

May 11, 2015

Mr. Thomas Barracato, President
Ohio Optical Dispensers Board
77 South High Street, 16th Floor
Columbus, Ohio 43215-6108

SYLLABUS:

2015-016

1. The language of 11A Ohio Admin. Code 4726-7-02(D) that “[l]icensees applying for their first initial renewal shall be exempt from reporting continuing education credit” is invalid because it conflicts with the language in R.C. 4725.51(A) that each renewal application “shall contain evidence that the applicant has completed continuing education within the immediately preceding one-year period.”
2. R.C. 4725.411 authorizes a licensed spectacle dispensing optician to use a computer to order prepackaged soft contact lenses at the time a written prescription is presented to the optician.



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

Opinions Section
Office 614-752-6417
Fax 614-466-0013
30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

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OPINION NO. 2015-016

Mr. Thomas Barracato, President
Ohio Optical Dispensers Board
77 South High Street, 16th Floor
Columbus, Ohio 43215-6108

Dear President Barracato:

We have received your opinion request on behalf of the Ohio Optical Dispensers Board regarding Sub. H.B. 258, 130th Gen. A. (2014) (eff. Mar. 23, 2015). Sub. H.B. 258 makes changes to the statutes that regulate optical dispensing in Ohio, amending R.C. 4725.40 and R.C. 4725.51 and enacting R.C. 4725.411. In light of those changes, you pose the following questions:

1. Is 11A Ohio Admin. Code 4726-7-02(D) valid in light of Sub. H.B. 258's amendments to R.C. 4725.51?
2. Does R.C. 4725.411 authorize licensed spectacle dispensing opticians to order soft contact lenses that are not in stock at the time a prescription for the lenses is presented? In other words, does placing an order into a computer system exceed a licensed spectacle dispensing optician's authority to dispense soft contact lenses under R.C. 4725.411?

Before addressing your questions, it is helpful to summarize the statutes that govern optical dispensing, *see* R.C. 4725.40-.59, and explain how the Revised Code empowers the Ohio Optical Dispensers Board ("Board") to administer those statutes.

The Regulation of Optical Dispensing

The provisions of law that regulate the practice of optical dispensing "are set forth in R.C. 4725.40-.59 and the administrative rules adopted pursuant thereto." 2002 Op. Att'y Gen. No. 2002-035, at 2-222. R.C. 4725.40(B) defines "[o]ptical dispensing" as follows:

"Optical dispensing" means interpreting but not altering a prescription of a licensed physician or optometrist and designing, adapting, fitting, or replacing the

prescribed optical aids,¹ pursuant to such prescription, to or for the intended wearer; duplicating lenses, other than contact lenses, accurately as to power without a prescription; and duplicating nonprescription eyewear and parts of eyewear. “Optical dispensing” does not include selecting frames, transacting a sale, transferring an optical aid to the wearer after an optician has completed fitting it, or providing instruction in the general care and use of an optical aid, including placement, removal, hygiene, or cleaning. (Footnote added.)

A person may not “engage in optical dispensing ... unless he has fulfilled the requirements of [R.C. 4725.48-.51] and has been certified as a licensed dispensing optician.” R.C. 4725.41. R.C. 4725.48-.501 require “[a]ny person who desires to engage in optical dispensing” to, among other things, pass an examination, complete a written application for a license, and submit to fingerprinting and background checks in accordance with R.C. 4776.01-.04. R.C. 4725.48(A); *see also* R.C. 4725.48(B) (an applicant for a license shall complete a written examination application, file the application with the Board, and pay an application fee); R.C. 4725.49 (setting forth the parameters within which an applicant may take the required examination); R.C. 4725.501 (requiring a license applicant to submit to fingerprinting and background checks). R.C. 4725.51 governs the process for license renewal. Under R.C. 4725.51, each license renewal applicant is required to pay a fee and show that she has completed the continuing education programs identified in the statute.

The Revised Code provides for three types of licensed dispensing opticians: (1) a licensed spectacle dispensing optician, (2) a licensed contact lens dispensing optician, and (3) a licensed spectacle-contact lens dispensing optician. R.C. 4725.40(D)-(F). A licensed contact lens dispensing optician may dispense only contact lenses, while a licensed spectacle-contact lens dispensing optician may dispense “any optical aid.” R.C. 4725.40(E)-(F). As amended by Sub. H.B. 258, R.C. 4725.40(D) authorizes a licensed spectacle dispensing optician to dispense “optical aids other than contact lenses” and “prepackaged soft contact lenses in accordance with [R.C. 4725.411].” R.C. 4725.40(D)(1)-(2). R.C. 4725.411 states that “[b]eginning January 1, 2016, a licensed spectacle dispensing optician may dispense prepackaged soft contact lenses if the only action necessary is to match the description of the contact lenses that is on the packaging to a written prescription.” Prior to its amendment, R.C. 4725.40(D) permitted a licensed spectacle dispensing optician to dispense only optical aids other than contact lenses. *See* Sub. H.B. 258.

