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FLORIDA | Board of Optometry

MEETING MINUTES

July 15, 2015

West Palm Beach Marriott
1001 Okeechobee Boulevard
West Palm Beach, Florida, 33410



Timothy Underhill, O.D.
Chair

Stuart Kaplan, O.D.
Vice-Chair

Anthony Spivey, DBA
Executive Director

1 **General Board Business started: 9:03 a.m.**

2
3 I. The meeting was called to order by Dr. Underhill, Chair. Those present for all or part of the meeting included the following:

4
5 **MEMBERS PRESENT:**

6 Timothy Underhill, O.D. Chair
7 Stuart Kaplan, O.D., Vice Chair
8 Christopher King, O.D.
9 Tamara Maule, O.D.
10 Carl Spear, O.D.
11 Clarence R. Presnell, R.Ph.

5 **STAFF PRESENT:**

6 Anthony Spivey, DBA, Executive Director
7 Joseph Lesho, Program Operations Administrator
8 Savada Knight, Regulatory Specialist II

12
13 **BOARD COUNSEL:**

14 Diane Guillemette, Assistant Attorney General
15 Office of Attorney General

16
17 **COURT REPORTER:**

18 For the Record
19 (850) 222-5491

20
21 *Please note the minutes reflect the actual order agenda items were discussed and may differ from the agenda outline.*
22 *AUDIO from this meeting can be found online: <http://floridasoptometry.gov/>*

23
24 **Section I began: 9:05 a.m.**

25
26 **II. MINUTES:**

27
28 **a. February 27, 2015 – Teleconference Call**

29
30 **Discussion:**

31 Dr. Underhill noted that on page 2, line 41, “Elliot Roth, D.O.” should be changed to “Elliot Roth, O.D.”

32
33 **Action:** Motion to approve the minutes with the noted correction was made by Dr. King. Seconded by Dr. Spear.
34 Vote: 6 yeas / 0 opposed; motion carried

35
36 **b. April 8, 2015 – Teleconference Call**

37
38 **Action:** Motion to approve the minutes as written was made by Dr. King. Seconded by Dr. Kaplan.
39 Vote: 6 yeas / 0 opposed; motion carried

40
41 **c. June 2, 2015 – Rules Committee Meeting**

42
43 **Action:** Motion to approve the minutes as written was made by Dr. Kaplan. Seconded by Dr. Spear.
44 Vote: 6 yeas / 0 opposed; motion carried

45
46 **Section II concluded: 9:07 a.m.**

47 **Section III began: 9:07 a.m.**

48
49 **III. PETITIONS:**

50
51 **a. Declaratory Statement:**

52
53 **i. Kirk Fallin, O.D.**

54 Petitioner was present, and was not represented by counsel.

55
56 On June 4, 2015, the board office received a Petition for Declaratory Statement from Dr. Fallin pertaining to s.
57 463.009, F.S. – Supportive Personnel. Specifically, the petition asked whether or not a licensed optometrist can
58 indirectly supervise a licensed optician in an optical establishment.

1
2 **Discussion:**

3 Dr. Fallin discussed his petition in more detail, explaining that he intends to open his own practice and would
4 like to know if he can hire an optician to work under indirect supervision if the optician only performs optician
5 duties.
6

7 Dr. Underhill stated that s. 463.009, F.S. may not be the right statute for the petition because “supportive
8 personnel” does not apply to licensed opticians. Dr. Kaplan agreed. Dr. Fallin explained that he believed
9 “supportive personnel” referred to individuals not licensed under chapter 463.
10

11 Ms. Guillemette advised that the board cannot issue a statement regarding the scope of practice of opticians, but
12 that they can issue a statement regarding an optometrist’s supervisory responsibilities.
13

14 After additional discussion, Dr. Spear made a motion to issue a declaratory statement saying that the optometrist
15 would not be held liable for the actions of the optician as long as the optician was working within his or her
16 scope of practice. The motion was not seconded. After more discussion, Dr. Spear withdrew the motion, but
17 stated that Dr. Fallin should still receive some type of response.
18

19 **Action:** Motion to dismiss the declaratory statement because the board cannot issue a statement as to the duties
20 of an optician was made by Dr. Kaplan. Seconded by Dr. King.

