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QUALIFICATION TO TAKE AN EXAMINATION FOR A LICENSE TO PRACTICE OPTOMETRY IN 1949 §1295-28, G. C.—NOW CHANGED UNDER §4725.08, R.C. IN 1950—QUALIFICATIONS REQUIRED IF PERSON FAILED EXAMINATION IN 1949 AND APPLIES FOR EXAMINATION IN 1960—§4725.08, R.C., OAG NO. 6334, 1943, P. 486.

SYLLABUS:

1. Where an individual was qualified to take an examination for a license to practice optometry in 1949 under the then existing Section 1295-28, General Code, but did not take such examination at that time, and said individual was not regularly enrolled and in attendance at a school of optometry on January 1, 1950, he must qualify under present Section 4725.08, Revised Code, to now take such examination.

2. Where an individual who took an examination for a license to practice optometry in 1949 and failed such examination, applies for such an examination in 1960, he must qualify under the requirements of Section 4725.08, Revised Code, to be admitted to such examination.

Columbus, Ohio, June 13, 1960

Hon. J. S. Covert, Secretary
State Board of Optometry, Columbus, Ohio

Dear Sir :

I have before me your request for my opinion which reads as follows :

“Two closely related problems have come up concerning which it is important that we have an opinion. These problems are as follows:

“a) An individual completes his optometric education in 1949 under conditions which meet the educational requirements of the Ohio State Board of Optometry, thus making him eligible to take this Board’s examination for licensure to practice in the State of Ohio. He did not elect to take the examinations in Ohio in 1949. In 1950 the law was changed, increasing the educational requirements. As a result, this individual is ineligible by present standards. He has now formally applied to take this examination. Question: Do the standards at the time he completes his education, or the standards in effect at the time he makes application to take the examination, determine his eligibility.

“b) The circumstances in this instance are identical with those under a) with the exception that the individual in this instance did, at that time, take the Ohio Board examination for licensure to practice in Ohio but failed to make a satisfactory grade. He has now formally applied to retake the examination. Question: Do the standards at the time he completes his education or the standards in effect at the time he makes application to take the examination determine his eligibility in a case where he had previously been accepted as eligible at that time. Since in both cases the individual concerned has formally applied to take the Ohio State Board of Optometry examination for licensure to practice in the state of Ohio and since this examination takes place June 12 thru 14, we would appreciate an early reply, if possible.”

Section 4725.08, Revised Code, sets forth the qualifications which an applicant for examination by the state board of optometry must have. This section prior to October 1, 1953 was Section 1295-28, General Code. At the time the individual mentioned in your first question completed his education, 1949, he would have qualified for examination under the then existing Section 1295-28, General Code, which read in part:

“Any person over the age of twenty-one years, of good moral character, who has had a preliminary education equivalent to a

four year course in a first grade high school, which shall be ascertained by examination or by acceptable certificate as to credentials for work done in such approved institution, and who has graduated from a school or college which maintains a course in optometry of not less than two years, shall be entitled to take a standard examination, provided said school or college of optometry is in good standing as determined by the board. The standard examination shall consist of test in practical, theoretical and physiological optics, * * *.”

You state that said individual did not elect to take the examination in 1949.

Amended Senate Bill No. 50 of the 98th General Assembly, amended Section 1295-28, *supra*, effective January 1, 1950, the here pertinent language being amended to read:

“* * *

“No person is eligible to take the examination unless he is at least twenty-one years of age, of good moral character, a citizen of the United States, and has satisfactorily completed a course of study of at least five college years and is graduated from a school of optometry accredited by the board; provided the school of optometry requires at least two academic years of study with credits of at least sixty semester hours or ninety quarter hours in a college of arts and sciences accredited by the association of American universities or the north central association of colleges and secondary schools or a similar regional accrediting agency as a prerequisite to admission to the courses in optometry; and provided that in addition the school of optometry requires a course of study of at least three academic years with credits of at least one hundred semester hours or one hundred fifty quarter hours. Students regularly enrolled and in attendance at a school of optometry on January 1, 1950, need not comply with such educational requirements but shall comply only with the educational requirements in effect immediately prior to said date. * * *”

A review of the 1950 amendment discloses that the educational requirements for a candidate for examination were increased. You state that the individual in question does not qualify under the increased requirements. Also, since said individual had completed his education in 1949, he was not “regularly enrolled and in attendance at a school of optometry on January 1, 1950” and, therefore, does not qualify under the savings clause of the 1950 legislation.

