

SUNSET EVALUATION REPORT
DISPENSING OPTICIANS
Chapter 458, 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

Report No. 81-2
January 1981

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 These programs are repealed unless they are specifically reestablished by the Legislature.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 dispensing opticians under Chapter 458, 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 dispensing opticians 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 It includes our recommendation on whether the program should be continued, modified, or repealed.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 dispensing opticians 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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January 1981

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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 458.

Scope of the Evaluation

This report examines the history of the statute on licensing of dispensing opticians 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

Hawaii is one of 20 states that regulate dispensing opticians. Chapter 458, HRS, makes it unlawful for individuals and firms to engage in the occupation of dispensing optician without a certificate of registration. As of March 5, 1980, 113 individuals and 65 businesses held certificates of registration.

Occupational Characteristics

The focus of Chapter 458 is on *dispensing* opticians. A "dispensing optician" is defined in Chapter 458 as an individual or firm who "prepares and dispenses" lenses, spectacles, eyeglasses, or appurtenances thereto on the written prescription of a licensed physician or optometrist, and, in accordance with the prescription, "interprets, measures, adapts, fits, and adjusts" lenses, spectacles, eyeglasses, or appurtenances to the human face for the aid or correction of visual or ocular anomalies of the human eyes.

There are two essential elements in this definition: (1) preparation (in the sense of interpreting, measuring, adapting, fitting, and adjusting lenses and eyeglasses) and (2) dispensing (in the sense of distributing, issuing, or selling). One without the other does not constitute the practice of dispensing optician. Thus, a department store selling eyeglasses without doing any fitting or adjusting of the eyeglasses is not engaged in the business of dispensing optician.

"Dispensing" in the broader context includes both preparation and dispensing, and is one of three functions of "opticianry," a term coined in the early 1940's.¹ The other two functions are surface grinding and finishing. Surface grinding is the shaping of curves in optic glasses or other transparent material to produce lenses of varying refractive values or prismatic power. Finishing is the grinding of the edges of lenses to shape and fit the lenses into frames. Chapter 458 does not regulate those who only grind or finish lenses. To come under Chapter 458, they must also dispense, as that term is defined above.

1. "Opticianry" has been defined as "the art and science of optics as applied to the compounding, filling, and adapting of ophthalmic prescriptions, products, and accessories."

In general, dispensing opticians do not grind or finish lenses. The lenses are ordinarily ground by manufacturers of lenses and finished by wholesalers. Sometimes wholesalers complete the grinding process, such as where a manufacturer grinds only one side of a lens, or partially finishes the lens. On occasions, retailers also finish as well as dispense lenses. In most cases, however, dispensing opticians simply select manufactured and finished lenses of such refractive values prescribed by ophthalmologists and optometrists, fit them to frames, and adjust the eyeglasses to the customers' faces. Most dispensing opticians, therefore, do not possess surface grinding equipment.

Dispensing opticians also do not determine the need for lenses or the refractive value needed to correct vision. They are not authorized to do so. This is the job of the ophthalmologists and optometrists.

Dispensing opticians generally learn their skills on the job, although there are formal education programs. About 90 percent of the dispensing opticians in the United States are trained through on-the-job apprenticeships in optical establishments.

The Law

Chapter 458 has remained substantially the same since its enactment in 1949. Its more important features are described below.

Board of Dispensing Opticians. Chapter 458 establishes the Board of Dispensing Opticians to carry out the purposes of the chapter. The board is comprised of three licensed opticians and two members from the general public. It is placed within the Department of Regulatory Agencies (DRA) for administrative purposes and receives staff support from the department.

The board is authorized to investigate applicants for dispensing optician's certificate of registration and to issue such certificates to those it finds competent and qualified. The board may also revoke or suspend any certificate of registration for fraud or dishonesty in obtaining the certificate; for dishonesty, fraud, gross negligence, or incompetency in the business of dispensing optician; and for any violation of Chapter 458. The board may hear complaints on its own motion or on the complaint of any person. The board also has the power to issue subpoenas, administer oaths, compel attendance of witnesses, and require the production of documentary evidence. The board has the authority to reissue without examination the certificate of any dispensing optician which has been revoked or may modify any suspension of a certificate.

The board may, with the approval of the Governor and the director of DRA, make, amend, and repeal rules and regulations for the administration of Chapter 458.

Certification. The board issues two types of certificates. The first type is a certificate to engage in the *business* of dispensing optician and the second is a certificate to engage in the *occupation* of dispensing optician. The first kind of certificate authorizes an individual, partnership, or corporation to establish and operate a shop where lenses and eyeglasses are fitted and dispensed. The second kind of certificate authorizes an individual to perform the acts of fitting and dispensing lenses and eyeglasses.

