges of optometry, of which eight are affiliated with universities. The professional optometry program must be preceded by a minimum of two years at an accredited junior college, college or university; four schools require three years of pre-optometry.³

2. The description of services, including the preceding paragraph on optometry, is drawn from an article by David B. Shaver, Jr., "Opticianry, Optometry, and Ophthalmology: An Overview," *Medical Care*, September 1974, pp. 754-755.

3. American Optometric Association, *Optometry Today: The Vision Care Profession*, 1977, p. 9.

Regulation of optometry in the U.S. Various trade associations have greatly influenced the education and regulation of optometrists in the United States. The American Optometric Association (AOA), the International Board of Boards (IBB), and the Association of Schools and Colleges of Optometry (ASCO) established the AOA Council of Education in 1922 to evaluate the academic and clinical programs and to accredit all schools of optometry in North America. State boards of optometry recognize the accreditation function of this body.

These associations were also responsible for the creation in 1951 of the National Board of Examiners in Optometry (NBEO), which is comprised of optometry educators. The NBEO has established standards in curricula, relative uniformity in basic and optometric science education, and standardized tests for optometry. The NBEO examinations test clinical and professional skills and knowledge. The NBEO also administers a practical examination which is available for those wishing to gain a special fellowship status.

Since 1924, every state and the District of Columbia has had laws regulating the practice of optometry. Hawaii's law was enacted in 1917. Every jurisdiction requires examination as a condition for licensing. Thirty states accept the NBEO examinations as substitutes for all or part of their own examinations and 34 state boards grant licenses by reciprocity at their discretion. The Hawaii Board of Examiners in Optometry conducts its own examinations and does not have any reciprocity agreements.

A majority of states require continuing education credits for license renewals. Most of the 44 states with continuing education requirements specify that credit may be earned for optometric or other scientific education, lectures, symposia, courses approved by the board, and courses given by the AOA. The amount of required continuing education varies from 6 to 33 hours per year. Hawaii requires the completion of eight hours per year.

Legislative History

The practice of optometry has been regulated by the State for 63 years. During this time significant changes in the statute have occurred in the definition of the practice and the licensing standards. These are briefly summarized in this section.

Definition of the practice. When the law was initially established, the practice of optometry was defined as the measurement of vision and the adaptation of lenses to aid vision. In 1949, the definition was broadened to include, among other acts, the recognition and analysis of visual dysfunction of the eye and the prescribing of muscular exercises for the eye. The current definition is as adopted in 1949.

Education and training requirements. The earliest requirements for licensing were a minimum of two years in a public high school and three years of study in a registered optometrist's office or graduation from a "reputable" school of optometry. The present education requirements was adopted in 1941 and calls for graduation from an accredited American optometric college or school recognized and approved by the board.

Continuing education. The continuing education requirement for optometrists was established in 1972 as a condition for license renewals. According to a legislative committee report, the purpose of this requirement was "... to insure the public of the highest quality of vision care possible with the latest knowledge in techniques, instrumentation and ideas." The Hawaii Optometric Association and the board supported the measure.⁴

Grounds for refusal to permit examination or issue certificate. Until 1941 the board was authorized to refuse licenses for these reasons: the use of fraud or deceit in obtaining a license; conviction of a felony or a crime involving moral turpitude; grossly unprofessional or dishonorable conduct likely to deceive or defraud the public; and the use of drugs by optometrists when such use would tend to affect their work.

In 1941, the first restraints on business practices were added to the licensing law. Act 195 prohibited advertising of prices for optometric services and goods and directly or indirectly accepting employment from any company or person not having an optometrist's license.

Act 58, SLH 1949, added three prohibitions: house-to-house selling of lenses, examinations, or optometric services and peddling of eyeglasses on the streets; soliciting or receiving any price differential, rebate, refund, discount, etc., from a dispensing optician for referrals; and renting or practicing on commercial premises without (1) retaining exclusive ownership and control of the practice and the prescription files; (2) definite separation from the commercial concern; and (3) clearly stating the name and "optometrist" to avoid the appearance of being associated with a commercial concern.

4. Standing Committee Report 177-72 on S.B. No. 1612-72, Senate Committee on Judiciary, 1972 Regular Session.

Act 230, SLH 1951, specified that an optometrist must always use the name under which the optometrist is licensed and may not employ or use any unlicensed person to perform optometric services without the optometrist's direct supervision.