21 Vote: 6 yeas / 0 opposed; motion carried
22

23 **ii. John Wachter, O.D.**

24 Petitioner was present, and was represented by counsel, Bruce Lamb, Esq.
25

26 On February 26, 2015, the board office received a Petition for Declaratory Statement from Dr. Wachter
27 pertaining to s. 456.054, F.S. – Kickbacks Prohibited. Specifically, the petition asked whether or not a licensed
28 optometrist can receive a portion of the proceeds received by an ophthalmologist for the cost of enhanced intra-
29 ocular lenses placed during cataract surgery, and whether or not a licensed optometrist may receive payment
30 from an ophthalmologist for co-managing a patient referred to the ophthalmologist for cataract surgery.
31

32 **Discussion:**

33 Dr. Underhill asked whether the payments specified in the petition have already occurred, or if the question is
34 being asked for future consideration. Mr. Lamb clarified that it had not yet occurred.
35

36 Dr. Spear then asked whether or not the Board of Medicine has addressed the issue. Mr. Lamb and Ms.
37 Guillemette each stated that their research could not produce any statements from the Board of Medicine
38 regarding this issue.
39

40 After additional discussion, it was determined that as long as the co-management provisions outlined in s.
41 463.0135, F.S., were followed, the payments would not be considered a kickback. Dr. Underhill also stated that
42 in order to eliminate suspicion of kickbacks, each practitioner should bill for his or her own services, rather than
43 having the ophthalmologist charge for the entire procedure and issuing payment to the optometrist.
44

45 Mr. Presnell stated for the record that he knows Mr. Lamb personally. Ms. Guillemette asked if their personal
46 relationship would affect his ability to deliberate on the matter, to which he responded no.
47

48 After additional discussion, a motion was made.
49

50 **Action:** Motion to issue a declaratory statement saying that as long as the patient is co-managed in compliance
51 with s. 463.0135, F.S., and the patient is presented with an itemized bill explaining the services rendered by
52 each practitioner, then the kickback provision of s. 456.054, F.S., would not be triggered was made by Dr.
53 Maule. Seconded by Dr. Kaplan.

54 Vote: 6 yeas / 0 opposed; motion carried
55

55 **Section III concluded: 9:59 a.m.**

56 **The board took a break at 9:59 a.m.**

57 **Section VI began: 10:12 a.m.**
58

1 VI. GENERAL BUSINESS

2
3 c. Board Counsel Report:

4
5 **Untimed Item: North Carolina Board of Dental Examiners v Federal Trade Commission**

6 Ms. Guillemette explained the ruling on the North Carolina Board of Dental Examiners v Federal Trade
7 Commission (FTC), and informed the board that there may be changes to the make-up of the state regulatory
8 boards in the future as a result of the ruling. She then told the board that suits have been filed in three other
9 states against regulatory boards, and the outcome of those cases could potentially open up individual board
10 members to litigation.

11
12 Ms. Guillemette then went on to discuss a letter that she received from the Joint Administrative Procedures
13 Committee (JAPC) regarding the proposed changes to Rule 64B13-4.001, F.A.C. She also expressed concern
14 regarding the 7 year examination limit because even though JAPC did not address it in their letter, she was
15 worried that it may open them up to an anti-trust suit similar to North Carolina Board of Dental Examiners v
16 FTC.

17
18 After discussion regarding both the merits and drawbacks of the 7 year provision, John Griffin, Esq. spoke out
19 in support of the provision on behalf of the Florida Optometric Association.

20
21 Additional discussion ensued, and Ms. Guillemette said she would respond to the letter from JAPC.

22
23 i. Rules Status Report – June 2015

24
25 1. Comments from Dr. King regarding:

26
27 a. Rule 64B13-4.002, F.A.C.

28 **Action:** Motion to approve the proposed language as presented in the agenda materials was made
29 by Dr. King. Seconded by Dr. Maule.
30 Vote: 6 yeas / 0 opposed; motion carried

31
32 **Action:** Motion to find that the proposed changes would not require a Statement of Estimated
33 Regulatory Cost was made by Dr. King. Seconded by Dr. Maule.
34 Vote: 6 yeas / 0 opposed; motion carried

35
36 b. Rule 64B13-4.003, F.A.C.