1. *Certificates to engage in business.* Section 458-4, HRS, provides that “[b]efore engaging or continuing in the occupation of dispensing optician individuals and firms shall first apply for and be granted certificates of dispensing opticians by the board of dispensing opticians.” Although the statute uses the term “occupation” in the sentence just quoted, it appears that “business” rather than “occupation” was intended, since the sentence requires the filing of an application for certificate by *firms* as well as by individuals. Further, elsewhere in Section 458-4, it is provided that “[s]eparate applications shall be made for each place of business.”

That Chapter 458 is concerned with regulating the business, rather than the occupation, of dispensing optician is supported by the provisions of Section 458-5, 458-6, and 458-7. Section 458-5 provides for the disclosure in the application of the names and experience of the partners, if the applicant is a partnership; of the officers, if the applicant is a corporation; and “of each person who will take facial measurements, fit, or adjust lenses or frames or duplicate lenses.” Section 458-6 provides that the certificate, when issued, “shall authorize the applicant, its agents and employees acting therefor, to engage in the business of dispensing optician without further license under this chapter.” Section 458-7 provides that “[n]o certificate holder shall cause any person to take facial measurements, fit or adjust lenses or duplicate frames unless such persons first have had three years of satisfactory training and mechanical optical experience, or at the time are acting under the direct supervision of one so experienced.” In none of these sections is there any mention of the need for certification of those persons who actually do the measuring, fitting, and adjusting of lenses and frames. The implication is strong that if the business establishment is certified, none of the workers in the establishment need be individually certified. The only requirement is that the persons who actually do the measuring, fitting, and adjusting of lenses and frames have at least three years’ experience or have worked under one so experienced.

2. *Certificate to engage in occupation.* Although the statute appears to provide only for certification of businesses, the Board of Dispensing Opticians has by rules provided for both business and occupational certifications. Rule 2.2 provides that “[a]n application for examination and a certificate to engage in the occupation [of dispensing optician] shall be filed at least thirty (30) days before the examination which is regularly conducted by the Board in July of each year.” Rule 2.4 provides that “[a]n application to engage in the business of dispensing optician shall be filed at least thirty (30) days before a Board meeting at which it may be considered.”

The board has adopted the experience requirement set forth in Section 458-7 (quoted above) as the minimum qualification required for occupational certification. Thus the board’s Rule 2.9 provides:

“The Board will accept statements signed by a dispensing optician, ophthalmologist or optometrist attesting that the applicant has had at least three (3) years of full-time training and mechanical optical experience under the direct supervision of an experienced person, of which at least one (1) year shall have been in the filling of prescriptions under the direct supervision of a dispensing optician, ophthalmologist or optometrist.”

Examination for certification. The statute does not speak expressly of *examinations* for certification. Rather, it provides for “investigation” of applicants by the board. Section 458-6 states:

“If the board of dispensing opticians, after investigation, approves the applicant and finds the applicant to be competent and qualified to accurately fill prescriptions for ophthalmic lenses and otherwise to engage in the business of dispensing optician, it shall register the applicant and issue to the applicant a certificate of dispensing optician.”

The board by rules has provided for the examination of individuals for occupational certification. Rule 2.10 provides that each individual applicant must attain a passing score of 70 in each part of the examination. The examination includes a written examination on the law and rules and regulations on dispensing opticians and on the theory of dispensing and mechanical optics, and includes also a practical examination. In addition to the practical and the written examination, the board may, at its option, give an oral examination to assist it in making a final determination as to qualification.

Although the board’s rules require an examination for occupational certificates, they impose no similar requirement for business certificates. For a business certificate, an applicant need only show that a person holding an occupational certificate will be in

charge of and responsible for the direct management and control of the business. (See Rule 2.11.)

Further, the rules do not require that every person who measures, fits, adapts, adjusts, and dispenses lenses and frames be a holder of an occupational certificate. Only those who are to be in charge of and responsible for the direct management and control of a place where the business of dispensing optician is to be carried out are required to hold occupational certificates. The rules permit any person who has at least three years of full-time training and mechanical optical experience to measure, fit, adapt, adjust, and dispense lenses and frames, without a certificate so long as the business place is certified and there is a holder of an occupational certificate in charge of the business place.