In 1957, Act 119 prohibited the practice of optometry on the premises of commercial concerns and required signs and separate entrances distinct from commercial concerns to avoid any interpretation that the practice is associated in any way with a commercial concern. According to a legislative committee report, these and other provisions in the act were intended "... to raise or maintain the standard of the profession by requiring optometrists to conduct their practices under their exclusive control and not in conjunction with any other unlicensed person, firm or corporation."⁵

In 1979, Act 131 deleted several of the statutory prohibitions against advertising and added specifications for the contents of advertisements. The deletions were enacted to conform to the U.S. Federal Trade Commission regulations which mandated removal of prohibitions on advertising of prices or availability of services by dispensing opticians, optometrists, and ophthalmologists.

The Licensing Law

Chapter 459 requires the licensing of optometrists by a board of examiners.

Board of Examiners. The board is comprised of five members, three of whom must be Hawaii residents practicing optometry for at least one year and two public members. The board is placed within the DRA for administrative purposes.

The Optometry Board is authorized to refuse applicants for examinations or licenses for cause, to examine candidates, to revoke or suspend licenses for violations of the law, to approve continuing education courses to meet the board's continuing education requirements, and to prescribe rules and regulations for Chapter 459. Under the general authority granted to all licensing boards,⁶ the board is also empowered to receive and hear consumer complaints. It may issue subpoenas, administer oaths, receive evidence, and order remedies.

5. Standing Committee Report No. 138 on S.B. No. 626, Senate Committee on Judiciary, 1957 Regular Session.

6. Section 92-17, HRS.

The licensing requirements. To take an examination, an applicant must be at least 18 years of age, be of good moral character, be a citizen of the United States, and be a graduate of an American optometric college, school, or university recognized and approved by the board and the AOA.

A candidate must also pass written and practical examinations of the board with an average score of 70 percent in each subject. An applicant who fails any part of the examination may retake only that part. If the applicant fails the third time, the complete examination must be retaken.

The statute specifies that all examinations shall be designed to ascertain the applicant's fitness to practice optometry, shall be in English, and in subjects taught by optometry schools seeking accreditation by the board and the AOA.

Grounds for refusal to permit examination or issue certificate. Section 459-9 gives the board authority to refuse to admit to examination or to issue a certificate for a variety of reasons, including fraud in the application or examination, unprofessional or dishonorable conduct likely to deceive or defraud the public, habits of intemperance or drug addiction which affect the work, advertising in several specific ways, accepting employment with a nonlicensed person, making house-to-house sales, locating a business in a commercial concern, accepting commissions or kickbacks, etc.

Contents of advertising. The statute also contains guidelines on what information must be included in advertising of ophthalmic goods and services to avoid misleading the public.

Chapter 3

EVALUATION OF THE REGULATION OF OPTOMETRISTS

This chapter contains our evaluation of the regulation of optometrists under Chapter 459, Hawaii Revised Statutes, including the need for regulation, certain commercial practices prohibited by state law, and the licensing examination.

Summary of Findings

1. There is sufficient potential harm to the public health, safety, and welfare to justify regulating the practice of optometry.

2. While regulation to ensure competency is justifiable, a number of statutory restrictions imposed on the practice of optometry are questionable, particularly in view of recent findings reported in Federal Trade Commission (FTC) studies. State restrictions which the FTC is considering banning include such restrictions as the prohibition on optometrists' accepting employment with an unlicensed person or company or corporation, renting or using space on the premises of commercial concerns, and using trade names.

3. Difficulties in keeping the state optometry written examination current and valid could probably be alleviated by using the examination developed by the National Board of Examiners in Optometry (NBEO).

Need for Regulation

The Hawaii statute on optometry attempts to protect the public from two forms of potential harm. The first harm is the potential harm of physical injury which might be inflicted by incompetent optometrists. Therefore, the statute establishing licensing procedures is to ensure competency. The second form of potential harm is that of economic loss by the public resulting from unscrupulous business practices. Therefore, the statute proscribes certain commercial practices. In this section, we review whether these two forms of potential harm provide a valid basis for regulation of optometry under Chapter 459.

Potential harm of physical injury. Erroneous prescriptions for eyeglasses or contact lenses may produce nausea, headaches, or needless additional expenses as well as poor vision. In addition, optometric services go beyond vision testing, prescribing and dispensing lenses. They include, among other responsibilities, the ability of optometrists to recognize eye symptoms requiring medical assistance. Incompetence may lead to failure of optometrists to recognize such eye conditions and to make appropriate referrals to physicians. This may result in serious health problems for the patient.

According to a 1978 study by the U.S. Department of Health, Education, and Welfare, optometrists play a significant role in providing health services, mainly as the point of entry to the health care system for vision care services. An FTC study reports that optometrists provide 70 percent of all visual examinations, write 60 percent of all prescriptions, and dispense about 60 percent of all eyeglasses.