The Court of Common Pleas of Franklin County in the case of *Glen v. State Board of Medical Examiners*, 1 Ohio N. P. N. S., 495,

considered a situation similar to that here concerned. The plaintiff in that case filed an application to practice dentistry in the year 1903. He had established residence in Ohio in 1901 and was qualified to be licensed as a dentist in Ohio at that time. He did not, however, apply for a license. The law was amended in 1902 and plaintiff did not qualify under the law as amended. The dental board denied his 1903 application and he filed an action in mandamus to require the issuance of a license. He contended that he was entitled to the license under the law in effect at the time he located in Ohio, claiming a vested right under the statutes in effect at that time. At page 453 of the opinion in the case, it is stated:

“* * * He did not see proper to take advantage of this privilege, and made no application until after the repeal of that law. In April, 1902, the Legislature saw proper to raise the standard for those persons applying to practice dentistry in the state, and so amended the law as to require an examination for all persons in relator’s class before they could receive a certificate of registration from the state board of examiners.

“There is no question but that the lawmaking power can continue to raise the standard in matters of this kind as often as the necessities may require. That is so held in *Dent v West*, 129 U. S., 114, a leading case and one that has been followed by the courts in many of our states.

“* * *

“My opinion is that relator has now no vested rights under said act of 1892, and to entitle him to a certificate of registration he must apply in accordance with the provisions of the amended act * * *.”

The Court of Appeals affirmed the decision, 5 O.C.C., N.S., 55, and the Supreme Court affirmed without opinion in 73 Ohio St., 376.

There do not appear to be any recent Ohio cases on this question, however, a New York Court of Appeals in *Marks v. Regents of University of New York*, 111 N.Y.S. 2nd, 362, 279 App. Div. 476, recently ruled that the Board of Regents might raise the standards for admittance to the optometry examination and that the applicant was not entitled to a mandamus forcing them to allow him to take the examination based on qualifications existant a few months before, when he graduated from a then-accredited college. A similar ruling is found in *Hunt v. State Board of Chiropractic Examiners*, California (1948), 196 Pac. 2nd, 77.

In view of the foregoing, and answering your first question, I conclude that the legislature clearly has the power to raise the standards for

eligibility to take an examination for a license to practice optometry, the individual in question has no vested rights under the law as existing prior to January 1, 1960, and said individual's qualifications for admittance to examination should be determined by the provisions of Section 4725.08, Revised Code, as existing at the time he made application for examination (1960).

Coming to your second question, the individual in this instance was qualified for examination in 1949, took such examination, but failed to pass. In 1960 he applied to retake the examination. He does not meet the present educational requirements as provided by Section 4725.08, Revised Code. He, also, was not enrolled as a student at a school of optometry on January 1, 1950, and does not come within the savings clause of Section 4725.08, *supra*.

At the time that the second individual failed the examination, 1949, the then existing law, Section 1295-29, General Code, provided:

“* * * In case of failure at any standard examination the applicant, *after the expiration of six months and within two years shall have the privilege of a second examination by the board without the payment of an additional fee.*” (Emphasis added)

In Amended Senate Bill No. 50, *supra*, effective January 1, 1950, this provision was deleted from the section and the provision that “No one shall be permitted to take more than four examinations” was inserted. The section was changed to Section 4725.09, Revised Code, in the code revision of 1953 and the language was changed to “No person shall be permitted to take more than four examinations.”

As in the first instance, it does not appear that the applicant has a vested right under the law as existing prior to January 1, 1960. Applicant might have argued that he had a right to take an examination within two years of his failure, under the former two year provision noted above. Since he did not make application within two years and since that two year period is long past, that question is not before us.

In Opinion No. 6334, Opinions of the Attorney General for 1943, page 486, the then Attorney General held that an applicant for a license to practice osteopathy and surgery, who failed the examination for such a license, must upon filing a subsequent application, meet the eligibility standards in effect at the time of his new application. The second paragraph of the syllabus reads as follows:

“Where, prior to the enactment of House Bill No. 112 by the 95th General Assembly, an applicant had the preliminary educational requirements to admit him to an examination for a certificate to practice osteopathy and surgery but has failed such examination, if such applicant desires to obtain a certificate to practice osteopathic medicine and surgery he must, since the enactment of such House Bill, submit evidence of his preliminary training as prescribed in amended Section 1270, General Code, and be examined in the subjects prescribed for the examination to practice osteopathic medicine and surgery as enumerated in amended Section 1273 of the General Code.”

In view of the foregoing, I conclude that the individual in question must qualify under the provisions of Section 4725.08, *supra*, as now existing, to be eligible to retake the examination.

In answer to your specific questions, it is my opinion and you are advised:

1. Where an individual was qualified to take an examination for a license to practice optometry in 1949 under the then existing Section 1295-28, General Code, but did not take such examination at that time, and said individual was not regularly enrolled and in attendance at a school of optometry on January 1, 1950, he must qualify under present Section 4725.08, Revised Code, to now take such examination.

2. Where an individual who took an examination for a license to practice optometry in 1949 and failed such examination, applies for such an examination in 1960, he must qualify under the requirements of Section 4725.08, Revised Code, to be admitted to such examination.

Respectfully,

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