Prohibited acts. In addition to prohibiting anyone from engaging in the business of dispensing optician without a certificate, Chapter 458 makes it unlawful for any dispensing optician to advertise in a misleading or deceiving manner; to furnish the services of an optometrist or a physician or to employ, directly or indirectly, or maintain on or near the premises used for optical dispensing any optometrist or physician or practitioner of any other profession for the purpose of any examination or treatment of the eyes; to dispense, furnish, or supply optical services and appliances without a prescription from an optometrist, surgeon, or physician (except that duplications and replacements without change in refractive value may be made without prescription); to fit contact lenses or artificial eyes except under the personal supervision of an oculist; and to grant or give any kickback, rebate, discount, etc., to any optometrist, physician, oculist, or practitioner of any other profession for referring any person to the dispensing optician or for rendering services to persons so referred.

Chapter 3

EVALUATION OF THE REGULATION OF DISPENSING OPTICIANS

This chapter contains our evaluation of the regulation of dispensing opticians. We evaluate the need for regulation and also the method of operations in regulating dispensing opticians, and we make recommendations.

Summary of Findings

Our findings are:

1. There is little potential harm to public health, safety, or welfare as to justify the continued regulation of dispensing opticians.
2. The statute is not designed to prevent or minimize any potential harm since the statute is short in ensuring the competence of dispensing opticians.
3. The administration of the examination for occupational licenses and the rules governing the examination are not in accord with each other.
4. Dispensing opticians are improperly included within the Hawaii professional corporation law.

The Need for Regulation

Potential harm. Neither legislative history nor the statute itself is particularly illuminating as to what potential harm to the public is posed by the practice of dispensing lenses, frames, and other optic accessories as to require regulation. However, a possible potential harm is injury to the eyes and other physical hurt. Thus, it is urged by dispensing opticians that, unless optical prescriptions are properly filled, lenses properly fitted to frames and frames properly adjusted to faces, the wearers of eyeglasses may suffer headaches and perhaps even further deterioration of sight.

The possibility of such harm, however, is remote and, even if it occurs, the injury is likely to be minimal. Further, the harm, if it occurs, cannot always be attributed to the dispensing optician.

A dispensing optician supplies optical services and appliances only upon the prescription of a physician or an optometrist (except when duplicating or replacing lenses, frames, and other optic materials). It is the physician or optometrist who determines what visual correction is required and prescribes the lenses. Physical harm, if any, may arise from an incorrect assessment of the visual defect or from an improper prescription of lenses.

The harm may also arise from improper grinding of the lenses, but this, too, is not among the things that a dispensing optician performs.

The job of a dispensing optician is relatively simple. He purchases lenses of such prismatic power prescribed by a physician or an optometrist from a manufacturer or wholesaler, fits the lenses into a frame, and adjusts the eyeglasses to the customer's eyes and face. The wearer of the eyeglasses dispensed by an optician may develop eyestrain or headaches because of an improper fit or adjustment. But, such discomfort is quickly discernible by the wearer and he can return to the dispensing optician for corrections, and the defects in fitting and adjustment are easily correctible by the dispensing optician.

Although not conclusive in and of itself, an indicator of the extent of potential harm posed by the products and services of dispensing opticians is the number of complaints lodged against dispensing opticians over the years. During the four years, 1976 to 1979, there were only 10 complaints filed with the Department of Regulatory Agencies (DRA) against dispensing opticians.¹ Three additional complaints were filed with the Office of Consumer Protection. Considering that thousands of eyeglasses are sold each year, 13 consumer complaints over a four-year period is miniscule. Further, the 13 complaints mostly concerned refusals by dispensing opticians to refund the complainants' money or to make other economic adjustments for improperly fitted lenses, not for any physical harm suffered by the complainants.

Licensing and physical harm. If the potential physical harm is of such magnitude as to require the regulation of dispensing opticians, then, the regulatory statute ought to be one which protects the public from such harm. Chapter 458, however, does not give assurance that only those who are competent to perform the tasks of a dispensing optician will ply the trade.

1. During this period, there were five complaints lodged with DRA against department and other retail stores selling eyeglasses with refractive values.

As noted in Chapter 2 of this report, the statute essentially is a business registration statute, not an occupational licensing statute. Thus, although the statute provides for board “investigation” of the competency and qualification of applicants “to accurately fill prescriptions for ophthalmic lenses and otherwise to engage in the business of dispensing optician,” it does not specifically provide for the examination of applicants to determine their competency to take facial measurements, fit or adjust lenses, or duplicate frames.

The Board of Dispensing Opticians by rules has provided for examination. But the requirement applies only to those who are to be in charge of and responsible for the direct management and control of the business place where the practice of dispensing optician takes place. An examination to determine competency is not required of all others who will take facial measurements, fit or adjust lenses, or duplicate frames. They are required only to have three years of training and mechanical optical experience or to act under the direct supervision of one so experienced. The rules also do not require an examination of those who intend to open and operate an optical dispensing business. For those who wish only to establish a business (i.e., applicants for business certificates), the rules impose but one condition—that the business place be under the direct management and control of one who holds an occupational certificate.

