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HOUSE BILL 112—95 GENERAL ASSEMBLY:

1. PRIOR TO ITS ENACTMENT, WHERE APPLICANT APPEARED FOR EXAMINATION—CERTIFICATE TO PRACTICE OSTEOPATHY AND SURGERY—PAID EXAMINATION FEE—FAILED TO OBTAIN PASSING MARK IN EXAMINATION—SUCH APPLICANT MAY NOT NOW TAKE EXAMINATION IN SUBJECTS PRESCRIBED BY FORMER SECTION 1288 G. C. AND BE LICENSED TO PRACTICE.
2. WHERE APPLICANT HAD PRELIMINARY EDUCATIONAL REQUIREMENTS FOR ADMITTANCE TO EXAMINATION—FAILED EXAMINATION—STATUS—SECTIONS 1270, 1273 G. C.
3. STATE MEDICAL BOARD, SINCE ENACTMENT SAID HOUSE BILL, HAS NO AUTHORITY TO ISSUE CERTIFICATES FOR THE PRACTICE OF OSTEOPATHY AND SURGERY—MAY ISSUE CERTIFICATES TO PRACTICE OSTEOPATHIC MEDICINE AND SURGERY TO THOSE WHO COMPLIED WITH PROVISIONS OF ACT.

SYLLABUS:

1. Where, prior to the enactment of House Bill No. 112 by the 95th General Assembly, an applicant has submitted himself for examination for a certificate to practice osteopathy and surgery and has paid the examination fee as prescribed by the then existing statute but failed to obtain a passing mark in such examination, by reason of the amendment of the statute by such House Bill such applicant may not now take an examination in the subjects prescribed by said former Section 1288 of the General Code and be licensed to practice osteopathy and surgery.

.. 2. 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.

3. The State Medical Board, since the enactment of House Bill No. 112 by the 95th General Assembly, has no authority to issue certificates licensing persons

to practice osteopathy and surgery, but may issue certificates to practice osteopathic medicine and surgery to those persons entitled thereto by reason of compliance with the provisions of such act.

Columbus, Ohio, August 28, 1943.

Dr. H. M. Platter, Secretary, State Medical Board,
Wyandotte Building,
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“To avoid controversy in the administration of the new amendment to the Medical Practice Act, House Bill No. 112, governing the practice of osteopathy in Ohio, the State Medical Board requests an opinion.

As the department interprets the new statute, future licenses issued will confer the right of the successful applicant to engage in the practice of osteopathic medicine and surgery. It believes no other type of licensure can be issued. What then becomes of the individuals who were unsuccessful in a former examination and who by the terms of the old statute may present themselves for another examination without the payment of an additional fee if taken within one year? This applies to several unsuccessful applicants in our recent examination who applied for a certificate to practice osteopathy and surgery.

Will not these men be required to qualify under the preliminary and professional requirements of the new law, pay an additional fee and if successful receive a license to practice osteopathic medicine and surgery?

Is not the department prevented from the issuance of a certificate to practice osteopathy and surgery in the future?”

The State Medical Board is a creature of statute and as such has such powers and such duties only as have been granted to or imposed upon it by the statutes creating it. See *Rose v. Baxter*, 7 O. N. P. (N. S.) 132; *Meeker v. Scudder*, 108 O. S., 423.

It should be remembered that the licensing of physicians to practice medicine, surgery and other elements of the profession is the act of the General Assembly. Such authority is exercised by the Legislature by reason of the police power of the state. *Neswith v. State*, 101 O. S. 158;

Shaw v. State, 101 O. S., 507. The State Medical Board in conducting the examinations for licenses and the issuance of certificates to practice to successful applicants therefor is an agency of the Legislature and may issue such certificates when it has determined that the conditions and standards prescribed by the Legislature for the issuance of the license have been found to exist.

Prior to the enactment of House Bill No. 112 by the 95th General Assembly the Medical Board was authorized to issue licenses to physicians and surgeons where it was determined that the applicant had the requisite educational qualifications then prescribed by Section 1270 of the General Code, only when such applicant had passed the examination prescribed by then existing Section 1273 of the General Code. Former Section 1277 of the General Code provided that each applicant for a certificate to practice medicine or surgery must pay an examination fee of twenty-five dollars and that if he were unsuccessful in the examination he might, within the period of one year, take another examination *for such purpose* without paying an additional fee.

