

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
Honolulu, Hawaii

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FOREWORD

Under the "Sunset Law," licensing boards and commissions and regulated programs are terminated at specific times unless they are reestablished by the Legislature. Hawaii's Sunset Law, or the Hawaii Regulatory Licensing Reform Act of 1977, scheduled for termination 38 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 These programs are repealed unless they are specifically reestablished by the Legislature.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 It includes our recommendation on whether the program should be continued, modified, or repealed. In accordance with Act 136, SLH 1986, draft legislation intended to improve the regulatory program is incorporated in this report as Appendix B.

We acknowledge the cooperation and assistance extended to our staff by the Board of Dispensing Opticians, the Department of Commerce and Consumer Affairs, and other officials contacted during the course of our examination. We also appreciate the assistance of the Legislative Reference Bureau which drafted the recommended legislation.

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Chapter 1

INTRODUCTION

The Hawaii Regulatory Licensing Reform Act of 1977, or Sunset Law, repeals statutes concerning 38 occupational licensing programs 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 Each year, six to eight licensing statutes are scheduled to be repealed unless specifically reenacted by the Legislature.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, Hawaii Revised Statutes.

Scope of the Evaluation

This report examines the history of the statute on the regulation 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 for evaluating the licensing program; Chapter 2, background information on the regulated industry and the enabling legislation; and Chapter 3, our evaluation and recommendations.

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 programs. Unless reestablished, the programs disappear or "sunset" on a prescribed date.

In the Sunset Law, the Legislature established policies on the regulation of professions and vocations. The law requires each occupational licensing program to 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 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 one against which the public cannot 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 alternative 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 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. 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 ruled in 1935 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 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 further states that for the exercise of the State's licensing powers to be justified, the potential harm must be to the health, safety, or welfare of that segment of the public consisting mainly of consumers of

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

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

the services provided by the regulated occupation. 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 provided by the regulated occupation. Consumers do not have to 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 is 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 the employer, but the mechanic's workmanship ultimately affects the consumer who brings a car in for repairs or who rents a car from the employer.

Consumer disadvantage. The exercise of the State's licensing powers is not warranted if the potential harm is one against which the consumers can reasonably be expected to protect themselves. Consumers are expected to be able to protect themselves unless they are at a disadvantage in selecting or dealing with the providers 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 a consumer characteristic which may cause the consumer to be at a disadvantage. The highly technical and complex nature of an occupation is an illustration of occupational characteristic that may place the consumer 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 be able to make judgments about the relative competencies and about the quality of services provided to 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 requirements 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. Licensing may not be the most appropriate method for protecting consumers. Instead, prohibiting certain business practices, governmental inspection, or the inclusion of the occupation within another existing business regulatory statute may be preferable, appropriate, or more effective in protecting 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. The term "costs" in this regard means more than direct money outlays or expenditure for a licensing program. "Costs" include opportunity costs or all real resources used up by the licensing program; they include 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 458, Hawaii Revised Statutes, establishes the Board of Dispensing Opticians to regulate the practice of dispensing opticians in Hawaii. The board is authorized to issue licenses to individuals and businesses that meet its requirements. This chapter summarizes occupational characteristics of the dispensing optician practice and its regulation by the board. It then recounts the findings and recommendations of our 1981 sunset report and reports on statutory developments since 1981.

Occupational Characteristics

A National Health Survey conducted in 1979 estimated that 50 percent of the United States populace over the age of 3 and 92 percent of persons over 75 years of age use eyeglasses and contact lenses.¹ Dispensing opticians provide a service to these persons similar to that of pharmacists. They interpret the prescription of an ophthalmologist or optometrist and dispense the appropriate corrective lenses to the patient.

Generally, dispensing opticians are considered to be secondary providers in the eye care field. Ophthalmologists and optometrists are considered the primary

1. National Center for Health Statistics, G. S. Poe: "Eye Care Visits and Use of Eyeglasses or Contact Lenses, United States, 1979 and 1980," *Vital and Health Statistics*, Series 10, No. 145, DHHS Pub. No. (PHS) 84-1573, Public Health Service, Washington, D.C., U.S. Government Printing Office, February 1984, p. 6.

providers. Ophthalmologists are medical doctors who diagnose and treat diseases of the eye and vision problems. Optometrists are nonmedical eye specialists who diagnose and treat vision problems. The practice of optometry began in the late 1800s from dispensing opticians who expanded their dispensing practice to include measuring and correcting refractive vision problems.² They began to advertise as "refracting opticians" or optometrists. Optometry became an independent profession when it gained recognition through state legislation.

Medical dictionaries offer various definitions of "optician" and "opticianry." Optician is defined in one dictionary as "a person who grinds and fits eyeglasses and contact lenses by prescription. To become an optician, a person must graduate from high school and complete a four to five year apprenticeship. In some states licensure is required."³ In another dictionary, opticianry is defined as "the science, craft, and art of optics applied to the translation, filling, and adapting of ophthalmic prescriptions, products, and accessories."⁴

Hawaii is one of 22 states that regulate the practice of opticians.⁵ There are no reciprocal licensing agreements between Hawaii and other states which

2. David D. Agahigian, "Peaceful Coexistence in Connecticut," *Connecticut Medicine*, Vol. 48, No. 4, April 1984, p. 242.

3. *Mosby's Medical and Nursing Dictionary*, 2nd ed., Mosby & Company, St. Louis, Mo., 1986, p. 803.

4. *Dorland's Medical Dictionary*, W. B. Saunders & Co., Philadelphia, Penn., 1981, p. 931.

5. Twenty states have statutory licensure requirements, one state requires registration of opticianry businesses, and one state requires registration of the use of national certification titles.

license opticians. As of July 1986, 195 individuals and 43 businesses held certificates of licensure from the State.⁶ This figure represents an increase of 58 percent for individual licenses and a decrease of 34 percent for business licenses since 1980.

Regulation of Opticians, Chapter 458

Regulation of dispensing opticians in Hawaii began in 1949 with the passage of Act 183 which: created a regulatory board for licensing; required licensure for individuals and businesses; prohibited dispensing opticians from employing or offering the services of optometrists or ophthalmologists on the premises of the optician's business; and prohibited dispensing opticians from giving discounts, commissions, and kickbacks to optometrists and ophthalmologists.

According to the current law, an individual or firm practices as a dispensing optician "when the individual or firm prepares or dispenses lenses, spectacles, eyeglasses, or appurtenances thereto to the wearer thereof on written prescription from physicians or optometrists duly licensed to practice their professions, and in accordance with the prescriptions interprets, measures, adapts, fits, and adjusts the lenses, spectacles, eyeglasses, or appurtenances thereto to the human face for the aid or correction of visual or ocular anomalies of the human eyes."⁷

The dispensing optician may only prepare and dispense corrective lenses based upon a written prescription from a physician or optometrist. The dispensing of

6. Hawaii, Department of Commerce and Consumer Affairs, *Geographic Report*, Honolulu, July 1986.

7. Section 458-1, HRS.

contact lenses is further restricted by requiring an optician to fit or duplicate contact lenses only under the written orders and "personal supervision of an ophthalmologist or optometrist."⁸ "Personal supervision" is defined in the board's rules as fitting the lenses from a written prescription of an optometrist or ophthalmologist and referring the wearer back to the prescriber.⁹

Dispensing opticians are regulated by a five-member board placed for administrative purposes within the Department of Commerce and Consumer Affairs. The board is composed of three licensed opticians and two public members. The board is authorized to develop minimum standards for licensure and examination and investigate and conduct hearings related to licensure violations.