The Ohio Optical Dispensers Board is “responsible for the administration of [R.C. 4725.40-.59].” R.C. 4725.44(A); *see also* R.C. 4725.42(A)(1)-(4) (creating the Ohio Optical Dispensers Board and setting forth requirements for Board membership). In fulfilling its administrative obligations, the Board processes “applications for licensure as licensed dispensing

¹ For purposes of R.C. 4725.40-.59, an “[o]ptical aid” means spectacles or a device that “may aid or correct human vision,” R.C. 4725.40(A)(1), and various types of contact lenses, R.C. 4725.40(A)(2).

opticians,” supervises examinations, and issues, suspends, and revokes licenses. R.C. 4725.44(A). When “required by or necessary to carry out the responsibilities imposed by [R.C. 4725.40-.59],” the Board adopts, amends, or rescinds administrative rules in accordance with R.C. Chapter 119. R.C. 4725.44(B). Failure to comply with R.C. Chapter 119’s procedures renders a rule adoption, amendment, or rescission invalid. *See* R.C. 119.02.

The Validity of Rule 4726-7-02(D)

Your first question asks whether rule 4726-7-02(D) is valid in light of Sub. H.B. 258’s amendments to R.C. 4725.51. Rule 4726-7-02(D) exempts first-time license renewal applicants from having to report continuing education study as required under R.C. 4725.51: “Licensees applying for their first initial renewal shall be exempt from reporting continuing education credit.”

R.C. 4725.51(A) provides that “[e]ach license issued under [R.C. 4725.40-.59] shall expire on the first day of January in the year after it was issued.” The statute instructs “[e]ach person holding a valid, current license [to] apply to the [Board] for the extension of the license under the standard renewal procedures of [R.C. Chapter 4745].”² R.C. 4725.51(A). Prior to its amendment by Sub. H.B. 258, R.C. 4725.51(A) further stated:

Each application for renewal shall be accompanied by a renewal fee the [B]oard shall establish by rule *and* shall contain evidence that the applicant has completed a continuing education program within the immediately preceding one-year period as follows:

(1) Licensed spectacle dispensing opticians shall have pursued *four hours of study in spectacle dispensing, approved by the [B]oard.* (Emphasis added.)

Sub. H.B. 258 amended R.C. 4725.51 to include an additional continuing education requirement for licensed spectacle dispensing opticians seeking to renew their license. *See* Ohio Legislative Service Comm’n, Final Bill Analysis, Sub. H.B. 258 (2014) (the act “[a]dds two hours of study in the form of contact lens dispensing ... to the continuing education required for spectacle dispensing optician license renewal”). R.C. 4725.51(A) now provides, in pertinent part:

Each application for renewal shall be accompanied by a renewal fee the [B]oard shall establish by rule. *In addition, the application* shall contain evidence that the applicant has completed continuing education within the immediately preceding one-year period as follows:

(1) Licensed spectacle dispensing opticians shall have pursued *both of the following, approved by the [B]oard:*

² R.C. 4745.02 requires the Board, as the “licensing agency” under R.C. 4745.01(B), to notify licensees by mail that their licenses to dispense optical aids will soon expire. The notice, accompanied by an application for renewal, shall be mailed “[o]n or before the thirtieth day prior to the expiration of any license.” R.C. 4745.02.

- (a) *Four hours of study in spectacle dispensing;*
(b) *Two hours of study in the form of contact lens dispensing described in [R.C. 4725.411].* (Emphasis added.)

Sub. H.B. 258 made two amendments to R.C. 4725.51. First, in the part of the statute that describes what information shall be included in an application for renewal, the General Assembly substituted the term “in addition” for the word “and,” as emphasized in the statutory language above. *Merriam-Webster’s Collegiate Dictionary* 46 (11th ed. 2012) describes “and” as a “function word to indicate connection or addition.” Thus, the phrase “in addition” is synonymous with the word “and.” See generally *Merriam-Webster’s Collegiate Dictionary* 14 (11th ed. 2012) (defining the word “addition” and describing the phrase “in addition” to mean “also”). This minor change in wording also altered R.C. 4725.51(A)’s sentence structure. What was expressed in one sentence is now expressed in two. Nevertheless, replacing “and” with “in addition” and changing the statute’s sentence structure has not altered the substance or meaning of R.C. 4725.51(A).