37 Ms. Guillemette recommended that this rule be repealed.

38
39 **Action:** Motion to repeal the rule was made by Dr. King. Seconded by Dr. Kaplan.
40 Vote: 6 yeas / 0 opposed; motion carried

41
42 **Action:** Motion to find that the proposed changes would not require a Statement of Estimated
43 Regulatory Cost was made by Dr. Kaplan. Seconded by Dr. Spear.
44 Vote: 6 yeas / 0 opposed; motion carried

45
46 **The board took a break at 11:59 a.m.**

47 **Section VI resumed: 12:16 p.m.**

48
49 c. Rule 64B13-4.006, F.A.C.

50 **Action:** Motion to approve the new language as presented and delete the existing language was
51 made by Dr. Kaplan. Seconded by Dr. Maule.
52 Vote: 6 yeas / 0 opposed; motion carried

53
54 **Action:** Motion to find that the proposed changes would not require a Statement of Estimated
55 Regulatory Cost was made by Dr. Kaplan. Seconded by Dr. Maule.
56 Vote: 6 yeas / 0 opposed; motion carried

57
58 ii. Delegation of Review of Annual Regulatory Plan

1 Dr. Underhill recommended that Dr. Kaplan be delegated to assist Ms. Guillemette with the Annual Regulatory
2 Plan.
3

4 **Action:** Motion to delegate Dr. Kaplan to assist with the Annual Regulatory Plan was made by Dr. Spear.
5 Seconded by Dr. Maule.
6 Vote: 6 yeas / 0 opposed; motion carried
7

8 **Section VI concluded: 12:19 p.m.**

9 **Section III resumed: 12:19 p.m.**

10
11 **III. PETITIONS:**

12
13 **b. Variance/Waiver:**

14
15 **i. Kate Lanier**

16 Petitioner was not present, and was not represented by counsel.

17
18 On June 5, 2015, the board office received a petition from Kate Lanier requesting a variance/waiver from Rule
19 64B13-4.001, F.A.C. The petition requests that the board accept a passing score on the National Board of
20 Examiners in Optometry (NBEO) Continued Professional Development in Optometry (CPOD) or Advanced
21 Competence in Medical Optometry (ACMO) examinations taken within the year of the date of application for
22 Optometrist licensure in lieu of parts I-III of the NBEO examination within the last 7 years.
23

24 **Discussion:**

25 Ms. Guillemette emphasized to the board that if they deny a petition, to be sure that they articulate the facts as
26 to why the standards were not met. She then reminded them of the standards for granting a petition.
27

28 Dr. King pointed out that the petition specifically states that there is no hardship and that the principles of
29 fairness have not been violated.
30

31 Dr. Underhill stated that he was not familiar with the other examinations that the petitioner is requesting to take
32 as a substitute for the national examination. Dr. King explained that NBEO's website describes them as similar
33 to TMOD section of Part II of the national examination.
34

35 After additional discussion, a motion was made.
36

37 **Action:** Motion to deny the Petition for Waiver/Variance based on the petitioner's statement that the application
38 of the rule does not create a substantial hardship or violate the principles of fairness, and because the substitute
39 examination offering is not equivalent to parts I-III of the national examination was made by Dr. King.

40 Seconded by Dr. Maule.

41 Vote: 6 yeas / 0 opposed; motion carried
42

43 **c. Board Action:**

44
45 **i. Dara Clein Martin, O.D.**

46 Petitioner was present, and was not represented by counsel.

47
48 On December 31, 2014, the board office received a petition from Dr. Martin requesting a waiver/variance from
49 Rule 64B13-4.001(2), F.A.C., requesting that the board waive the 7 year examination requirement. The petition
50 was heard by the board at the February 27, 2015 meeting, and on March 11, 2015 a Notice on Petition for
51 Variance and Waiver was filed informing Dr. Martin that the petition was denied. On March 30, 2015, the board
52 office received a Petition for Request of Hearing from Dr. Martin, requesting that the board reconsider the
53 denial of her Petition for Waiver/Variance.
54

55 **Discussion:**

56 Ms. Guillemette stated that if there are material facts in dispute, then the appeal of the initial denial may be
57 better served going before DOAH. Dr. Underhill stated that there are no facts in dispute.
58

1 Dr. Spear made a motion to find that no facts were in dispute, which was seconded by Dr. King.

2
3 Mr. Presnell asked if the board could stop the discussion if it was discovered that there were disputed material
4 facts. Ms. Guillemette confirmed that they could.