The professional literature is virtually unanimous in contending that physical harm, either through acts of commission or omission, is a danger in the practice of optometry, and that, therefore, it is vital to ensure that those who practice optometry are properly trained and meet competency standards.¹ Our review finds no evidence to the contrary, and we conclude that regulation to ensure the competency of optometrists and to protect the public from the potential harm of physical injury is necessary and justifiable.

Potential harm of economic loss. Chapter 459 contains a list of prohibitions, the violation of which would constitute grounds for the board of examiners to refuse to admit applicants to its examination or to refuse to issue licenses. These prohibitions must be found to be needed to protect the welfare of the public, since under the sunset law, regulation to protect a profession is not a justifiable reason for regulation.

State prohibitions. Among the business practices prohibited by the Hawaii statute are the following:

- Optometrists cannot accept employment from any nonlicensed person or from any company or corporation.

1. However, Dr. M. E. Woodruff of the School of Optometry, University of Waterloo, Ontario, Canada, believes that state examinations for licensure of optometrists should be abolished and that a degree from an accredited institution should be an adequacy certification of competency. See "Should state boards continue to examine for licensure?" in *The Journal of American Optometric Association*, May 1977, pp. 589-594.

- Optometrists cannot rent or use space on the premises of commercial concerns and their places of practice must be physically distinct and clearly marked to avoid misinterpretation of association with commercial concerns.
- Optometrists cannot use trade names in connection with the practice of optometry.

In addition to the foregoing, advertising by optometrists is also regulated, including a statutory provision which prohibits optometrists from advertising optometric goods and services at a discount or as a premium.

The overall effect of the prohibitions in Chapter 459 is that optometrists are precluded from locating their practices in high density, high traffic areas, such as shopping centers and department stores, some of which dispense and sell optical goods and services. Dispensing opticians, in turn, are precluded from having in their employ or having as associates, optometrists to prescribe glasses on their premises.

These types of prohibitions have recently come under the review of the federal government, particularly the FTC.

Federal Trade Commission studies. Two FTC studies have questioned various aspects of state prohibitions on the commercial practices of optometrists, and their findings suggest the direction in which the federal government might move.

The Bureau of Economics of the FTC summarized its findings as follows:

“(1) The existence of advertising and commercial practice by some optometrists in a market does not result in a lowering of the quality of examinations available to consumers. While the overall distribution of quality across all types of optometrists is about the same in restrictive and nonrestrictive cities, there is considerable variation in quality between optometrists.

“(2) The existence of price advertising and commercial practice by some optometrists does result in lower prices. The prices of both less thorough and more thorough eye examinations and eyeglasses were significantly lower in the least restrictive cities than in the most restrictive cities.

“(3) In nonrestrictive cities, nonadvertising, traditional optometrists give more thorough eye examinations and charged higher prices than advertising and chain firm optometrists.

“(4) Advertising and chain firm optometrists are just as likely to obtain the correct prescription and produce adequate eyeglasses as nonadvertisers but on average, at lower prices.

“(5) There are no significant differences in the workmanship of the eyeglasses regardless of where they are purchased.

“(6) There are no significant differences in the incidence of unnecessary prescribing between advertising and nonadvertising optometrists.

“(7) There are no significant differences in quality of the eye examinations between individual advertising optometrists and optometrists associated with large chain optical firms.”²

A second FTC study went further. It stated that its evidence shows “substantial consumer injury is occurring due to the public and private restrictions at issue,” that this injury consists of “increased costs that result from . . . these restrictions,” and that “evidence also indicates that these restrictions reduce consumption of ophthalmic products and services.”³

In addition to the consumer injury test, the FTC staff applied a “public policy” test. It reported:

“The second part of the unfairness test requires a determination that these public and private restrictions offend public policy. The evidence presented . . . indicates that these restrictions may have two negative effects on consumers: (1) they may increase the cost of eye care goods and services, and (2) they may decrease consumer access to these goods and services. Both of these effects are contrary to clear national policies.”⁴

The recommendation which emerged from this particular study was that the FTC initiate formal rulemaking proceedings to determine whether the kinds of prohibitions typically found in state statutes are unfair acts or practices under the Federal Trade Commission Act.⁵

2. Federal Trade Commission, Bureau of Economics, *Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry*, September 1980, p. 26.

3. Federal Trade Commission, *State Restrictions on Vision Care Providers: The Effects on Consumers (“Eyeglasses II”)*, Report of the Staff to the Federal Trade Commission, July 1980, pp. 197–198.

4. *Ibid.*, p. 204.

5. *Ibid.*, p. 193.