In short, not only is there no apparent potential physical harm, but neither the statute nor the rules are designed to ensure that the potential for any physical harm is minimized. The reason why the statute and the rules are so short in giving such assurance is probably because the potential for any physical harm is so dubious in the first place.

The problem of competition. Dispensing opticians also offer as a reason for retaining the regulatory statute on their business the fear that without the statute they will be forced out of business and optometrists will have a monopolistic control over the sale of refractive lenses. It is asserted that if optometrists have such a control, the price of lenses and eyeglasses will rise rapidly.

The dispensing opticians’ fear is based on the wording of the statute regulating the practice of optometry. Section 459–2, HRS, provides that it is unlawful for any person to practice optometry without first securing a license as provided in Chapter 459. It makes certain exceptions, however, as follows:

“ . . . [T]his chapter shall not apply to, or prohibit, a duly licensed physician or surgeon from practicing optometry as in this chapter defined, nor shall it

prohibit a duly licensed physician or surgeon, oculist, or optometrist from filling prescriptions or orders, nor shall it prohibit the replacement, duplication, or repair of ophthalmic lenses, frames, or fittings thereof, by persons qualified to write or fill prescriptions or orders under chapter, *nor shall it prohibit or prevent a certified optician from doing the mere mechanics of repairing, replacing, or duplicating of such ophthalmic lenses, frames, fittings, or other optic materials . . .*” [Emphasis added.]

The dispensing opticians maintain that under this language, if Chapter 458 were repealed, dispensing opticians would no longer be able to fill prescriptions for ophthalmic lenses and be reduced to doing only the mere mechanics of repairing, replacing, or duplicating lenses, frames, fittings, and other optic materials. Chapter 458, they state, is the only statute which authorizes dispensing opticians to fill prescriptions. They claim that once dispensing opticians are reduced to only repairing, replacing, and duplicating lenses and other optic materials, the optometrists would corner the market in the sale of new prescription glasses and lenses. The optometrists, they observe, already dispense 60 percent of all eyeglasses nationally.

Although not explicitly stated anywhere in Hawaii’s legislative history, it appears that possible monopolistic practices in the sale of prescription glasses was one of the reasons for the enactment of the statute on dispensing opticians. The statute was first enacted in 1949. In the same year, the statute on optometrists was extensively amended. The opticians’ law and the amendments to the optometry statute were dovetailed. One common provision injected into both laws and which still appears in Chapters 458 and 459 provides for the complete separation of the practice of optometry from the practice of dispensing opticians and for an arm’s length relationship between dispensing opticians and optometrists.

Thus, Section 458–13, HRS, makes it unlawful for a dispensing optician to furnish the services of an optometrist (as well as that of a physician or surgeon) or directly or indirectly employ or maintain on or near the optician’s premises any optometrist (or physician or surgeon or the practitioner of any profession for the purpose of any examination or treatment of the eyes). It also makes it unlawful for a dispensing optician to grant, allow, or credit any price differential, rebate, refund, kickback, or commission to any optometrist (or physician or surgeon) for referring any person to the dispensing optician. Then, Section 459–9, HRS, prohibits an optometrist from renting or occupying any space on the premises of a dispensing optician and from soliciting or receiving any price differential, rebate, refund, kickback, or commission from a dispensing optician for referring any customer to the optician.

The prevention of monopolistic practices in the dispensing of ophthalmic lenses, frames, and other optic materials appears also to be the policy on the national level. The Federal Trade Commission has issued regulations requiring optometrists and ophthalmologists to provide each of their patients with a written prescription so that the patient may cause the prescription to be filled by any dispenser of the patient's choosing.

If the threat of monopolistic control by optometrists over the sale of prescription glasses is real, that threat can adequately be met without retaining the present statute on dispensing opticians. It can be met through appropriate amendments to the law governing the practice of optometry. Chapter 459 could be amended to exempt from the provisions of the chapter not only the mechanics of repairing, replacing, or duplicating ophthalmic lenses, frames, fittings, or other optic materials but also the filling of prescriptions by dispensing opticians. The present statutory provisions concerning establishment of the practice of optometry on the premises of a dispensing optician and receipt and solicitation of kickbacks and commissions from dispensing opticians could, of course, continue to remain on the books.¹

In summary, the threat of monopolistic control by optometrists over the sale of prescription lenses is no valid reason for the continued maintenance of the statute on dispensing opticians.