The so-called "Medical Practice Act" grants to the Medical Board the authority to issue licenses to practice "limited branches" of medicine to persons presenting the qualifications prescribed by statute when the applicant has passed the examination prescribed in Section 1274-2 of the General Code and has paid the fee of twenty-five dollars as provided by law (Section 1274-3, General Code).

Former Sections 1288 and 1289 of the General Code set forth the requirements for the issuance of a certificate to practice osteopathy, and osteopathy and surgery. In order to have obtained a certificate to practice osteopathy an applicant must have had a diploma from a reputable school of osteopathy and have passed an examination in the subjects of "pathology, physiological chemistry, gynecology, minor surgery, osteopathic diagnosis and the principles and practice of osteopathy" (former Section 1289, General Code). If, however, he desired to obtain a certificate to practice major surgery he must have been further examined in the subjects of "anatomy, physiology, obstetrics, surgery and diagnosis" (former Section 1288, General Code). You will observe that while former Section 1289 of the General Code required a license fee of twenty-five dollars to be paid before an applicant for the practice of osteopathy could be admitted to an examination, it contained no provision for re-examination without the payment of an additional fee as did former Section 1277 in the case of examinations for certificates to practice medicine or surgery.

In House Bill No. 112 the General Assembly repealed former Sec-

tions 1288, 1289, 1290, 1291, 1292 and 1293 of the General Code which related to the licensing of persons to practice osteopathy and surgery. It further amended Sections 1262, 1268, 1269, 1270, 1273, 1277, 1278, 1282 and 1289-1 of the General Code.

The effect of such amendments was to take from the State Medical Board (1) the power to issue certificates licensing persons to practice osteopathy and minor surgery when the applicant had complied with former Section 1289 of the General Code, which has been repealed; (2) the power to issue certificates to persons then licensed to practice osteopathy to practice major surgery, upon compliance with the provisions of former Section 1288 of the General Code, and (3) to authorize and empower such Board to issue certificates authorizing persons to practice osteopathic medicine and surgery where such applicants presented evidence of their preliminary qualifications as provided in such act and have further been successful in passing the examinations therein provided (Sections 1270, 1271, 1273 and 1274, General Code) and, second, to issue to a person licensed to practice osteopathy a license to practice osteopathic medicine and surgery when he shall have attained the additional preliminary education as therein specified (see Section 1270, General Code).

It is thus to be seen that the State Medical Board has no longer the right to exercise the power to issue licenses and conduct examinations under authority of former Sections 1288 and 1289 of the General Code, which have been repealed; that is, to practice osteopathy or osteopathy and surgery. It now has the power to issue certificates of licensure to practice osteopathic medicine and surgery to those persons who have the qualifications and who pass the examination prescribed by the statute.

The act now prescribes that an applicant for a certificate to practice osteopathic medicine and surgery must have at least two years of collegiate work in an approved college and must have a diploma from a school or college of osteopathy (Section 1270, General Code) and must pass an examination conducted by the Board in anatomy, physiology, pathology, *chemistry, materia medica and therapeutics, the principles and practice of osteopathic medicine, diagnosis, surgery, obstetrics and such other subjects as the Board requires* or if he already be licensed to practice osteopathy and surgery must pass an examination in the subjects of materia medica and therapeutics, and the principles of osteopathic medicine, bacteriology, preventive medicine and hygiene (Section 1273, General Code).

It should be further observed that the statute authorizes those persons who have been licensed to practice osteopathy or osteopathy and

surgery under the former statute to continue such practice but further specifically provides that before practicing osteopathic medicine and surgery they shall present to the Board satisfactory evidence of their additional qualifications (Section 1270, General Code) and shall pass an additional examination in the subjects of materia medica and therapeutics, the principles and practice of osteopathic medicine, bacteriology, preventive medicine and hygiene (Section 1273, General Code). It is thus to be seen that the examination now authorized to be given by the Board is not one of those prescribed by former Sections 1288 and 1289 of the General Code.