The board administers written and practical examinations to determine if applicants are competent to practice. The board has adopted rules on prerequisites for licensure, subject areas to be covered by the examination, and conditions for reexamination. Currently, the board's rules require an applicant to have "three years of full-time practical and mechanical optical experience or its equivalent" before they may take the examination for licensure.¹⁰ An applicant must receive a passing grade of 75 percent on each part of a four-part examination covering: the state law and rules affecting dispensing opticians, theory of dispensing and mechanical optics, a practical examination in eyeglasses, and a practical

8. Section 458-13(5), HRS.

9. Section 16-91-2, Hawaii Administrative Rules.

10. Section 16-91-18, Hawaii Administrative Rules.

examination in contact lenses.¹¹ An applicant who receives a passing score on three of the four parts is required to retake only that part which the applicant failed.¹²

Prior Sunset Evaluation

Under the 1977 Sunset Law, the Board of Dispensing Opticians was scheduled to be terminated at the end of December 1981. Our sunset evaluation of the regulation of dispensing opticians at that time concluded as follows:

- "1. There is little potential harm to the public health, safety and 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."¹³

Need for regulation. We found that neither the statutes nor their legislative history provided a clear finding on the purpose of regulation and what potential harm is posed to the public by the practice of dispensing corrective lenses, frames, and optical accessories. We also found the probability of permanent eye injury to be

11. Section 16-91-19(b), Hawaii Administrative Rules.

12. Section 16-91-19(d), Hawaii Administrative Rules.

13. Hawaii, Legislative Auditor, *Sunset Evaluation Report, Dispensing Opticians, Chapter 458, Hawaii Revised Statutes*, Report No. 81-2, Honolulu, January 1981.

very remote. Even when they occur, injuries are not always attributable to the optician, since the optician only fills a prescription based upon the diagnosis and orders of an ophthalmologist or optometrist. Further, our review of complaints filed against licensed opticians between 1976 and 1979 showed that only 13 complaints had been filed. None of the complaints related to physical harm. Based upon these factors, we found that regulation could not be justified by the need for consumer protection.

Licensing activities. We found that the statute did not assure a minimum level of competence to protect the consumer. Applicants were not required to be examined to ensure their competency to take facial measurements, fit or adjust lenses, or duplicate frames. Examinations were required under the board's rules only of those who were to be in charge of or responsible for managing the place of business where the practice occurred. Employees who actually practiced dispensing did not have to pass the examination.

Competition. Dispensing opticians justified a separate regulatory statute for their practice as a way to prevent monopolistic control of their trade by optometrists, who also dispense and sell eye care products. Chapter 459, HRS, which regulates the practice of optometry, prohibits anyone from practicing optometry without a license. The dispensing opticians argued that without Chapter 458, they would no longer be able to fill prescriptions but would be reduced to repairing, replacing, and duplicating lenses, frames, and fittings. However, we found that this was not sufficient reason to retain Chapter 458, as Chapter 459 could be amended to exempt the filling of prescriptions by dispensing opticians.

Examination. We noted three particular problems with the examination for licensure established by the board. *First*, the examination was inconsistent with

the board's rules. The examination was divided into three parts covering (1) the law and the rules, (2) theory, and (3) a practical examination. The board's rules allowed applicants to retake those sections of the theory part of the examination which they failed. However, the theory part of the examination was not subdivided into sections, so the rule could not be implemented. *Second*, the board ignored its own rules on the examination. The rules required those failing the law, rules, or practical parts of the examination to retake the entire examination. According to the rules, applicants were not allowed to retake only the parts they failed. However, the board had frequently disregarded this rule and allowed applicants to retake only the parts they failed. Finally, over the years the same questions had been used repeatedly in the examination. Thus, there was no assurance that the applicants passed because of their knowledge of occupational practices instead of mere familiarity with the examination.

Professional status in the law. We found that dispensing opticians should not have been included in Chapter 416, HRS, the professional corporations law. This law was intended to allow members of the "learned professions," whose practice involved professional personal services, to enjoy the benefits of federal tax laws relating to corporations.

Chapter 458 already allowed corporations to engage in the business of dispensing optician by providing for licensure of firms as well as individuals. The nonprofessional nature of the occupation, as well as the option of business licensure, indicated that dispensing opticians should not be included in Chapter 416.

Recommendations and responses. On the basis of our findings, we recommended that Chapter 458 be allowed to expire as scheduled and Chapter 459 (regulating optometrists) be amended to provide for the filling of prescriptions by

dispensing opticians. Amending Chapter 459 was to ensure that dispensing opticians would continue to be an alternative to optometrists in the fitting and dispensing of eye care products.

Additionally, we recommended that if the Legislature decided to retain Chapter 458, the Board of Dispensing Opticians should review the practices and rules on examination for occupational licenses to ensure their consistency with one another and further, dispensing opticians should be deleted from Chapter 416, the professional corporations law.

The Board of Dispensing Opticians responded that it disagreed with the recommendation to allow the statute to expire. However, it agreed with our other recommendations to review the practices and rules on examination and to delete dispensing opticians from the professional corporations law. The Department of Commerce and Consumer Affairs responded that it was in general agreement with our evaluation.

Subsequent Developments—Reenactment of Chapter 458

Following the submission of our sunset report during the 1981 legislative session, hearings were held to determine whether Chapter 458 should be reenacted, modified, or repealed. The Legislature received testimony from ophthalmologists, optometrists, and opticians. They all strongly supported continued licensure of dispensing opticians with certain modifications to the regulatory statute.

The Board of Dispensing Opticians testified that licensing was necessary to "insure that only those persons meeting the necessary training, experience, and character requirements are allowed to become licensed opticians, thereby screening

out those unqualified applicants who can harm the public and the reputation of the industry."¹⁴

The board said it "favors the continuance of Chapter 458, HRS, since an unqualified person could cause emotional and great physical harm and damage to a person's sight and eyes. Since the inception of the board in 1960, there have been only a few complaints. We attribute this to the licensing requirements and actions of the board."¹⁵

The legislative committee of the Hawaii Association of Dispensing Opticians also supported reenactment of Chapter 458. In addition, they recommended the removal of the licensure of firms from Chapter 458, and clarification of the fitting of contact lenses by opticians only under the written orders of an ophthalmologist or optometrist. Deletion of business licenses was proposed in order to limit the application of licensure to individuals and streamline the application process. The clarification on contact lens fitting was suggested to assure that a dispensing optician was not duplicating or fitting lenses based on an outdated prescription.¹⁶

The Legislature considered two measures related to this issue during the 1981 session: one reenacting the licensure of opticians under Chapter 458; and a second

14. Testimony on Senate Bill No. 590 presented by Virginia Kam, President, Board of Dispensing Opticians, to Honorable Steve Cobb, Chairman, Senate Committee on Consumer Protection and Commerce, March 2, 1981.