Summary. From the above, it appears that there is little need to retain Chapter 458. Only the following require legislative attention—an assurance (1) that optical services and supplies are furnished and dispensed by opticians only on the written prescription of an ophthalmologist or optometrist, except when the services and supplies consist only of repairing, replacing, or duplicating lenses, frames, and other optic appliances and (2) that competition in the providing and dispensing of optical services and supplies is maintained. Such assurance can be secured by appropriate amendments to Chapter 459, the statute which governs the practice of optometry.

1. It should be noted that state prohibitions of such practices as optometrists locating in mercantile establishments, a practice prohibited by the Hawaii optometry law, have been criticized in recent Federal Trade Commission studies: Bureau of Consumer Protection, *State Restrictions on Vision Care Providers: The Effects on Consumers ("Eyeglasses II")*, Report of the Staff to the Federal Trade Commission, July 1980; Bureau of Economics, *Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry*, September 1980.

Administration of the Law

In this section we report on some operational deficiencies in the administration of the law on dispensing opticians. The deficiencies are in the areas of examination for occupational certificates and regulation of professional corporations.

Examination for occupational licenses. We note here three particular problems in the examination for occupational licenses. *First*, the examination is improperly structured, making it impossible to implement the rules governing it. *Second*, the rule concerning retaking of examination is violated in practice. *Third*, there is an undue amount of repeat questions in the examination.

1. *Improper structuring of examination.* The rules of the Board of Dispensing Opticians require an applicant to attain a passing score of 70 in each part of an examination covering: (a) the law and rules and regulations, (b) the theory of dispensing and mechanical optics, and (c) a practical examination. The rules further provide that if an applicant receives a passing score on all those portions of the examination covering the law and rules and regulations and the practical, and also in at least two parts of the theory segment of the examination, he need not retake the entire examination but may rather retake only those portions of the theory segment that he has failed, provided he has scored not less than 50 in those failed parts.

In so providing, the rules assume that there are at least three parts in the theory segment of the examination. But the theory segment of the examination is not divided into parts. The entire examination is divided into five parts, and the theory segment constitutes a single part. Therefore, the rule concerning the right to retake only those parts that the applicant has failed cannot be implemented.

2. *Violation of rule.* According to one of the board's rules, an applicant who fails any part of the section on the law and rules and regulations or the practical section must retake the entire examination. The board has often disregarded this rule and permitted persons failing any of these parts to retake only the parts they have failed instead of the entire examination.

The board minutes of November 14, 1978 indicate that the board is aware of its violation of the rule. It discussed revising this provision and instructed the secretary to draft the revision. The rule has not been revised as of September 1980.

3. *Repeat questions.* The same questions have been used over and over again over the years in the written examination of applicants for occupational licenses. The 1967 examination and the 1977 examination illustrate this situation. Many of the same questions were included in both of these examinations. In 1980 the examination branch, which is responsible for developing the tests, revised the examination, but the revisions were limited to simply rewording some questions so that the correct answers would be positive rather than negative, and vice versa.

The repeated use of questions encourages applicants to study only past examination questions, rather than the subject matter in depth. The board members are aware of the problem and have expressed concern over this matter. Corrective action, however, is yet to be taken.

Professional corporation. In 1969, the Legislature enacted Act 226, now Part VIII of Chapter 416 on corporations. By that act, the Legislature authorized persons rendering certain types of professional services to incorporate. The Legislature included the services of dispensing opticians among the professional services covered by the act. We think that the services of dispensing opticians are wrongly included in the professional corporation law and should be deleted therefrom.

Before Act 226, a corporation for profit could not be organized for the purpose of carrying on any profession. The term "profession" has been commonly understood to mean "learned profession," or occupation or employment where the labor and skills involved are predominantly mental or intellectual, rather than physical or manual, and where the relationship between the professional and his client is essentially personal. Clearest examples of a profession are doctors and lawyers. The prohibition against incorporating for the purpose of providing professional services was deemed necessary to preserve to the client the benefits of a highly confidential relationship, based on personal confidence, ability, and integrity.

Act 226 was intended to enable members of these professions to enjoy the benefits of federal tax laws accruing to corporations, namely the benefits of such programs as qualified pension plans; profit-sharing plans; deferred compensation plans; and insurance coverage including life, health, medical, and disability. The professional corporation law enables the members of the learned profession to enjoy these benefits by allowing

them to incorporate, but at the same time it preserves the personal and confidential relationship that needs to exist between the professional and the client for the professional services to be properly performed. It thus provides for rendering of professional services by only those individually licensed to practice the profession, for ownership of shares in the corporation by only licensed professionals, and for retention of personal liability on the part of the professional for negligent or wrongful acts or misconduct in the performance of professional services.