As I have above pointed out, the former law did not grant to an applicant for a license to practice osteopathy who had paid his examination fee but failed to pass the examination the right to re-examination without the payment of an additional fee (see former Section 1289, General Code). Former Section 1277 of the General Code which prescribed the fee for examination for a certificate to practice medicine or surgery did contain the following language:

“Each applicant for a certificate to practice medicine or surgery in this state shall pay a fee of twenty-five dollars for an examination. On failure to pass such examination the fee shall not be returned to the applicant, but within a year after such failure he may present himself and be again examined without the payment of an additional fee. * * *”

You will observe that the examinations referred to in such former Section 1277 are for the purpose of obtaining a certificate to practice medicine or surgery and have no reference to the practice of osteopathy. There now exists no section authorizing an osteopath to take an examination in surgery alone and thus become licensed to practice osteopathy and surgery. Present Section 1277 of the General Code reads as follows:

“Each applicant for a certificate to practice medicine or surgery, or osteopathic medicine and surgery, in this state shall pay a fee of twenty-five dollars for an examination. On failure to pass such examination the fee shall not be returned to the applicant, but within a year after such failure he may present himself and be again examined without the payment of an additional fee. All fees for examination shall be paid in advance to the treasurer of the board and by him paid into the state treasury to the credit of a fund for the use of the state medical board.”

You will observe from the language of the section above quoted that such section only authorizes applicants for certificates to practice medicine

or surgery or osteopathic medicine and surgery who have failed to pass the examination to take a new examination for such purpose without the payment of additional fee. It would, therefore, seem that if the Medical Board is not authorized to issue a certificate to practice surgery to an osteopath upon the presentation of evidence of qualifications equal to that which he was required to have under the repealed section it could seriously be urged that the Medical Board now has authority to give such examination. Since the law now provides, with respect to licenses for medical doctors that they shall be examined in certain medical and pathological subjects, as well as surgery, and as to applicants for the practice of osteopathic medicine and surgery that such applicants must present evidence of preparation in excess of that which was required under the former law and must be examined in different subjects than were prescribed by the former law, no authority exists for the Medical Board to conduct the examination for which such former applicant was qualified. It would further seem that if a person who has been licensed to practice osteopathy now desires to take an examination to authorize him to practice major surgery he must present the qualifications as to preliminary education specified in Section 1270 of the General Code and be examined in the additional subjects specified in Section 1273 to entitle him to a certificate to practice osteopathic medicine and surgery, the fee for which is prescribed in Section 1277 of the General Code.

It might be argued that by reason of the provisions of the former section, the repeal thereof would take from the applicant a vested right to the re-examination which was prescribed by such repealed section. However, such question has been before the court and in the case of *State, ex rel. Glenn v. The Board of Dental Examiners*, 5 O. C. C. (N. S.) 55, affirmed without opinion in 73 O. S. 376, the court held as stated in the second paragraph of the syllabus that:

“A vested right is not conferred by a statute which merely prescribes a method by which such a right may be obtained; and it is competent for the Legislature to raise the conditions for obtaining such a right both as to those who were and those who were not theretofore competent to acquire it.”

Specifically answering your inquiries, it is my opinion that:

1. Where, prior to the enactment of House Bill No. 112 by the 95th General Assembly, an applicant has submitted himself for examination for a certificate to practice osteopathy and surgery and has paid the examination fee as prescribed by the then existing statute but failed to obtain a passing mark in such examination, by reason of the amendment of the statute by such House Bill such applicant may not now take an

examination in the subjects prescribed by said former Section 1288 of the General Code and be licensed to practice osteopathy and surgery.

2. 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.

3. The State Medical Board, since the enactment of House Bill No. 112 by the 95th General Assembly, has no authority to issue certificates licensing persons to practice osteopathy and surgery, but may issue certificates to practice osteopathic medicine and surgery to those persons entitled thereto by reason of compliance with the provisions of such act.

Respectfully,

THOMAS J. HERBERT,
Attorney General.