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OPTOMETRY, OHIO STATE BOARD OF—IN POSSESSION OF LICENSING POWERS—SUBJECT TO RULES AND PROVISIONS OF ADMINISTRATIVE PROCEDURE ACT—MUST FOLLOW PROCEDURE PRESCRIBED FOR ADOPTION, FILING AND PROMULGATION OF ITS RULES AND REGULATIONS.

SYLLABUS:

The Ohio State Board of Optometry, by virtue of its possession of licensing powers, is subject to the rules and provisions of the administrative procedure act and must, therefore, follow the procedure prescribed therein for the adoption, filing and promulgation of its rules and regulations.

Columbus, Ohio September 29, 1950

Harry J. Hanold, O. D., Secretary, Ohio State Board of Optometry
Lima, Ohio

Dear Sir:

This will acknowledge your letter of recent date in which you request my opinion as follows:

“Kindly advise if the filing of rules for the Ohio State Board of Optometry comes under the administrative procedure act.”

Section 154-62, General Code, sets out in general terms what officials, boards, departments, etc., are to come within the context of the word “agency” as used in the provisions of the administrative procedure act.

This section reads in part as follows :

“* * * ‘Agency’ means and includes except as hereinafter limited, any official, board or commission having authority to promulgate rules or make adjudications in the bureau of unemployment compensation, the state civil service commission, the department of industrial relations, the department of liquor control, the department of taxation, the industrial commission, the functions of any administrative or executive officer, department, division, bureau, board or commission of the government of the state of Ohio specifically made subject to the provisions of the administrative procedure act, and the licensing functions of any administrative or executive officer, department, division, bureau, board or commission of the government of the state of Ohio having the authority or responsibility of issuing, suspending, revoking or cancelling licenses. * * *”

Section 154-63, General Code, makes “agencies” as defined in Section 154-62 above, amenable to the procedure prescribed for the adoption of rules in the administrative procedure act. It provides as follows :

“Every agency authorized by law to adopt, amend or rescind rules shall comply with the procedure prescribed in this act for the adoption, amendment or rescission of rules. Unless otherwise specifically provided by law, the failure of any agency to comply with such procedure shall invalidate any such rule or amendment hereafter adopted, or the rescission of any rule. No agency shall adopt any rule which is inconsistent with the constitution of the United States, the constitution of the state of Ohio or any law of this state.”

It will be noted that “agency” as defined above in Section 154-62, General Code, includes the following three categories :

1. Officials, boards or commissions having authority to promulgate rules or make adjudications in the bureau of unemployment compensation, the state civil service commission, the department of industrial relations, the department of liquor control, the department of taxation, and the industrial commission.

2. The functions of any officer, department, division, etc., of the state government specifically made subject to the provisions of the administrative procedure act.

3. The licensing functions of any officer, department, division, board, etc., of the state government having authority to issue, suspend, revoke or cancel licenses.

Obviously the Board of Optometry does not fall within the first

category and an examination of the sections of the General Code pertaining to the Board of Optometry (Sections 1295-21 to 1295-35, inclusive) reveals that the board is not "specifically" made amenable to the provisions of the administrative procedure act, and hence does not fall within the second category. Therefore, it is apparent that if the board is to be subject at all to the provisions of the administrative procedure act that it must come within the third category.

That a division, board, etc., falling within this third category is subject to the provisions of the administrative procedure act in the adoption, amendment and promulgation of its rules, is borne out by the case of *Motor Insurance Corporation v. Superintendent of Insurance*, 80 O. A. 505, wherein the Court of Appeals of Franklin County held the Department of Insurance to be amenable, by virtue of its possession of licensing functions, to the procedure advanced in the administrative procedure act for the adoption, amendment and promulgation of rules.

Hence it is obvious that if the Ohio State Board of Optometry has the power to issue, suspend, revoke or cancel licenses, that it comes within the term "agency" and that the board is, therefore, subject to the terms and provisions of the administrative procedure act in the adoption and promulgation of rules by the provisions of Section 154-63, *supra*.

Section 1295-24, General Code, reads in part as follows :

"The board shall make rules and regulations governing the practice of optometry and such other rules as may be necessary to carry out the provisions of this chapter; provided, however, that it shall require the concurrence of a majority of the members of the board to grant or to revoke a license."

It is apparent from a reading of the above quoted portion of Section 1295-24 and the other sections of the General Code pertaining to the Ohio State Board of Optometry (Sections 1295-21 to 1295-35, inclusive) that the board has the power to issue, suspend, revoke or cancel licenses. As such there can be little doubt but that the board is an "agency" as is defined in Section 154-62, *supra*, and that it is, consequently, subject to the procedure prescribed by the administrative procedure act for the adoption, amendment or rescission of its rules.

Additional support for such a conclusion is to be found in the fact that former Section 1295-31a of the General Code which provided a procedure for appeal from the orders of the Board of Optometry refusing to grant or suspending or revoking licenses, was repealed by the same act

wherein the administrative procedure act was adopted. Thus it would clearly seem that the legislature intended the administrative procedure act to cover the Board of Optometry and that Section 1295-31A was no longer necessary.

Accordingly it is my opinion that the Ohio State Board of Optometry, being subject to the rules and provisions of the administrative procedure act, must follow the procedure set out in the act for the adoption, filing and promulgation of its rules and regulations.

Respectfully,

HERBERT S. DUFFY,
Attorney General.