The services of dispensing opticians are misplaced among those included in the professional corporation law, because they are not of the kind generally associated with the term "profession." The labor and skill involved in dispensing optical materials are not predominantly mental or intellectual; they are mostly physical and manual. The relationship between a dispensing optician and his client is not essentially personal or confidential, but rather that of seller and buyer of goods.

Indeed, even before Act 226, corporations have been organized (and they have been allowed to be organized under Hawaii's general corporation law) for the purpose of engaging in the business of dispensing opticians. Chapter 458 itself has long recognized that corporations could enter into the business of dispensing opticians. Unlike the statutory provisions on doctors, veterinarians, and other professions covered by the professional corporation law, Chapter 458 has allowed firms as well as individuals to apply for certificates to engage in the dispensing optician business.

The nonprofessional character of the occupation of dispensing optician and the past corporate involvement in the practice of dispensing optical materials have posed difficulty in enforcing the professional corporation law as it applies to dispensing opticians. Since the passage of the law, the DRA Professional and Vocational Licensing Division has given dispensing opticians the option of forming professional corporations or incorporating under the general corporation law. Under the professional corporation law, there is no such option. Insofar as the Board of Dispensing Opticians is concerned, it has not paid much attention to the enforcement of the professional corporation law. The individual members of the board are, to a large extent, unaware of the requirements of the professional corporation law, even though the board has adopted rules covering the matter.

Recommendations

We recommend as follows.

1. *Chapter 458, Hawaii Revised Statutes, be allowed to expire as scheduled on December 31, 1981, and Chapter 459 (the statute regulating optometrists) be amended to provide for filling of optical prescriptions by dispensing opticians and for ensuring that dispensing opticians would be a viable alternative to optometrists in the fitting and dispensing of optical supplies.*

2. *If the Legislature should decide to retain Chapter 458, the Board of Dispensing Opticians and DRA review the practices and rules on examination for occupational licenses to the end that the practices and the rules may be brought into harmony with one another.*

3. *Dispensing opticians be deleted from among the professions subject to the professional corporation law.*

APPENDIX
RESPONSES OF AFFECTED AGENCIES

COMMENTS ON AGENCY RESPONSES

A preliminary draft of this Sunset Evaluation Report was transmitted on January 2, 1981 to the Board of Dispensing Opticians and the Department of Regulatory Agencies. We asked them for their comments on the recommendations contained in the report.

A copy of the transmittal letter to the Board of Dispensing Opticians is included as Attachment 1 of this appendix. A similar letter was sent to the Department of Regulatory Agencies. The responses are included as Attachments 2 and 3, respectively.

The board disagrees with the basic recommendation to allow Chapter 458, Hawaii Revised Statutes, to expire on December 31, 1981. It agrees with the other recommendations we made on reviewing the practices and rules on examination for licenses, something which the board states that it had long before begun, and exempting dispensing opticians from among the professions subject to the professional corporation law.

We comment on several aspects of the board's response. In relation to our recommendation to allow Chapter 458 to expire, we noted that Chapter 459 (the statute on optometry) does not "prohibit or prevent a certified optician from doing the mere mechanics of repairing, replacing, or duplicating of such ophthalmic lenses, frames, fittings, or other optic materials . . ." We noted that this is a narrow exemption, since dispensing opticians are also engaged in the filling of prescriptions. Therefore, we recommended that Chapter 459 be amended to provide for the filling of prescriptions by dispensing opticians.

The board has apparently read this recommendation as one which would regulate opticians as part of the optometry statute. It states: "Under this proposal, two professions—opticianry and optometry—would be regulated under one statute, and that statute would be one designed originally to regulate optometry. There would be no protection for the consumer from collusion between the opticians and optometrists. Such collusion has recently been the subject of a Federal Trade Commission Study and proposed ruling."

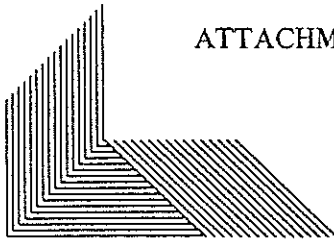
We are not recommending that opticians be regulated under the optometry law. Rather, we are recommending that the practice of opticians be deregulated. The recommendation that the definition in the optometry law of what opticians can do be broadened to include the filling of prescriptions is solely to ensure that "dispensing opticians would be a viable alternative to optometrists in the fitting and dispensing of optical supplies."