Second, in Sub. H.B. 258, the General Assembly augmented R.C. 4725.51’s continuing education requirements by directing licensed spectacle dispensing opticians to pursue, in addition to the four hours of study in spectacle dispensing previously required, “[t]wo hours of study in the form of contact lens dispensing described in [R.C. 4725.411].” R.C. 4725.51(A)(1)(b). Rule 4726-7-02(D), however, exempts first-time renewal applicants from *any* continuing education obligations, and so the type and amount of continuing education required by R.C. 4725.51(A) appears to have no bearing on whether rule 4726-7-02(D)’s exemption is valid. Therefore, adding two hours of study in contact lens dispensing to the four hours of study already required is of no material consequence to the exemption as set forth in rule 4726-7-02(D).

Although the amendments made to R.C. 4725.51 by Sub. H.B. 258 do not affect rule 4726-7-02(D)’s validity, rule 4726-7-02(D) is invalid for reasons unrelated to those amendments. Rules promulgated by administrative agencies should be “designed to accomplish the ends sought by the legislation enacted by the General Assembly.” *State ex rel. Am. Legion Post 25 v. Ohio Civil Rights Comm’n*, 117 Ohio St. 3d 441, 2008-Ohio-1261, 884 N.E.2d 589, at ¶14; see also 1993 Op. Att’y Gen. No. 93-014, at 2-80 (“[t]he purpose of administrative rulemaking is to facilitate the administrative agency’s placing into effect the policy declared by the General Assembly in the statutes to be administered by the agency” (quoting *Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St. 3d 46, 47, 554 N.E.2d 97 (1990))). In carrying out the policies and intentions of the statutes, administrative rules may not add to, subtract from, or conflict with the legislative enactments. See *State ex rel. Am. Legion Post 25*, 2008-Ohio-1261, at ¶14 (“an administrative rule may not add to or subtract from a legislative enactment”); *Ohio Licensed Beverage Ass’n v. Ohio Dep’t of Health*, Franklin App. No. 07AP-490, 2007-Ohio-7147, at ¶26 (same); *Kelly v. Accountancy Bd. of Ohio*, 88 Ohio App. 3d 453, 457, 624 N.E.2d 292 (Franklin County 1993) (“[a]dministrative agencies ... possess rule-making powers pursuant to a statutory delegation of power; since administrative rules are made pursuant to a statutory delegation of authority, a rule which conflicts with a statute is invalid”); 2011 Op. Att’y Gen. No. 2011-022, at 2-177 (“an administrative body ... may adopt such rules as it deems appropriate ... provided

that the rules are not unreasonable or in clear conflict with statutory enactments and do not add to statutorily-delegated powers” (quoting 1998 Op. Att’y Gen. No. 98-035, at 2-208)). Rule 4726-7-02(D) is invalid because it impermissibly conflicts with R.C. 4725.51.

Before the General Assembly amended R.C. 4725.51 in Sub. H.B. 258, division (A) of the statute stated, in relevant part: “Each application for renewal *shall* be accompanied by a renewal fee ... and *shall* contain evidence that the applicant has completed a continuing education program.” (Emphasis added.) As amended by Sub. H.B. 258, this portion of R.C. 4725.51(A) declares that “[e]ach application for renewal *shall* be accompanied by a renewal fee.... In addition, the application *shall* contain evidence that the applicant has completed continuing education.” In each of these versions of the statute, the General Assembly makes clear that in addition to a renewal fee, an application for renewal *shall* include evidence that the applicant has completed the requisite continuing education studies. *See generally Sierra Club v. Koncelik*, Franklin App. Nos. 12AP-288, et al., 2013-Ohio-2739, 991 N.E.2d 1240, at ¶21 (“[i]nterpretation of a statute depends on the legislature’s intent in enacting the statute. If reviewing the statute conveys a meaning that is clear, unequivocal, and definite, the statute must be applied as written”) (internal citations omitted). The use of the word “shall” in R.C. 4725.51(A) is significant, as it means that including this information in the renewal application is mandatory. *See Dep’t of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St. 3d 532, 534, 605 N.E.2d 368 (1992) (“[i]t is axiomatic that when it is used in a statute, the word ‘shall’ denotes that compliance with the commands of that statute is *mandatory*”) (emphasis in original).