15. *Ibid.*

16. Testimony on Senate Bill No. 598 submitted by James Tannehill, Chairman, Legislative Committee, Hawaii Association of Dispensing Opticians, to Honorable Russell Blair, Chairman, House Committee on Consumer Protection and Commerce, March 25, 1981.

repealing the statute and providing minimal regulation of opticians under Chapter 459, which regulates optometry.¹⁷

The Legislature decided to reenact Chapter 458, based on the unanimous support of the ophthalmologists, optometrists, and opticians.¹⁸ Chapter 458 was amended to include the recommendations of the Hawaii Association of Dispensing Opticians to remove the licensure of firms and clarify the fitting of contact lenses. It was further amended by (1) replacing "investigation" of applicants by the board with "examination" by the board, and (2) repealing the provision allowing only those employees with three years of training and experience to dispense without a license if the employee worked under the direct supervision of a licensed optician. The Legislature also amended Chapter 416 by removing opticians from inclusion in the professional corporations law.

In 1984, the Legislature amended Chapter 458 to reinstate licensure of businesses and added a provision that each business must employ a licensed dispensing optician as a prerequisite for licensure. This measure was passed based on testimony from the board that many optical businesses were practicing dispensing without a license. The board testified that each separate place of business should be required to have a licensed dispensing optician on the premises for the protection of the consumer.¹⁹

17. Senate Bill Nos. 590 and 598, Eleventh Legislature, 1981, State of Hawaii.

18. Conference Committee Report No. 3 on Senate Bill No. 598, Eleventh Legislature, 1981, State of Hawaii.

19. House Standing Committee Report No. 284-84 and Senate Standing Committee Report No. 611-84 on House Bill No. 1785-84, Twelfth Legislature, 1984, State of Hawaii.

In 1985, the Legislature conducted a major review and revision of Hawaii's corporation laws. The section of Chapter 416 relating to professional corporations was rewritten and reenacted as Chapter 415A, HRS. In the revision process, Chapter 458 was again included in the professional corporations law. Apparently, the inclusion was unintentional.

Chapter 3

EVALUATION OF THE REGULATION OF DISPENSING OPTICIANS

This chapter updates our 1981 sunset evaluation of the regulation of dispensing opticians. It includes our assessment of the current regulatory operations of the board and our recommendations on continued licensure of the practice of dispensing opticians.

Summary of Current Findings

We find that:

1. Regulation of dispensing opticians is not necessary as the practice does not pose sufficient harm to justify continued licensure.
2. Current statutory regulation of dispensing opticians is unrelated to establishing any level of competency. Instead, statutory provisions could have the effect of being anticompetitive and unduly restrictive.
3. Licensing standards established by the board are arbitrary and restrictive.
4. The board of dispensing opticians performs only minimal activities which serve no consumer protection function.

Need for Regulation

Our current findings are in accord with the results of our previous sunset evaluation: regulation serves no purpose and should be eliminated.

The practice of dispensing opticians does not pose a sufficient potential danger to the public to warrant state regulation. The dispensing optician functions as a

secondary provider of eye care to consumers. Their scope of practice is limited to selling retail eyewear based on a prescription from an eye doctor and an assessment of the manufactured products available to suit the patient's needs. The dispenser simply evaluates the fit and quality of the eye care product based on the visual and aesthetic needs of the patient. They are not trained to detect or assess vision problems or eye diseases and are prohibited by law from providing diagnosis and treatment of visual problems or eye diseases. This narrow scope of practice limits the amount of potential harm that could result from malpractice by dispensing opticians.

The role of a dispensing optician as a secondary provider is somewhat analogous to that of a pharmacist, but the potential harm posed by malpractice on the part of dispensing opticians is greatly mitigated because death or serious injury generally do not result from misfit eyewear as could occur if a pharmacist dispenses the wrong drug. Consumers are not likely to incur permanent disabilities, because uncomfortable or incorrectly fit eyewear is readily apparent. Consumers can tell if their eyewear gives them blurred vision or discomfort. If consumers do have difficulties with eye care products, most are likely to return to either the dispenser or the eye doctor to correct any problems.

Opticians testified during the 1981 legislative hearings that there is a possibility of physical harm to consumers from incorrectly fit eyeglasses or contact lenses. However, we found no documented cases of physical harm. Eye care practitioners could not cite any specific cases of malpractice, and none could be found among the consumer complaints filed with the Regulated Industries Complaints Office (RICO).

Our review of the RICO files shows a total of 24 complaints filed against dispensing opticians between 1982 and 1986. Of these 24 complaints, 14 were made by members of the industry charging other practitioners with unlicensed activity or advertising violations. Only ten complaints were received from consumers. All of the consumer complaints sought monetary compensation because of dissatisfaction with the product or services. While it is possible that some consumers may have been dissatisfied because they experienced unclear vision or physical discomfort, RICO investigations did not attribute the problems to malpractice by dispensing opticians.

It should also be noted that a majority of the states, 28, do not license dispensing opticians. Only 20 states statutorily require licensure of the practice of dispensing opticians. One state requires registration of optical businesses, and one state requires registration in order to use a national certification title. We could find no evidence of consumer problems in states that do not regulate optician practices.

A 1980 study conducted by staff of the Federal Trade Commission (FTC) compared the services and products provided by eye care practitioners in regulated states with those provided in states with no regulation. The staff found that the overall quality of care was not enhanced by regulation. In fact, they found that the quality was not significantly different and the costs for services and products was actually less in the nonregulated states.¹

1. Letter from Janet M. Grady, Regional Director, Federal Trade Commission, to Owen H. Yamasaki, Office of the Auditor, August 21, 1986, pp. 7-8.

Contact lenses. Similarly, statutory regulation of contact lens fitting by dispensing opticians appears to serve little purpose. Moreover, contact lenses are already subject to regulation by the U.S. Food and Drug Administration (FDA).

In order to protect consumers from harmful or inferior products, the FDA closely regulates the production and distribution of contact lenses. The FDA subjects contact lenses and associated products to premarket approval tests comparable to those for new drugs and other "medical devices." The FDA began its formal reviews of contact lenses in 1968 by requiring all new contact lenses to be pretested before their release for sale to the public.² While there have been efforts to decrease the extent of regulation by the FDA, all contact lenses and associated products are still subject to review and registration with the FDA as medical devices.

A nationwide study conducted by staff of the Federal Trade Commission compared the fitting of cosmetic contact lenses by opticians, optometrists, and ophthalmologists to ascertain if there were any differences in the quality of services provided by these groups. The FTC staff found no significant differences among patients fitted by opticians, optometrists, or ophthalmologists.³ In another study,

2. Leonard G. Schiffrin and William J. Rich, *The Contact Lens Industry: Structure, Competition and Public Policy*, Health Technology Case Study 31, Washington, D.C., U.S. Government Printing Office, December 1984, p. 51.

3. Gary D. Hailey et al., *A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists, and Opticians*, Washington, D.C., Federal Trade Commission, December 1983, p. 3.

the FTC found that the prices for eye care services and contact lenses were significantly lower in those states that did not restrict the practice of opticians.⁴

Current controls by the federal government and FTC studies indicate that there is no reason to restrict contact lens fitting by dispensing opticians beyond requiring a written prescription. Dispensing opticians have said that Chapter 459, Hawaii Revised Statutes, which regulates the practice of optometry, would prohibit them from filling prescriptions for contact lenses and eyeglasses if Chapter 458 (regulating opticians) were to be terminated. However, this objection could be easily resolved by amending Chapter 459 (regulating *optometrists*) to allow dispensing opticians to fit contact lenses and eyeglasses upon written prescription of an optometrist or ophthalmologist.