As to the matter of collusion, Chapter 459 (the statute on optometry) prohibits kickback schemes between optometrists and opticians and can continue to do so even if Chapter 458 (the statute on opticians) is sunsetted.

The board states that the report has ignored the dispensing opticians' involvement with contact lenses. We did not discuss contact lenses since we believe that the involvement of dispensing opticians with contact lenses is narrowly circumscribed by statute. Specifically, the statute states that: It is unlawful for a dispensing optician to "fit or offer, undertake or attempt to fit contact lenses or artificial eyes except under the *personal supervision of an oculist.*" [Emphasis added.]

With respect to the response of the Department of Regulatory Agencies, the department states that it "is in general agreement with the observation and evaluation . . . of the Board of Dispensing Opticians."

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

January 2, 1981

Ms. Virginia Kam, Chairman
Board of Dispensing Opticians
Department of Regulatory Agencies
State of Hawaii
Honolulu, Hawaii

COPY

Dear Ms. Kam:

Enclosed are five preliminary copies, numbered 6 through 10, of our *Sunset Evaluation Report on Dispensing Opticians*. These copies are for review by you and other members of the board. This preliminary report has also been transmitted to Mr. Tany S. Hong, Director, Department of Regulatory Agencies.

The report contains recommendations relating to the regulation of dispensing opticians. We would appreciate receiving your written comments on the recommendations by January 16, 1981. Your comments will be included as part of the final report which will be submitted to the Legislature.

Since the report is not in final form and changes may possibly be made to it, access to this report should be restricted solely to board members and those officials whom you might wish to call upon to assist you in your response. We request that you exercise controls over access to the report and ensure that the report will not be reproduced. Should you require additional copies, please contact our office. Public release of the report will be made solely by our office and only after the report is published in its final form.

We appreciate the assistance and cooperation extended to us.

Sincerely,

Clinton T. Tanimura
Legislative Auditor

Enclosures



GEORGE R. ARIYOSHI
GOVERNOR

TANY S. HONG
DIRECTOR

DICK H. OKAJI
LICENSING ADMINISTRATOR

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

January 16, 1981

RECEIVED

Mr. Clinton T. Tanimura
Legislative Auditor
465 South King St., Suite 500
Honolulu, Hawaii 96813

JAN 19 1 20 PM '81

OFF. OF THE AUDITOR
STATE OF HAWAII

Dear Mr. Tanimura:

Thank you for your letter of January 2, 1981, inviting our written comments on the recommendations presented in your preliminary report to the Governor and to the Legislature of the State of Hawaii entitled, "Sunset Evaluation Report - Dispensing Opticians - Chapter 458, Hawaii Revised Statutes."

The Board of Dispensing Opticians has, at their meeting on January 12, 1981, discussed in detail the Preliminary Sunset Evaluation Report of the Legislative Auditor. While we are in agreement with portions of this report, the incomplete nature of the report and the incorrect implications given in other sections of the report force us to disagree with the report's major conclusion.

The report recommends:

1. Chapter 458, Hawaii Revised Statutes, be allowed to expire as scheduled on December 31, 1981, and Chapter 459 (the Statute regulating optometrists) be amended to provide for filling of optical prescriptions by dispensing opticians and for ensuring that dispensing opticians would be a viable alternative to optometrists in the fitting and dispensing of optical supplies.

Under this proposal, two professions--opticianry and optometry--would be regulated under one statute, and that statute would be one designed originally to regulate optometry. There would be no protection for the consumer from collusion between opticians and optometrists. Such collusion has recently been the subject of a Federal Trade Commission Study and proposed ruling.

Our present legal arrangement provides this protection. The present structure of our Laws also ensures the consumer of his choice in selection of dispensing optical services and effectively prevents vertical monopolies in optical services. "Band-Aid" applications to a statute that is designed for another profession would never provide the same competent service to the public as we presently have.

In addition to the above, the recommendation of the Legislative Auditor is based upon a somewhat incomplete report. The impression is given in the report that licensed dispensing opticians do nothing other than fit glasses. In fact, most dispensing opticians also finish the lenses prior to dispensing them. The task of the dispensing optician is far larger than the report would lead one to believe.

It is thought by many that the dispensing optician's only task is to fit frames, repair, adapt, and adjust the same. This definition has long been incomplete and outdated. When the consumer enters a local optician establishment with a prescription from an optometrist or ophthalmologist he is first of all aided in choosing a frame by a highly-trained sales person. Attention is paid to the customer's cosmetic, fashion and specific optical frame needs. While this sales person may not be an optician, such activity always occurs under the supervision of a licensed optician.