Rule 4726-7-02(D) exempts first-time license renewal applicants from having to report credits for the continuing education studies described in R.C. 4725.51. By modifying R.C. 4725.51(A)’s requirement that “[e]ach application for renewal ... contain evidence that the applicant has completed continuing education,” rule 4726-7-02(D) conflicts with R.C. 4725.51(A). *Cf. Koncelik*, 2013-Ohio-2739, at ¶25 (administrative rule was valid because it did not modify the mandatory duties set forth in the controlling statute); *State ex rel. Am. Legion Post 25*, 2008-Ohio-1261, at ¶17 (emphasizing that the word “shall” in statutory language indicates a clear legal duty that may not be limited by administrative rule). *See generally* 1990 Op. Att’y Gen. No. 90-098, at 2-429 (recognizing that federal law preempts state law when the laws “inevitably conflict so as to make compliance with both federal and state regulations a physical impossibility”); 1985 Op. Att’y Gen. No. 85-101, at 2-433 (“[i]n determining whether an ordinance is in ‘conflict’ with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa”) (quoting *Vill. of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923) (syllabus, paragraph 2))). Therefore, absent statutory authority to provide for such an exemption, the Board exceeded its authority in promulgating rule 4726-7-02(D). *See generally D.A.B.E., Inc., d.b.a. Arnie’s Saloon v. Toledo-Lucas Cnty. Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536, at ¶¶37-41 (an administrative agency has only such administrative rule-making power as the General Assembly grants it; an administrative agency may not exercise legislative functions); 1990 Op. Att’y Gen. No. 90-056, at 2-234 (“[a]n administrative rule must give effect to the ‘unambiguously expressed intent’ of the statute it interprets” (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984))).

As a creature of statute, an administrative agency may only adopt rules as authorized by statute. *See* 1995 Op. Att’y Gen. No. 95-034, at 2-178. The Board adopted rule 4726-7-02(D) in 2011 pursuant to R.C. 4725.44. R.C. 4725.44 states, in pertinent part:

(B) The [B]oard shall adopt, amend, or rescind rules, pursuant to [R.C. Chapter 119], for the licensure of dispensing opticians and ocularists, and such other rules as are required by or necessary to carry out the responsibilities imposed by [R.C. 4725.40-.59], including rules establishing criminal records check requirements under [R.C. 4776.03] and rules establishing disqualifying offenses for licensure as a dispensing optician or certification as an apprentice dispensing optician pursuant to [R.C. 4725.48], [R.C. 4725.52-.53], and [R.C. 4776.10].

R.C. 4725.44 confers authority upon the Board to promulgate rules for the administration of R.C. 4725.40-.59, but nothing in the language of R.C. 4725.44 or any of the other statutes that govern optical dispensing authorizes the Board to exempt a class of license renewal applicants from R.C. 4725.51’s continuing education requirements.³ In particular, we find no language in the statutes that exempts first-time license renewal applicants from those requirements. *See generally* 1995 Op. Att’y Gen. No. 95-034, at 2-178 (“[w]hether the [agency] has authority to adopt the rules about which you ask ... depends upon whether such authority has been conferred upon the [agency] by express statutory terms or by necessary implication from the express statutory grant of powers”).

The absence of such language in the case of a first-time renewal of an optical dispensing license contrasts with language the General Assembly has enacted in R.C. 4725.16. R.C. 4725.16(A)(1) states that licenses “issued by the state board of optometry shall expire annually on the last day of December, and may be renewed in accordance with [R.C. 4725.16] and ... [R.C. Chapter 4745].” The statute requires renewal applicants to complete continuing education courses “during the twelve-month period beginning on the first day of October and ending on the last day of September.” R.C. 4725.16(B). R.C. 4725.16(D) exempts first-time optometric license renewal applicants from having to complete continuing education courses: “The board

³ R.C. 4725.51(B) permits the Board to “provide, by rule ... for waiver of the continuing education requirements ... in cases of hardship or illness.” Authorizing the Board to waive continuing education requirements in cases of hardship does not mean that the Board may promulgate a sweeping rule that exempts all first-time renewal applicants from R.C. 4725.51(A)’s continuing education requirements. Rather, “a determination regarding hardship requires examination of the unique characteristics of a particular situation. Accordingly, a determination of ‘hardship’ must be based on the facts of a particular case.” 2003 Op. Att’y Gen. No. 2003-003, at 2-15 to 2-16 (internal citations omitted). In apparent recognition of this principle, the Board has promulgated 11A Ohio Admin. Code 4726-7-03(A)(1), which provides, in relevant part, that “[t]he [B]oard may grant a waiver of continuing education ... for ... [h]ardship.”

shall waive the requirement of continuing optometric education for any optometrist ... *who has received an initial certificate of licensure during the nine-month period which ended on the last day of September.*” (Emphasis added.) R.C. 4725.16(D) demonstrates that when the General Assembly intends to exempt first-time license renewal applicants from continuing education requirements, it does so in explicit terms. Thus, the absence of similar language in R.C. 4725.40-.59 is significant. *See generally D.A.B.E., 2002-Ohio-4172*, at ¶40 (“[i]n construing ... administrative power through and by a legislative body, the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it” (quoting *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6 (1917))).