5
6 Dr. King suggested that the board allow the petitioner to speak before making the determination. Dr. Spear
7 withdrew the motion on the floor.

8
9 Dr. Underhill stated that he could not see how the rule has created the hardship, and that the underlying
10 principle of statute would not be met if the rule were to be waived.

11
12 After additional discussion, Dr. Spear moved to table the discussion to allow Dr. Martin time to contact NBEO
13 and gather more details about their examination dates and processes. No vote was necessary.

14
15 **Section III concluded: 12:56 p.m.**

16 **Section IV began: 12:56 p.m.**

17
18 **IV. RATIFICATION LISTS:**

19
20 **a. Licensure:**

21
22 **i. Optometrist**

23 Motion to ratify optometrist license numbers 5025 through 5063 was made by Dr. Kaplan. Seconded by Dr.
24 King.

25 Vote: 6 yeas / 0 opposed; motion carried

26
27 **b. Continuing Education:**

28
29 **i. CE Providers and Courses Approved by Committee Chair**

30
31 **Discussion:**

32 The board discussed changing the approval process for jurisprudence CE courses so that they are required to be
33 approved prior to the course offering.

34
35 **Action:** Motion to change the Delegation of Authority of jurisprudence CE approval from the department to the
36 board was made by Dr. King. Seconded by Dr. Maule.

37 Vote: 6 yeas / 0 opposed; motion carried

38
39 **Action:** Motion to approve CE Providers and Courses Approved by Committee Chair and Board Staff was
40 made by Dr. Maule. Seconded by Dr. Kaplan.

41 Vote: 6 yeas / 0 opposed; motion carried

42
43 **ii. CE Providers and Courses Approved by Board Staff**

44
45 These providers and courses were captured in the motion under Section IV(b)(i).

46
47 Before moving on to the next section, Dr. Maule brought up an issue for discussion. She asked the board for their
48 opinions on a scenario brought to her by a CE provider, who asked whether or not a licensee could obtain CE credit for
49 observing surgeries at an ophthalmology practice. After discussion, the board decided that the observance of surgeries
50 alone does not meet the requirements of the CE rule, but if the observance occurred as part of a program that does meet
51 the rule requirements, then it would be allowed.

52
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54 **Section IV concluded: 1:17 p.m.**

55 **Section VI resumed: 1:17 p.m.**

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57 **VI. GENERAL BUSINESS:**

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d. **Committee Reports:**

ii. **Continuing Education – Dr. Maule**

1. **Renewal Report** – Dr. Maule presented the renewal report to the board as an FYI.

2. **Optional Reporting Cycle Final Report** – Dr. Maule explained that the most recent renewal was the last optional reporting period in CE Broker. She stated that she believes the system is working well.

i. **Budget – Mr. Presnell:** Mr. Presnell asked if the board could be presented with a budget, including future projections. Dr. Spivey stated that he had already put in a request to the finance and accounting section to obtain this information for each board meeting.

a. **Chair/Vice Chair Report**

i. **Future Agenda Items:** Nothing to report

ii. **Old Business:** Nothing to report

iii. **New Business:** Nothing to report

iv. **Discussion – Qualifications of Providers giving Jurisprudence CE:** This issue was discussed during the CE Committee report.

Section VI concluded: 1:22 p.m.

Section III resumed: 1:22 p.m.

III. PETITIONS:

c. **Board Action:**

i. **Dara Clein Martin, O.D.**

After Dr. Martin finished speaking with a representative at NBEO, the board continued hearing her petition.

Dr. Maule suggested issuing her a license provided she meets certain contingencies. Ms. Guillemette informed her that licenses issued in such a manner cannot be granted until the contingencies have been met.