Once the frame is selected, the customer sits with the optician and discusses specific lens needs. The optician is highly trained in the vast variety of modern lenses, including such items as their specific uses, power, size limitations and optical qualities. Choosing the type of lens that will fit the customer's needs, the optician takes a set of measurements that vary according to the type of lens that will be used. These measurements, including such items as distances between the pupils and bifocal segment heights, are critical. Without accuracy in these measurements, the customer would not receive the visual enhancement that the prescribing oculist intended.

The prescription is then given to a wholesale laboratory where the lens blanks are cut to the patient's prescription. Curvature of the lens is chosen by the dispensing optician for the patient's comfort and individual prescription needs. These blanks are prepared (surfaced) by trained technicians under the supervision of licensed dispensing opticians. These blanks are either sent back to the dispensing optician's own finishing laboratory or are finished by the wholesaler's laboratory. In either case, the lenses are thoroughly checked by a dispensing optician for power, thickness, and signs of aberrations or defects.

From the measurements preciously taken by the dispensing optician, the lenses are then centered and cut to the frame shape and size. Glass lenses are then tempered for strength, tinted and assembled.

The entire process is performed under the supervision of a licensed optician. Glasses that do not meet specified tolerances are never dispensed. The optician's training also makes him aware of the incorrect power and centering of the customer's glasses that may in time lead to muscular problems of the eye and unnecessary vision disorders.

In addition to the process described above, dispensing opticians also are involved in the preparation of contact lenses. The Report of the Legislative Auditor makes no mention of contact lenses at all. While the dispensing optician works under the supervision of an oculist in this area, the sensitive nature of any object designed to be worn in contact with the eye, requires a great deal of care in its preparation. Often dispensing opticians, again under the supervision of an oculist, are charged with instructing customers in the proper care and use of contact lenses. Errors in the preparation of contact lenses could lead to edema of the eye and corneal abrasion. Corneal astigmatism and even scarring of the cornea could result. Loss of vision could be the extreme result.

All of the above is reported to counteract the minimal picture of the task of the dispensing optician that is presented in the report. THE BOARD OF DISPENSING OPTICIANS DISAGREES WITH RECOMMENDATION #1 OF THE REPORT.

The second recommendation of the Legislative Auditor is that, if Chapter 458 is retained, the practices and rules on examinations for occupational licenses be reviewed. The Board of Dispensing Opticians wishes to report that such a review is currently well under way. We have instituted changes in the written examination for dispensing opticians to conform with the examination rules. Several sets of examinations will be constructed to be used alternately. We are also investigating placing our examination in the hands of a professional testing service.

Refinements have also been made in the practical examinations which include dividing of the examination into various parts and grading by a point system. A system of anonymity is used so that graders of the practical examination have no knowledge of the candidate's identity.

One can see from the above that we agree with the recommendation of the Legislative Auditor and have, in advance of receiving his report, long begun the process of revising our examination procedures.

The third recommendation of the Legislative Auditor concerns a recommended change in the profession corporation law. We are also in agreement with this recommendation.

Mr. Clinton T. Tanimura

-4-

January 16, 1981

CONCLUSION:

It is the position of the Board of Dispensing Opticians that the role of Dispensing Optician is of such a nature that one cannot assume that the consumer can readily judge the merchandise and services that he is receiving. WE RECOMMEND THE CONTINUATION OF CHAPTER 458 OF THE REVISED STATUTES OF THE STATE OF HAWAII.

Very truly yours,

Virginia S. K. Kam

VIRGINIA S. K. KAM, President
Board of Dispensing Opticians

VSKK:rh

ATTACHMENT 3

GEORGE R. ARIYOSHI
GOVERNOR



STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF REGULATORY AGENCIES
1010 RICHARDS STREET
P. O. BOX 541
HONOLULU, HAWAII 96809

TANY S. HONG
DIRECTOR
BANK EXAMINER
COMMISSIONER OF SECURITIES
INSURANCE COMMISSIONER

DONALD D.H. CHING
DEPUTY DIRECTOR

January 20, 1981

RECEIVED

JAN 20 11 35 AM '81

OFF. OF THE AUDITOR
STATE OF HAWAII

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

Dear Mr. Tanimura:

Thank you for the opportunity to comment on your
"Sunset Evaluation Report on Dispensing Opticians."

The Department of Regulatory Agencies is in general
agreement with the observation and evaluation you have made
of the Board of Dispensing Opticians. You and your staff
should be commended for the accurate and thorough assessment
of the board.

Very truly yours,

DONALD D. H. CHING
Deputy Director

cc: Tany S. Hong, Director