Statute Unrelated to Establishing Standard of Care

An authority on state occupational licensure has written, "Licensing is the process by which an agency of government grants permission to an individual to engage in a given occupation upon finding that *the applicant has attained a minimal degree of competency necessary to ensure the public health, safety, and welfare will be reasonably protected.* [Emphasis added.]"⁵

In the context of dispensing opticians, the issue of competency is irrelevant. The level of competency needed to protect the public cannot be defined because the

4. U.S., Federal Trade Commission, *State Restrictions on Vision Care Providers: The Effects on Consumers ("Eyeglasses II")*, Report of the Staff to the Federal Trade Commission, Bureau of Consumer Protection, July 1980, p. 151.

5. Benjamin Shimberg, *Occupational Licensing: A Public Perspective*, Princeton, N.J., Educational Testing Service, 1982, pp. 15-16.

public's health and safety is not in serious danger. We find that Chapter 458 does not identify the potential harm which would warrant regulation nor does it establish any minimum education or experience requirements for licensure or specify the skills which are to be examined to ensure a minimum level of competence. The statute only requires applicants to be examined and found qualified by the board prior to certification.⁶ As will be shown below, the board's standards for licensure are arbitrary and also unrelated to any standard of competency. Thus, the statute has little relevance to ensuring any standard of care.

In fact, the extent to which the practice of dispensing is actually regulated is unclear. In practice, the law permits unlicensed persons to be employed and to work as dispensing opticians. The only restriction is that unlicensed employees who dispense must act under the "direct personal supervision" of the certificate holder.⁷ The board defines "direct personal supervision" in its rules as having a licensed dispensing optician available for consultation and referral to the supervised employee.⁸ Since the rules do not require the licensed supervisor to be immediately available on the premises, unlicensed employees, in effect, have considerable latitude in what they can do.

The statute requires each holder of a certificate to file a report with the board containing the names and experience of each employee who is involved in dispensing. The purpose of this report purportedly is to provide information about

6. Section 458-6, HRS.

7. Section 458-7, HRS.

8. Section 16-91-2, Hawaii Administrative Rules.

who is actually dispensing and also to allow evaluation of those persons receiving training prior to application for licensure. However, we found that these reports are not routinely filed with the board or the department. Thus, they are not used as records of who is actually dispensing or to evaluate the qualifications of applicants.

Anticompetitive impact of regulation. Staff of the FTC studied state restrictions on eye care practitioners and found that certain activities, such as withholding a patient's prescription and advertising bans, were unfair acts or practices in violation of Section 5(a)(1) of the Federal Trade Commission Act. Subsequently, the FTC adopted a set of rules requiring eye care practitioners to provide patients with a written copy of their lens prescription, so that the patient could choose from whom to purchase eye care products.⁹ These studies and proposed rules by the FTC were initiated to open the market and allow greater competition between eye care practitioners and eyewear providers.¹⁰

Practice restrictions. We found that Chapter 458 contains two restrictions on the practice of dispensing opticians which are unnecessary, appear to impede entry into the industry, and unduly limit competition. These restrictions include: (1) requiring each place of business to have a separate license; and (2) prohibiting opticians from employing optometrists, physicians, or surgeons.¹¹

The statute requires each firm to be licensed. It also requires each place of business to be licensed. And, finally, it requires a licensed dispensing optician to be

9. Title 16 C.F.R., Part 456, 1982.

10. *Federal Register*, Vol. 50, No. 3, Friday, January 4, 1985, pp. 598-600.

11. Sections 458-4, 458-6, 458-13(1), and 458-13(3), HRS.

employed at each place of business. The rules say that the licensed dispensing optician shall be responsible for the acts of all employees at each place of business. Since firms already have to be licensed, it is unnecessary to also require its branches, or each place of business, to also be licensed. Making a complaint against a place of business would be the same as making a complaint against the parent firm.

The restriction prohibiting opticians from employing the services of an optometrist or ophthalmologist is unreasonable, particularly since an eye doctor can employ a dispensing optician, but the converse is not allowed. This restriction has no basis in consumer protection as there is no threat of consumer harm posed by opticians who employ eye doctors.

Advertising restrictions. The FTC has proposed that all state restrictions on advertising be removed. Chapter 458 provides that dispensing opticians may not advertise in a manner that is misleading or deceptive.¹² However, the board has adopted a rule which restricts advertising practices. The board's rule prohibits dispensing opticians from using the term "specialist" in advertisements with reference to contact lenses or artificial eyes.¹³

Board members and industry representatives indicate that most dispensing opticians do specialize in fitting either eyeglasses or contact lenses, depending on their training and background. Thus it would appear that this type of advertisement could direct the consumer to a more qualified dispenser, depending on the consumer's needs, and would not be misleading or deceptive.

12. Section 458-13(2), HRS.

13. Section 16-91-32(4), Hawaii Administrative Rules.

Board Standards for Licensure

The board is authorized to establish the competency and the adequacy of applicants for licensure. In doing so, the board has established requirements for licensure that bear little relevance to ensuring any standard of care. Instead, they are arbitrary rules that have the effect of restricting entry into the occupation. The experience requirement, the practical examination, and the examination cutoff score are of particular concern.

Experience requirement. The board has adopted a rule that the prerequisite for admission to the state examination is "three years full-time practical and mechanical optical experience or its equivalent, including experience with spectacles and contact lenses, under the direct personal supervision of a dispensing optician, ophthalmologist, or optometrist."¹⁴ The board's experience requirement is questionable and applied arbitrarily. Unlike a certified education or apprenticeship program, this required training period was established arbitrarily by the board and never validated by any certifying agency. This means that individuals are forced to work for three years at an apprentice level for no valid reason.

Further, the board has not taken steps to ensure that apprentices receive any meaningful training during the required three year period. It has not established any specific standards for this experience requirement, the content of the training to be received, or the type of supervision to be given.

The rules vaguely define "direct personal supervision" as having a licensed dispensing optician available for consultation and referral to the individual who is

14. Section 16-91-18, Hawaii Administrative Rules.

being supervised. However, the quality and content of training could differ greatly depending upon the knowledge and skills of the supervisor, the type and quality of the equipment available, and the acuity of the trainee. For instance, one business may deal mainly with dispensing eyeglasses and thus not provide sufficient training in fitting contact lenses. Conversely, another business may provide training which is adequate for competent fitting of contact lenses but not for preparing or dispensing of eyeglasses.

Finally, the board has not adopted any standards or guidelines for evaluating the information submitted by applicants regarding their experience. Applicants merely submit a written note or letter from their supervisors, which states that they were employed and trained for the required three years. There is no followup to ascertain the validity of the statement.

Practical examination. The practical examination has no demonstrated relationship to establishing any specific level of competency. During the last three years, 1984 to 1986, the practical examination given to applicants was identically formatted and measured the same skills which includes: preparing eyeglass lenses and frames, neutralizing or "reading" prescriptions of eyeglass and contact lenses, and taking measurements of the cornea from a live subject. While these skills are somewhat related to the specific responsibilities of dispensing opticians, the validity of the practical examination is questionable for several reasons.

First, the practical examination was not professionally developed or validated and could, therefore, be unfair to applicants. *Second*, few dispensing opticians actually prepare lenses and frames. This activity is usually performed at an optical lab by technicians who work under the supervision of a licensed dispensing optician. *Third*, while the measurements of the cornea are taken from a live

subject, the actual fitting of the contact lenses or eyeglasses is not performed on the subject, so it is unclear whether a proper fit is actually achieved.