In December 1980, the FTC provided a formal advance notice of proposed rule-making and asked for public comment on its staff studies.⁶ While FTC announced that it had not committed itself to any particular course of action, it seems likely that some form of action might be forthcoming.

It would be appropriate, therefore, for the Legislature to review the practices proscribed in the Hawaii statute, particularly in the context of and in view of the federal findings.

Regulatory Operations

The two major regulatory operations under the purview of the Board of Examiners in Optometry are the investigation and resolution of complaints and the conduct of examinations for licensing. Only 12 formal complaints were filed with the board between 1975 and 1980. This is a relatively small number considering the thousands of transactions between practitioners and the public which must have taken place during that period. Sometimes when the board finds that there has been no violation of law, it will forward the complaint to the grievance committee of the Hawaii Optometric Association. The caseload of complaints does not appear to impose a problem on either the board or the investigative staff of the Department of Regulatory Agencies. However, there does appear to be a problem with examinations.

Licensing and examinations. The law requires the board to examine applicants in subjects which are required in institutions of optometry. It has been reported as a general condition in the United States and Canada that because of the increase in knowledge and changes in techniques in optometry in the past decade, "many board members do not have the basic level of education or training of the candidates who appear before them for assessment."⁷

Locally, the licensing examination consists of a practical examination and a written examination. With respect to the written examination, the board, until recently, wrote most of the test questions. Some applicants have questioned whether the examination is testing current teachings and practices. Some examinees have suggested that the validity of the questions be tested by sending the questions to the schools from which they graduated.

6. *Federal Register*, December 2, 1980, pp. 79823-79831.

7. Dr. M. E. Woodruff, *op. cit.*, p. 591.

The more recent history of the board's activities with the examination shows that in September 1978, the board expressed concern that the examination questions may not be current with what is being taught in the schools and that the examination should be revised. At the same meeting, the board also considered purchasing multiple choice questions from accredited institutions of optometry to retest candidates who failed parts of the July 1978 examination.

In January 1979, the board first used questions purchased from schools of optometry for a test given to those who failed a subject in the previous July examination. These questions were also included in the July 1979 examination. The board purchased and used additional questions for its January 1980 examination.

The obvious solution to the problem of a local board trying to keep up with a changing profession is to replace the local written examination with the examination of the NBEO. As of 1977, Hawaii was one of 17 jurisdictions which did not use the NBEO examination at all. On the other hand, there were 12 jurisdictions which used the NBEO as the sole and exclusive written examination.

There was a time, in 1975, when the board considered the idea of substituting the NBEO examination for the local examination. However, the idea was apparently dropped. According to one board member, the NBEO examination was not adopted because of strong opposition by the Hawaii Optometric Association. In our discussions with optometrists, we have not been able to determine precisely why there were or are objections to the utilization of the NBEO examination. In the absence of valid objections, this would be an appropriate time to resurrect the idea.

Recommendations

We recommend the following:

1. *Chapter 459 be reenacted.*
2. *In the process of reenacting Chapter 459, the Legislature review the various commercial practices prohibited by statute and determine, in view of the findings of the FTC studies, whether prohibitions should be deleted.*
3. *The Board of Examiners in Optometry utilize the examination of the NBEO to satisfy the written examination requirement.*

APPENDIX

AFFECTED AGENCIES

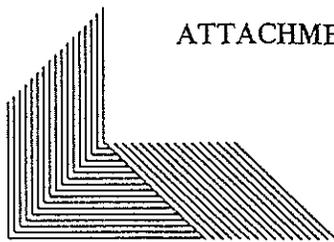
AGENCY RESPONSE

The two principal agencies affected by this Sunset Evaluation Report are the Board of Examiners in Optometry and the Department of Regulatory Agencies. On February 3, 1981, we transmitted this report to the affected agencies and invited them to respond to the recommendations in the report. A copy of the transmittal letter to the board is included as Attachment 1 of this appendix. The board's response is included as Attachment 2. The Department of Regulatory Agencies did not submit any written comments.

In its response, the Board of Examiners in Optometry supports our recommendation that Chapter 459, Hawaii Revised Statutes, be reenacted. We also recommended that the examination prepared by the National Board of Examiners in Optometry (NBEO) be used to satisfy the written examination requirement. The board's position is that the recommendation to use the NBEO examination is "totally unsatisfactory at this juncture of time." The board states that the "NBEO has most recently been an unstable entity."

