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CLEARINGHOUSE RULE 97-022

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

1. Statutory Authority

Generally, ch. 449, Stats., prohibits unlicensed persons from practicing optometry, as it is defined in s. 449.01 (1), Stats. Section Opt 1.03, as amended by the rule, would authorize an unlicensed person to perform “remediable procedures” under the immediate supervision of an optometrist. The rule’s definition of “remediable procedure” in s. Opt 1.02 (5m), however, is so vague as to make it impossible to determine whether the rule’s intent is to allow unlicensed persons to perform functions that fit squarely within the definition of the practice of optometry so as to be prohibited by ch. 449, Stats.

One might presume that since there does not appear to be any statutory authority to delegate functions of the practice of optometry to unlicensed persons, “remediable procedures” would not include functions that are within the practice of optometry. It is noted, however, that the definition in no way attempts to exclude activities included in the practice of optometry. Thus, it seems that the possibility exists that a “remediable procedure” could include certain functions reserved for licensed optometrists of the practice of optometry, and that the rule would appear to be delegating, or authorizing the delegation, of optometric practices to unlicensed persons without the requisite statutory authority.

Accordingly, the definition of “remediable procedure” ought to be clarified in the rule, and the statutory authority for allowing unlicensed persons to practice those procedures should be reviewed in light of the definition of the practice of optometry and the prohibitions in ch. 449, Stats., relating to unlicensed persons practicing optometry. The statutory authority question especially needs to be addressed in light of the fact that another chapter of the statutes grants

specific authority for dentists to delegate remediable procedures. [s. 447.065, Stats.] There is no similar provision in the chapter of the statutes that governs optometry.

2. Form, Style and Placement in Administrative Code

a. SECTION 20 of the rule appears to renumber s. Opt 3.10 (intro.) as s. Opt 3.10 (1). The treatment clause should reflect this treatment. In addition, it does not appear that the first clause of sub. (1) is necessary. Accordingly, the clause beginning with “In” and ending with the comma after “examination” should be deleted. If necessary, the remaining clause could be amended by inserting “received on the practical examination” after the word “grades.”

b. SECTION 23 of the rule appears to create a note. The creation of the note should be identified in the treatment clause.

c. The phrase “satisfies all of the following criteria,” or a similar phrase, should be inserted immediately before the colon in s. Opt 4.01 (intro.).

d. In s. Opt 4.01 (4) and (6), the punctuation mark and the word “and,” as found in the current administrative code provisions, are missing. If the rule intends to delete these items, they need to be shown with the appropriate strike-throughs. In addition, other provisions of the rule amend punctuation marks in various lists., e.g., changing the semicolons to periods in s. Opt 4.02 (1) (a) to (c). Why was this not done with all of the subsections of s. Opt 4.01?

e. Because SECTION 31 of the rule creates s. Opt 5.02 (intro.), the content of the (intro.) should not be underscored.

4. Adequacy of References to Related Statutes, Rules and Forms

a. Section Opt 3.04 refers to a violation of “rules of conduct” of an examination. Where are these rules? Are these rules in the administrative code or are they distributed with the examination? The rule should be clarified.

b. Section Opt 3.07 (2), and other provisions of the rule, refer to a grade “determined by the board to represent minimum competence to practice optometry.” Where are these grades determined? Are these grades determined in another rule provision? If so, an appropriate cross-reference should be provided. If the grades are not determined by rule, it would be useful to include in the rule or, at a minimum, in a note to the rule, how these grades are determined and where those seeking to take the exam can determine what a passing grade will be.

c. It appears that the phrase “in this chapter” should be inserted after the word “rules” in s. Opt 5.01.

d. In s. Opt 5.02 (1m), “(1) (b)” should be inserted before “Stats.”

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. Section Opt 3.02 (1) requires that an applicant for a licensure examination file an application with the board. The application must include the appropriate fee and certain other

items. The rule requires the application also to include a transcript and verification of the applicant's successful completion of a national examination. However, those two items are required to be submitted directly by the appropriate college or board having control of those items. Thus, it is not clear how the applicant is supposed to submit a completed application if part of the application must be submitted by other entities. Perhaps the rule could be amended to require that the applicant cause the entities with control over those items to submit the materials directly to the board. In the alternative, the rule could be clarified to provide that: (1) the application form needs to be submitted; (2) an appropriate fee must accompany the application; and (3) other required items of documentary evidence must be submitted by the entities with control over the items before the applicant's application will be considered. This comment also applies to s. Opt 4.02.

b. In the Note created by SECTION 23 of the rule, the phrase "approved college of optometry college" is used. One occurrence of the word "college" is not needed and should be deleted.

c. The phrase "Grossly incompetent" in the last sentence of s. Opt 5.02 (1m) should be in quotation marks.

d. In s. Opt 5.02 (1), the word "overnight" should not appear in parentheses. [s. 1.01 (6), Manual.] Perhaps the word "or" could be inserted between the word "wear" and "overnight." In the alternative, if "extended wear" means overnight, "extended wear" should be defined as such in the rule and the use of the word "overnight" in s. Opt 5.02 (1) would be unnecessary.

e. In s. Opt 5.04, the rule seems to consider the phrase "in printed form" to be the same as a communication. Although this may be true in most cases, the clarity of the rule would be enhanced if consistent terminology were employed. For example, if the prohibition is on the title "doctor" being used in written communications, then that should be made clear. However, if the prohibition is on any use of the title "doctor" without the appropriate disclaimer, then that should be clarified.

f. In s. Opt 5.10 (1) (intro.), the phrase "to fail" should be inserted after the word "optometrist" to correspond with the current rule provision.

g. In s. Opt 5.12, the word "remedial" should be "remediable" based on s. Opt 1.03.

h. In s. Opt 5.15, the term "(title)" need not appear.