Neither the experience or practical examination requirement is endorsed by the national opticianry association, the Opticians Association of America (OAA). The OAA endorses national certification by the American Board of Opticianry (ABO) which uses the National Opticianry Competency Examination as a measure of competency for the dispensing of eyeglasses. To evaluate the competence of those who fit contact lenses, the OAA endorses certification by the National Contact Lens Examiners (NCLE) who use the Contact Lens Registry Examination.¹⁵

The OAA's position is that the successful completion of a written qualifying examination is sufficient to determine competency.¹⁶ Further, the OAA states that the examinations should be related to specific job performance, professionally constructed and validated, and independently and objectively administered and scored.¹⁷ Currently, 16 of the 22 states which regulate dispensing opticians use the national written examinations for state certification.

Despite these deficiencies, the board continues to support the state practical examination as the final test of competency. Because of past difficulties with the State's written examination, the board has decided that, beginning in 1987, it will require applicants to be certified by the ABO and the NCLE based on passing the

15. American Board of Opticianry/National Contact Lens Examiners, *Bulletin of Information for Candidates*, Fairfax, Va., 1986, p. 6.

16. Opticians Association of America, *Manual on Licensure for Ophthalmic Dispensers*, Fairfax, Va., October 1984, p. 9

17. *Ibid.*, p. 10.

national written examinations for opticianry and contact lenses. However, applicants will still be required to pass the state practical examination before receiving state certification.

Based on the OAA's endorsement of the national examinations and the lack of professional evaluation of the state practical examination, there appears no reason to continue to administer the state practical examination. Should licensing be continued, the one valid requirement for licensure could be passing the national examinations. Further testing by the State should be unnecessary.

Cutoff score. In 1985, the board adopted a rule revising the cutoff score for the examinations, increasing it from 70 percent to 75 percent.¹⁸ We were unable to discern the purpose for this increase and none of the participating board members could explain the reason for the adjustment. The primary effect of this revised cutoff score is to restrict entry into the occupation. A report on cutoff scores by the National Committee for Health Certifying Agencies concludes that "non-statistical setting of cut-off scores are designed to control the practitioner population for economic reasons through the setting of pass/fail rates, and should be considered indefensible."¹⁹

Board functions. If the Legislature chooses to continue the licensure of dispensing opticians, it should consider eliminating the board and allowing the Department of Commerce and Consumer Affairs (DCCA) to administer the statute

18. Section 16-91-19(b), Hawaii Administrative Rules.

19. National Commission for Health Certifying Agencies, *Guidelines for Membership Criteria, Report on Cut-Off Scores*, July 1980, p. 3.

and regulate the practice. The board is unnecessary because it serves no consumer protection function and most of its duties have already been assumed by DCCA.

Under the State's professional and vocational licensing program, DCCA has been delegated centralized authority in the following areas: application review, examination development and administration, license issuance and renewal, licensee records, and complaints investigation. These functions are delegated either by statute or administrative rule and the board no longer performs these functions.²⁰

The Board of Dispensing Opticians has adopted a rule delegating to the executive secretary of the board, a DCCA employee, responsibility for reviewing all applications and certifying the applicants for examination.²¹ The board has also delegated the task of examination development and administration to the examination branch of DCCA. The examination branch develops, administers, grades, and validates the state written examination. The branch also assists the board by administering the state practical examination.

At its June 1986 board meeting, the members approved the use of the written examinations required by the national certifying agencies, the ABO and the NCLE. These written examinations will be administered, graded, and validated under a contract with the Educational Testing Service, thus removing the board from responsibility in this matter.

Since 1982, RICO has received, investigated, and recommended settlements for consumer or industry complaints against licensed professions and vocations. The

20. Hawaii, Department of Commerce and Consumer Affairs, "Organizational Chart and Descriptions," Honolulu, June 1986.

21. Section 16-91-11, Hawaii Administrative Rules.

board's responsibility in this area is limited to review and discussion of the RICO staff recommendations relating to actions against licensees.

Accordingly, the only activities left for the board are rule adoption and the development, review, and grading of the practical examination. However, as we have already stated, the practical examination serves no purpose and should be eliminated.

Summary

We find that the practice of dispensing opticians does not pose a serious danger to the public's health and safety and there is no need to continue to regulate their practice. Chapter 458 does not ensure any standard of practice but instead results in restrictive and anticompetitive actions. It should be allowed to expire. These findings and recommendations are in agreement with our prior 1981 sunset evaluation report.

Recommendations

We recommend that:

1. Chapter 458, Hawaii Revised Statutes, be allowed to expire on December 31, 1987; and Chapter 459, Hawaii Revised Statutes, be amended to allow dispensing opticians to continue to provide eye care products and services, including the fitting of contact lenses, upon the written prescription of an optometrist or ophthalmologist.

2. *If the Legislature chooses to continue the licensure of dispensing opticians, we recommend that Chapter 458 be amended by:*

- . requiring passage of the National Opticianry Competency Examination and the national Contact Lens Registry Examination as the only prerequisite to state licensure;*
- . eliminating the provision related to contact lens fitting which requires fitting under the personal supervision of an optometrist or ophthalmologist;*
- . removing the requirement for each place of business to apply separately for a license;*
- . removing the statutory restriction preventing opticians from employing the services of ophthalmologists or optometrists; and*
- . eliminating the Board of Dispensing Opticians and assigning to the Department of Commerce and Consumer Affairs responsibility for the licensing program.*

3. *If the Board of Dispensing Opticians is not eliminated, we recommend that the board amend its rules by:*

- . eliminating the three-year experience requirement;*
- . eliminating the practical examination;*
- . eliminating the requirement for separate applications for each place of business; and*
- . eliminating restrictive advertising prohibitions.*

4. *Regardless of the actions which may be taken with respect to Chapter 458, we recommend that Chapter 415A, the professional corporations law, be amended to remove the inclusion of Chapter 458.*

APPENDICES

APPENDIX A

COMMENTS ON AGENCY RESPONSES

A preliminary draft of this Sunset Evaluation Report was transmitted on December 16, 1986, to the Board of Dispensing Opticians and the Department of Commerce and Consumer Affairs for their review and comments. A copy of the transmittal letter to the board is included as Attachment 1 of this Appendix. A similar letter was sent to the department. The response from the board is included as Attachment 2. The department did not respond to the report.

The board commented only on those recommendations with which it disagreed. The board did not agree that the statute should be allowed to expire. It acknowledges that serious injury generally may not result from the misfit of eyewear. However, it was concerned that certain consumers, such as senior citizens and children, needed protection because they may be reluctant to speak up. The board stated that the only way to protect these consumers is to ensure that all dispensing opticians have entry level proficiency. However, as discussed in the report, the law does not specify minimum licensure requirements and the board's standards are arbitrary, providing no assurance of entry level proficiency.

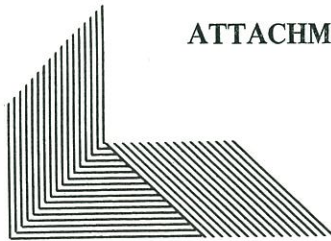
The board suggests that amending Chapter 459, HRS, which regulates optometrists, to allow dispensing opticians to practice is illogical and anticompetitive. The board may have misunderstood the recommendation. Amending Chapter 459 would allow dispensing opticians to maintain their current scope of practice plus allowing them to fit contact lenses without supervision by a licensed eyecare practitioner. Both practitioners and dispensers would dispense products within the same scope of practice under one law.

Should the Legislature choose to reenact the statute, the board does not agree with our recommendation that the board be eliminated. It acknowledges that the board's activities have been minimal but states that its continuation is essential in providing consumers with the "finest and highest trained opticians."