Dr. Underhill expressed concern that issuing the license would establish a bad precedent. Ms. Guillemette explained that petitions for waiver/variance are taken on a case-by-case basis, so precedence does not necessary become a factor.

After additional discussion, a motion was made.

Action: Motion to grant the Petition for Waiver/Variance from rule 64B13-4.001(2), F.A.C. and approve the application for license under the condition that she take and pass the TMOD, and Parts III and IV of the national examination within one year of its issuance made by Dr. Kaplan. Seconded by Dr. Maule.

Vote: 4 yeas / 2 opposed (Underhill, Spear); motion carried

Dr. Martin agreed to withdraw her application for licensure after the petition was initially denied at the March 2015 meeting, so in light of the new motion, she requested to reinstate her application and agreed to waive the 90-day clause.

Section III concluded: 1:50 p.m.

Section V began: 1:50 p.m.

V. PROSECUTION REPORT:

Nothing to report

1 Dr. Underhill stated that he would like an explanation for the lack of disciplinary cases being brought before the board, in
2 addition to a detailed breakdown of where the cases are being dismissed. He also asked that staff determine whether or not
3 Dr. McClain has been reviewing every case. Board staff agreed to discuss the issue with prosecution.
4

5 **Section V concluded: 2:00 p.m.**

6 **Section VI Resumed: 2:00 p.m.**

7
8 **VI. GENERAL BUSINESS:**
9

10 **a. Chair/Vice Chair Report:** These items were discussed during an earlier portion of the meeting
11

12 **b. Executive Direct Report:**

13 **i. Delegation of Authority**

14 Dr. Spivey presented the board with the 2015-2016 Delegation of Authority
15

16 **Action:** Motion to accept the Delegation of Authority with the addition of delegating jurisprudence CE course
17 approval to the board was made by Dr. King. Seconded by Dr. Kaplan.
18

19 **Vote:** 6 yeas / 0 opposed; motion carried
20

21 **ii. Discussion – Annual Review of Course and Exam (FOA and FMA)**

22 Dr. Spivey presented letters from both FOA and FMA in support of approval of the course and exam.
23

24 **Action:** Motion to approve the course and exam was made by Dr. Kaplan. Seconded by Dr. Maule.
25

26 **Vote:** 6 yeas / 0 opposed; motion carried
27

28 **iii. Compliance Report**

29 Dr. Spivey presented the board's compliance report as an FYI.
30

31 **c. Board Counsel Report:** These items were discussed during an earlier portion of the meeting
32

33 **d. Committee Reports:**

34 **i. Budget – Mr. Presnell:** This item was discussed during an earlier portion of the meeting
35

36 **ii. Continuing Education – Dr. Maule:** These items were discussed during an earlier portion of the meeting
37

38 **iii. Complaints, Investigations, and Enforcement – Dr. Kaplan:** Nothing to report
39

40 **iv. Disciplinary Compliance:** Nothing to report
41

42 **v. Examination – Dr. King:** Dr. King discussed the transition of the Florida Laws and Rules examination from
43 the department to NBEO.
44

45 **vi. FOA – Dr. Underhill:** Nothing to report
46

47 **vii. Healthiest Weight – Dr. King:** Dr. King told the board that the annual summit for Healthiest Weight will be
48 held on September 23, 2015, but he will not be able to attend.
49

50 **viii. Legislative – Dr. Underhill:** Nothing to report
51

52 **ix. Probable Cause – Mr. Presnell**

53 **1. Stats:** Nothing to report
54

55 **x. Rules – Dr. Kaplan:** Dr. Kaplan stated that he was working to assist the department with the 15% rule
56 reduction.
57
58

1 xi. **Unlicensed Activity – Dr. Kaplan:** Nothing to report
2

3 **Section VI concluded: 2:12 p.m.**

4 **Section VII began: 2:12 p.m.**
5

6 **VII. NEXT MEETING DATE:**
7

8 a. **December 4, 2015 – Orlando**
9

10 **Section VII concluded: 2:12 p.m.**

11 **Section VIII began: 2:12 p.m.**
12

13 **VIII. ADJOURNMENT**
14

15 **The meeting was adjourned at 2:12 p.m.**