Accordingly, we conclude that rule 4726-7-02(D) is invalid and recommend that the Board rescind the rule in accordance with the procedures in R.C. Chapter 119. *See* R.C. 119.01-.13; 1995 Op. Att’y Gen. No. 95-034, at 2-185 (explaining the way in which an administrative agency rescinds rules under the provisions in R.C. Chapter 119).

A Licensed Spectacle Dispensing Optician May Order Prepackaged Soft Contact Lenses that are Not in Stock at the Time a Prescription for Such Lenses is Presented

Your second question asks whether R.C. 4725.411 authorizes licensed spectacle dispensing opticians to order prepackaged soft contact lenses that are not in stock at the time a prescription for the lenses is presented. You wish to know whether placing an order by means of a computer exceeds a licensed spectacle dispensing optician’s authority to dispense prepackaged soft contact lenses under R.C. 4725.411.

R.C. 4725.411 authorizes a licensed spectacle dispensing optician to “dispense prepackaged soft contact lenses if the only action necessary is to match the description of the contact lenses that is on the packaging to a written prescription.”⁴ The act of “optical dispensing” includes “designing, adapting, [or] fitting ... the prescribed optical aids.” R.C. 4725.40(B). Pursuant to R.C. 4725.411, a licensed spectacle dispensing optician may not design, adapt, or fit soft contact lenses.

When a licensed spectacle dispensing optician matches a patient’s prescription to a box of contact lenses in inventory, the licensed spectacle dispensing optician takes the box from inventory, reviews the description of the contact lenses on the box, and ensures that this description matches the description of the contact lenses on the patient’s prescription. *See* 2002 Op. Att’y Gen. No. 2002-035, at 2-223 (“[i]n the situation in which a person reviews a patient’s prescription for replacement contact lenses and selects from inventory lenses for the patient, it is readily apparent that the person is directly responsible for ensuring that the replacement lenses

⁴ “‘Prescription’ means the written or verbal directions or instructions as specified by a physician or optometrist licensed by any state for preparing an optical aid for a patient.” R.C. 4725.40(H).

match the patient's prescription for contact lenses"). Presumably, when a licensed spectacle dispensing optician orders prepackaged soft contact lenses through a computer, the licensed spectacle dispensing optician accesses a database that contains the descriptions and specifications of the available prepackaged soft contact lenses, reviews the descriptions and specifications, and selects from the database a prepackaged box of soft contact lenses that matches the patient's prescription. There is no material difference between matching the information in a written prescription to the corresponding information on a package of soft contact lenses that is available in inventory and matching the same information in a written prescription to the corresponding information that is displayed or described on the computer's monitor.

R.C. 4725.411 does not require that prepackaged soft contact lenses be available in inventory when the licensed spectacle dispensing optician matches the prescription to the lenses' packaging. Therefore, that a box of prepackaged soft contact lenses is not in the hands of the licensed spectacle dispensing optician at the time a prescription is filled is not significant. *See generally Fed. Gas & Fuel Co. v. City of Columbus*, 96 Ohio St. 530, 541, 118 N.E. 103 (1917) ("[w]hen a statute clearly confers a grant of power to do a certain thing, without placing any limitations as to the manner or means of doing it, certainly the grantee of such power is naturally and necessarily vested with a wide discretion to do such incidental things as are reasonably and manifestly in the grantee's interests"); *accord* 2014 Op. Att'y Gen. No. 2014-006, at 2-42.

Accordingly, we conclude that R.C. 4725.411 authorizes a licensed spectacle dispensing optician to use a computer to order prepackaged soft contact lenses at the time a written prescription is presented to the optician.

Conclusions

In sum, it is our opinion, and you are hereby advised that:

1. The language of 11A Ohio Admin. Code 4726-7-02(D) that "[l]icensees applying for their first initial renewal shall be exempt from reporting continuing education credit" is invalid because it conflicts with the language in R.C. 4725.51(A) that each renewal application "shall contain evidence that the applicant has completed continuing education within the immediately preceding one-year period."

2. R.C. 4725.411 authorizes a licensed spectacle dispensing optician to use a computer to order prepackaged soft contact lenses at the time a written prescription is presented to the optician.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General