Should the statute be reenacted, the board also disagrees with our recommendations that the national examination be used as the only prerequisite for licensure and that the three-year experience requirement and the practical examination be eliminated. The board states that the experience requirement is necessary to prevent harm to consumers even though it acknowledges that the requirement is "somewhat vague." The board also feels that the practical examination is objective and "truly tests" for minimum competency. However, as noted in our report, we could find no basis for the three-year requirement and there are no standards for the practical examination. The board's position on the practical examination is contrary to that of the national Opticians Association of America which does not endorse practical examinations.

ATTACHMENT 1

THE OFFICE OF THE AUDITOR
STATE OF HAWAII
465 S. KING STREET, RM. 500
HONOLULU, HAWAII 96813



CLINTON T. TANIMURA
AUDITOR

December 16, 1986

C O P Y

Mr. Ted Yamada, Acting Chairperson
Board of Dispensing Opticians
Department of Commerce and Consumer Affairs
State of Hawaii
1010 Richards Street
Honolulu, Hawaii 96813

Dear Mr. Yamada:

Enclosed are six preliminary copies, numbered 4 through 9, of our *Sunset Evaluation Report, Dispensing Opticians, Chapter 458, Hawaii Revised Statutes*. These copies are for review by you, other members of the board, and your executive secretary. This preliminary report has also been transmitted to Robert Alm, Director of the Department of Commerce and Consumer Affairs.

The report contains our recommendations relating to the regulation of dispensing opticians. If you have any comments on our recommendations, we would appreciate receiving them by January 15, 1987. Any comments we receive 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, we request that you limit access to the report to those officials whom you wish to call upon for assistance in your response. Please do not reproduce the report. 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

JOHN WAIHEE
GOVERNOR



ROBERT A. ALM
DIRECTOR

NOE NOE TOM
LICENSING ADMINISTRATOR

BOARD OF DISPENSING OPTICIANS

STATE OF HAWAII
PROFESSIONAL & VOCATIONAL LICENSING DIVISION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
P. O. BOX 3469

HONOLULU, HAWAII 96801

January 15, 1987

RECEIVED

JAN 15 8 12 AM '87

OFF. OF THE AUDITOR
STATE OF HAWAII

Mr. Clinton T. Tanimura
Legislative Auditor
The Office of the Auditor
465 S. King Street, Rm. 500
Honolulu, HI 96813

Dear Mr. Tanimura:

We thank you for the opportunity to review and comment on the preliminary draft of the Legislative Auditor's Sunset Evaluation Report for the Board of Dispensing Opticians.

While we believe the report to be fairly thorough in its evaluation, the Board of Dispensing Opticians does not agree with several of the recommendations made at the conclusion of your report. At this time we would like to address and discuss only those recommendations that we are in disagreement with.

There are two reasons why we do not agree with the first recommendation that Chapter 458, Hawaii Revised Statutes, be allowed to expire on December 31, 1987; and Chapter 459, Hawaii Revised Statutes, be amended to allow dispensing opticians to continue to provide eye care products and services, including the fitting of contact lenses, upon the written prescription of an optometrist or ophthalmologist.

First, the board feels that the health, safety and welfare of consumers will not be completely protected if Chapter 458, HRS, and the Board of Dispensing Opticians is sunsetted. It is true that potential harm posed by malpractice on the part of dispensing opticians is greatly mitigated because death or serious injury generally may not result from the misfit of eyewear. However, we should also be concerned for consumers such as senior citizens and children who are generally reluctant to speak up or complain about their eyewear when not properly fitted. An ill-fitted contact lens can cause irritation or excessive tearing, and an improperly dispensed pair of glasses can cause images to be improperly displaced. If sufficient irritation and discomfort is experienced while driving or even

Mr. Clinton T. Tanimura
January 15, 1987
Page 2

while walking on stairs, it could cause potential danger and even death to the user as well as to innocent bystanders in the event of an auto accident. In that light, wouldn't it be in the interest of the user/consumer to minimize such potential dangers by ensuring that those who fit eyewear meet a level of entry level proficiency. The board feels the only way to protect these consumers is to ensure that all prospective dispensing opticians have the training, knowledge and experience in fitting eyewear and that they are tested for competency before being issued a license to dispense eyeglass or contact lens to the public.

Further, it would appear you are of the position that since contact lenses are already subjected to regulation by the U. S. Food and Drug Administration further regulations serve little purpose. However, if we may cite your quote from page 22 of the report, "the FDA closely regulates the production and distribution of contact lenses". (emphasis added) We wish to point out that the FDA regulations are concerned with the manufacture and materials of contact lenses but the FDA does not regulate the fitting of contact lenses which is one of the primary concerns of dispensing opticians. The FDA regulation does not concern most dispensing opticians in the state because the majority of the dispensing opticians in our state are concerned with fitting contact lenses rather than in its manufacturing.

Secondly, as stated on page 25 of your report under the heading of Anticompetitive Impact of Regulation, the Federal Trade Commission adopted rules to allow greater competition between eye care practitioners (ophthalmologists and optometrists) and eyewear providers (opticians). If the FTC created rules to increase competition between eye care practitioners and eyewear providers, how logical would it be for these two separate providers to be governed by the same statute as suggested by the Legislative Auditor's recommendation #1!

The Board believes that Chapter 458, HRS, should be extended not only for the aforesaid reasons but also to allow sufficient time to initiate the recommended changes to Chapter 458, HRS, as you suggested and which the board is agreeable to.

Mr. Clinton T. Tanimura
January 15, 1987
Page 3

The Board also disagrees with the first and last item of the second recommendation of your report.

Item No. 1, "requiring passage of the National Opticianry Competency Examination and the National Contact Lense Registry Examination as the only prerequisite of state licensure." The Board disagrees that the national examination be the only prerequisite for licensure . The national examination is a written examination used to test the applicant's knowledge in geometric optics, anatomy, physiology and theory of dispensing glasses and fitting contact lens. It does not test the applicant's ability to properly work with the equipment of the trade and to show competency in the use of the equipment. Competency is being able to use these equipment as an integral part in the overall performance of an optician.

Item No. 2, "eliminating the Board of Dispensing Opticians and assigning to the Department of Commerce and Consumer Affairs responsibility for the licensing program." The Board disagrees with the recommendation of eliminating the Board. While we agree that the Board's activities have been minimal, the continuation of the Board is essential in providing the consumer the finest and highest trained opticians through a program that's continually changing to meet the demand of new products and materials in the optical field. The consumers ultimately benefit in the knowledge that they have been fully informed of the latest products and technologies that their eyewear provider can provide and thus insuring a higher level of confidence to the public's health and safety. The board feels that the only way to provide the consumers with the latest technologies is by having the licensees give input regarding the industry.

Further, the Board disagrees with the first and second item of the third recommendation of the Auditor's report.

Item No. 1 "eliminating the 3 years experience requirement". The Board believes that eliminating the 3 years experience requirement would be a gross error and would do more harm to the consumer by allowing untrained individuals to fit

Mr. Clinton T. Tanimura
January 15, 1987
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glasses and contact lens. By requiring the 3 years of experience, the consumer is assured that the unlicensed individual is working under the direct supervision of a licensed optician who is directly responsible for any actions or injuries that may result of improperly fitted glasses or contact lenses.

While the 3 years experience requirement is somewhat vague, if the Legislature should find in favor of maintaining the Board it will amend its rules to clarify the experience requirement.