ATTACHMENT 1

THE OFFICE OF THE AUDITOR
STATE OF HAWAII
465 S. KING STREET, RM. 500
HONOLULU, HAWAII 96813
(808) 548-2450



CLINTON T. TANIMURA
AUDITOR
RALPH W. KONDO
DEPUTY AUDITOR

COPY

February 3, 1981

Dr. Ronald Reynolds, Chairman
Hawaii Board of Examiners in Optometry
Department of Regulatory Agencies
State of Hawaii
Honolulu, Hawaii

Dear Dr. Reynolds:

Enclosed are five copies of our *Sunset Evaluation Report – Optometrists*. We invite your response to the recommendations contained in the report. The Acting Director of the Department of Regulatory Agencies has also been furnished copies of the report and has been invited to respond to the recommendations.

The report has been submitted on this date to the Governor, the Director of Finance, and the State Legislature. Should you decide to respond to the recommendations, we ask for your cooperation in doing so by February 13, 1981. We will then transmit to the Legislature a copy of any response received.

Thank you for your assistance and cooperation.

Sincerely,

Clinton T. Tanimura
Legislative Auditor

Enclosures



GEORGE R. ARIYOSHI
GOVERNOR

Donald D. H. Ching
Acting Director
~~PROCESSED~~
~~RECEIVED~~

DICK H. OKAJI
LICENSING ADMINISTRATOR

BOARD OF EXAMINERS IN OPTOMETRY
STATE OF HAWAII
PROFESSIONAL & VOCATIONAL LICENSING DIVISION
DEPARTMENT OF REGULATORY AGENCIES
P. O. BOX 3469
HONOLULU, HAWAII 96801

February 12, 1981

RECEIVED

FEB 12 2 03 PM '81

OFF. OF THE AUDITOR
STATE OF HAWAII

Mr. Clinton T. Tanimura
Legislative Auditor
Office of the Legislative Auditor
465 South King Street, Room 500
Honolulu, Hawaii 96813

Dear Mr. Tanimura:

Re: Sunset Evaluation Report, Optometrists
Chapter 459, Hawaii Revised Statutes

The response from the Board of Examiners in Optometry is twofold. Our comments will be first directed to the recommendations of the report as circulated and secondly to the actual contents of the report.

The Board of Examiners in Optometry does agree and support the recommendation that Chapter 459, Hawaii Revised Statutes, be reenacted. However, the Board feels that this chapter should be updated with more current and relevant verbiage and philosophies. An attempt was made in 1979 with the introduction of Senate Bill No. 1751 (Administrative Bill) to update Chapter 459, HRS. Its legislative fate is now history.

With regard to the statute prohibition of commercial practices and the most recent Federal Trade Commission (FTC) studies, some mixed feelings were expressed by the board. There is deep concern for professionalism, competitive fees, an open marketplace, and good quality vision care. The board expresses added concerns with compliance to the FTC. Compliance with the FTC, if and when it is needed, will be immediately enacted by the board. However, FTC recommendations should be based on current and valid data that is equitable to both consumer and professional.

The third recommendation of utilization of the National Board of Examiners in Optometry (NBE) to satisfy the written

February 12, 1981

examination requirement is totally unsatisfactory at this juncture of time. It is agreed that the NBEO will perhaps be easier administratively for the Department of Regulatory Agencies and the Board of Examiners in Optometry. However, the NBEO has most recently been an unstable entity. It has been criticized by students taking it, as being trivial, irrelevant, and unfair in its content. An example is the student protest from the Pacific University College of Optometry. Recognizing this shortcoming, the NBEO wrote to all the State boards of optometry asking for possible examination questions. The Hawaii board received this request from Dr. Norman Wallis, Executive Director of the NBEO. It should be added at this time that the critiques received by the 1979 candidates for the Hawaii examination were extremely positive. These critiques are on file with the Department of Regulatory Agencies.

Secondly, to ask the Board of Examiners in Optometry to reply in ten days to the report, if it wished to do so, is unfair. The actual report preparation took much longer. A thirty-day reply period would seem to be more reasonable.

There also appears to be some inaccurate statements made in the report. One specific ambiguity is in reference to the statement on page 18: "In our discussions...resurrect the idea." There are specific reasons already mentioned in this letter which question this statement. It is also noted that for a report to be an objective statement for legislative persual, more direct statements from the Board of Examiners in Optometry should have been included. The board feels that it works in cooperation with all State agencies and is appointed by the Chief Executive of the State for that specific purpose.

In conclusion, it is the hope of the Board of Examiners in Optometry that the preceding statements be interpreted as helpful and constructive opinions. The work done by the Office of the Legislative Auditor is appreciated and reflects all of our concern for a better Hawaii.

Respectfully submitted,


Ronald R. Reynolds, O.D.
President of the Board

cc: Members of the Board
Beryl Chun, O.D.
Stanley Kuriyama
Carolee Stamper
Dennis Kuwabara, O.D.