Item No. 2, "eliminating the practical examination." The Board believes that eliminating the practical examination would again be in error and would cause harm to the consumer. The Board feels that the practical examination is an objective exam and does provide complete anonymity in the administration of the examination. Further, the Board feels that the practical examination truly tests an individual for competency and determines whether prospective dispensing opticians can meet the minimum requirement in showing a satisfactory level of proficiency in the use of laboratory equipment both in dispensing of glasses and the fitting of contact lenses.

Presently, the Opticians Association of America is attempting to develop a practical examination to coincide with the national written examination. Although development of this practical examination is a few years away, it does address the fact that the profession believes in and sees the need for prospective opticians to be able to demonstrate and meet the mechanical abilities necessary for entry level proficiency. When this exam is developed, the Board will look into its possible use as a replacement for the board's practical examination.

We wish to express appreciation for the opportunity to submit our comments and should the Board be extended, we do not anticipate any problems in following the recommendations which the Board is in agreement.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Ted H. Yamada". The signature is fluid and cursive, with the first name "Ted" being more prominent.

Ted H. Yamada
Vice Chairman, Board of
Dispensing Opticians

APPENDIX B

DIGEST

A BILL FOR AN ACT RELATING TO DISPENSING OPTICIANS

Implements Auditor's recommendations concerning dispensing opticians, but keeps board rather than transfer functions to Department of Commerce and Consumer Affairs. Clarifies difference between license and certificate of dispensing optician.

A BILL FOR AN ACT

RELATING TO DISPENSING OPTICIANS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 26H-4, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "§26H-4 Repeal dates. (a) The following chapters are
4 hereby repealed effective December 31, 1987:

- 5 [(1) Chapter 458 (Board of Dispensing Opticians)
6 (2)] (1) Chapter 459 (Board of Examiners in Optometry)
7 [(3)] (2) Chapter 452 (Board of Massage)
8 [(4)] (3) Chapter 471 (Board of Veterinary Examiners)
9 [(5)] (4) Chapter 441 (Cemeteries and Mortuaries)
10 [(6)] (5) Chapter 463 (Board of Detectives and Guards)
11 [(7)] (6) Chapter 455 (Board of Examiners in Naturopathy)

12 (b) The following chapters are hereby repealed effective
13 December 31, 1988:

- 14 (1) Chapter 465 (Board of Psychology)
15 (2) Chapter 468E (Board of Speech Pathology and Audiology)
16 (3) Chapter 468K (Travel Agencies)
17
18

(4) Chapter 373 (Commercial Employment Agencies)

(5) Chapter 442 (Board of Chiropractic Examiners)

(6) Chapter 448 (Board of Dental Examiners)

(7) Chapter 436E (Board of Acupuncture)

(c) The following chapters are hereby repealed effective
December 31, 1989:

(1) Chapter 444 (Contractors License Board)

(2) Chapter 448E (Board of Electricians and Plumbers)

(3) Chapter 464 (Board of Registration of Professional
Engineers, Architects, Surveyors and Landscape
Architects)

(4) Chapter 466 (Board of Public Accountancy)

(5) Chapter 467 (Real Estate Commission)

(6) Chapter 439 (Board of Cosmetology)

(7) Chapter 454 (Mortgage Brokers and Solicitors)

(8) Chapter 454D (Mortgage and Collection Servicing Agents)

(d) The following chapters are hereby repealed effective
December 31, 1990:

(1) Chapter 447 (Dental Hygienists)

(2) Chapter 453 (Board of Medical Examiners)

(3) Chapter 457 (Board of Nursing)

(4) Chapter 460J (Pest Control Board)

(5) Chapter 462A (Pilotage)

(6) Chapter 438 (Board of Barbers)

(e) The following chapters are hereby repealed effective
December 31, 1991:

(1) Chapter 448H (Elevator Mechanics Licensing Board)

(2) Chapter 451A (Board of Hearing Aid Dealers and Fitters)

(3) Chapter 457B (Board of Examiners of Nursing Home
Administrators)

(4) Chapter 460 (Board of Osteopathic Examiners)

(5) Chapter 461 (Board of Pharmacy)

(6) Chapter 461J (Board of Physical Therapy)

(7) Chapter 463E (Podiatry)

(f) The following chapters are hereby repealed effective
December 31, 1992:

(1) Chapter 437 (Motor Vehicle Industry Licensing Board)

(2) Chapter 437B (Motor Vehicle Repair Industry Board)

(3) Chapter 440 (Boxing Commission)[.]

(g) The following chapter is hereby repealed effective
December 31, 1993:

(1) Chapter 458 (Board of Dispensing Opticians)."

SECTION 2. Section 415A-2, Hawaii Revised Statutes, is
amended by amending the definition of "professional service" to

1 read as follows:

2 "Professional service" means any service which lawfully may
3 be rendered only by persons licensed under chapters 442, 448,
4 453, 455, [458,] 459, 460, 461, 466, 471, and 605 and may not
5 lawfully be rendered by a corporation organized under the Hawaii
6 Business Corporation Act, chapter 415."

7 SECTION 3. Section 458-4, Hawaii Revised Statutes, is
8 amended to read as follows:

9 "§458-4 Application for certificate of dispensing optician.
10 Before engaging [or continuing] in the occupation of dispensing
11 optician, individuals shall first apply [for examination] to take
12 the National Opticianry Competency Examination and National
13 Contact Lens Registry Examination on forms prescribed by the
14 board, and the application shall be accompanied by the
15 application and examination fees. The application shall bear the
16 signature of the individual [and shall contain the name under
17 which the applicant proposes to do business, and the business
18 address].

19 Before engaging [or continuing] in the business of
20 dispensing optician, firms, including sole proprietorships for
21 which the proprietor is to be a licensed dispensing optician,
22 shall first apply for certificates of dispensing optician, on
23
24

forms prescribed by the board, and the application shall be accompanied by the application and registration fees. The application shall bear the signature of the proprietor if the applicant is a sole proprietorship, partner if the applicant is a partnership, or president or secretary if the applicant is a corporation; shall contain the name under which the applicant proposes to do business and the business address, and, for a partnership, corporation, or sole proprietorship for which the proprietor is not a licensed dispensing optician, the name of the licensed dispensing optician who shall be employed at that business address. [Separate applications shall be made for each place of business, and each application shall be accompanied by a registration fee.]"

SECTION 4. Section 458-6, Hawaii Revised Statutes, is amended to read as follows:

"§458-6 Issuance or denial of license and certificate of dispensing optician. [If the board of dispensing opticians, after examination, approves the application 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

1 optician upon payment of the registration fee. If the board does
2 not so determine, it shall deny the application.]

3 (a) The board shall issue a license to an individual who
4 passes both the National Opticianry Competency Examination and
5 National Contact Lens Registry Examination and pays a license
6 fee. The license shall authorize the licensed dispensing
7 optician to engage in the occupation of dispensing optician. If
8 the individual fails to pass both or either of the examinations,
9 the individual shall not be licensed. No other requirement for
10 licensure, other than that imposed by this subsection and section
11 458-4, shall be imposed on an applicant for a license.

12 (b) The board shall establish the procedures for issuing
13 certificates of dispensing opticians and qualifications of firms
14 applying to engage in the business of dispensing opticians. Upon
15 approval [the board] of an application for a certificate of
16 dispensing optician and payment of a certificate fee, the board
17 shall issue [certificates] a certificate of dispensing optician
18 to [firms] the firm within sixty days. [A separate certificate
19 is required for each address where the business is to be
20 conducted.] No application for certificate of dispensing
21 optician shall be approved unless a licensed dispensing optician
22 is to be employed at each place of business[.] of the firm. The
23

1 certificate shall authorize the applicant to engage in the
2 business of dispensing optician. The certificate or a copy shall
3 be at all times displayed in a conspicuous place at [the] each
4 place of [the] business [licensed.] of the firm. The certificate
5 shall not be transferable."

6 SECTION 5. Section 458-7, Hawaii Revised Statutes, is
7 amended to read as follows:

8 "§458-7 Reports to board; required experience of employees.
9 Each holder of a certificate of dispensing optician shall file
10 with the board [of dispensing opticians] a report containing the
11 names and experience of each person employed by the certificate
12 holder, who, in the course of the person's employment, takes
13 facial measurements, fits or adjusts lenses or frames, or
14 duplicates lenses, together with such other information as the
15 board requires. No certificate holder shall cause any person to
16 take facial measurements, fit or adjust lenses or duplicate
17 frames unless such persons are acting under the direct personal
18 supervision of a [certificate holder.] licensed dispensing
19 optician."

20 SECTION 6. Section 458-8, Hawaii Revised Statutes, is
21 amended to read as follows:

22 "§458-8 Expiration and renewal. Certificates and licenses
23
24

1 issued under this chapter, unless sooner suspended or revoked,
2 expire on July 1 of each even-numbered year, but may be
3 biennially renewed by the certificate or license holders in good
4 standing upon the payment of a biennial renewal fee. The holder
5 of an expired certificate or license may have the same restored
6 within one year of the date of expiration upon due application
7 therefor and payment of the delinquent fees and a penalty fee."

8 SECTION 7. Section 458-9, Hawaii Revised Statutes, is
9 amended to read as follows:

10 "§458-9 Revocation or suspension of certificates[.] or
11 licenses. After notice and hearing, as in this chapter provided,
12 the board [of dispensing opticians] may revoke or suspend any
13 certificate or license issued under this chapter for fraud or
14 dishonesty in obtaining the certificate[,] or license, for
15 dishonesty, fraud, gross negligence, or incompetency in the
16 occupation or business of dispensing optician, or for violation
17 of this chapter."

18 SECTION 8. Section 458-11, Hawaii Revised Statutes, is
19 amended to read as follows:

20 "§458-11 Reinstatement. The board [of dispensing
21 opticians] may reissue without examination the license or
22 certificate of any dispensing optician issued under this chapter
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1 which has been revoked or may modify the suspension of any such
2 license or certificate which has been suspended."

3 SECTION 9. Section 458-12, Hawaii Revised Statutes, is
4 amended to read as follows:

5 "§458-12 Fees. All fees [received by the board of
6 dispensing opticians] required under this chapter shall be [as
7 provided in] set by rules adopted by the director of commerce and
8 consumer affairs pursuant to chapter 91 and shall be deposited
9 with the director of finance to the credit of the general fund."

10 SECTION 10. Section 458-13, Hawaii Revised Statutes, is
11 amended to read as follows:

12 "§458-13 Acts prohibited. It shall be unlawful to do any
13 of the following:

14 (1) To engage in the business of dispensing optician
15 without first having been issued a certificate of
16 dispensing optician under this chapter, or to engage in
17 the business of dispensing optician without employing a
18 [certificate holder] licensed dispensing optician at
19 each place of business;

20 (2) To advertise in any manner that would tend to mislead
21 or deceive the public;

22 [(3) To furnish the services of an optometrist, physician,
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or surgeon or directly or indirectly employ or maintain on or near the premises used for optical dispensing any optometrist, physician, or surgeon, or the practitioner of any other profession for the purpose of any examination or treatment of the eyes;

(4)] (3) To dispense, furnish, or supply the services and appliances relating to the business of dispensing optician to the intended wearer or user thereof, except upon a prescription issued by a licensed physician, surgeon, or optometrist; provided that duplications, replacements, reproductions, and repetitions, without change in the refractive value may be done without prescription by individuals or firms holding a license or certificate of dispensing optician issued under this chapter;

[(5)] (4) To fit or duplicate, or offer, undertake, or attempt to fit or duplicate hard and soft contact lenses or artificial eyes except under the written [orders and personal supervision] prescription of an ophthalmologist or optometrist;

[(6)] (5) For a dispensing optician to grant, allow, credit, or pay, directly or indirectly, openly or secretly, any

price differential, rebate, refund, discount,
 commission, credit, kickback, or other allowance,
 whether in the form of money or otherwise, to any
 oculist, optometrist, physician, surgeon, or
 practitioner of any other profession (A) for or on
 account of the referring or sending by any oculist,
 optometrist, physician, surgeon, or practitioner to the
 dispensing optician of any person for the rendition of
 any of the services performed or articles or appliances
 furnished by a dispensing optician as described in
 section 458-1, or (B) for or on account of the
 rendition of any services or the furnishing of any
 articles or appliances to a person so referred or sent
 by any oculist, optometrist, physician, surgeon, or
 practitioner. Every scheme, agreement, undertaking,
 arrangement, or device shall also be deemed in
 violation of section 481-7. The certificate or license
 of every dispensing optician who violates this
 [subsection] paragraph shall be revoked."

SECTION 11. Section 459-2, Hawaii Revised Statutes, is
 amended to read as follows:

"§459-2 Optometry; unauthorized practice, unlawful. It

shall be unlawful for any person to practice optometry or to append the letters "O.D." or any other optometric degree to a person's name with the intent thereby to imply that the individual is a practitioner of optometry, without first securing and holding an unrevoked and unsuspended license under and as provided in this chapter. This chapter shall not apply to, or prohibit, a duly licensed physician from practicing optometry as in this chapter defined, nor shall it prohibit a duly licensed physician or optometrist from filling prescriptions or orders, nor shall it prohibit the replacement, duplication, or repair of ophthalmic lenses, contact lenses, frames, or fittings thereof, by persons qualified to write or fill prescriptions or orders under this chapter, nor shall it prohibit or prevent any dispensing optician licensed under chapter 458 from [doing the mechanics of repairing, replacing, or duplicating of any ophthalmic lenses, frames, fittings, or other optic materials,] performing the activities authorized by the license, nor shall it apply to optometric service corporations formed for the primary purpose of contracting with individuals, groups of individuals, and corporations for defraying or assuming the cost of services of optometrists and of contracting on behalf of optometrists to furnish services as provided in chapter 424.

1 An "ophthalmic lens" within the meaning of this chapter
2 means any spectacle lens which has a spherical, cylindrical, or
3 prismatic power or value, and is ground pursuant to a
4 prescription."

5 SECTION 12. Section 458-5, Hawaii Revised Statutes, is
6 repealed.

7 ["§458-5 Same; contents of. Each application, to enable
8 the board of dispensing opticians to consider if the applicant
9 should be registered under this chapter, shall contain:

10 (1) The experience of the applicant;

11 (2) The name and experience of each person who will take
12 facial measurements, fit, or adjust lenses or frames or
13 duplicate lenses;

14 (3) Such other information as the board requires."]

15 SECTION 13. Statutory material to be repealed is bracketed.
16 New statutory material is underscored.

17 SECTION 14. This Act shall take effect on July 1, 1987.

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19 INTRODUCED BY: _____
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