

1 **May 13, 2017**
2 **Rules Workshop 64B13-4.001 Examination Requirements**
3 **Telephone Conference Call**
4

5 **CALL TO ORDER (Roll Call):**

6 Dr. Anthony Spivey called the roll. All Board members are present.
7 Dr. Spivey turned the meeting over to Dr. Stuart Kaplan.
8

9 **MEMBERS PRESENT:**

10 Stuart Kaplan, O.D., Chair
11 Tamara Maule, O.D., Vice-Chair
12 Stephen Kepley, O.D.
13 Christopher King, O.D., F.A.A.O.
14 Carl Spear, O.D.
15 John Griffin, J.D.

STAFF PRESENT:

Dr. Anthony Spivey, DBA, Executive Director
Gail Curry, Program Operations Administrator
Savada Knight, Regulatory Supervisor

16
17 **BOARD COUNSEL:**

18 Diane Guillemette, Assistant Attorney General
19 Office of Attorney General
20

21 **PROSECUTION COUNSEL:**

22 Chris Dierlam, Assistant General Counsel
23 Department of Health, Office of the General Counsel
24

25 **COURT REPORTER:**

26 For the Record
27 (850) 222-5491
28

29 Dr. Kaplan asked for audience attendance.
30

31 **Audience Attendance:**

32 Leonard Carson, General Counsel for Carson & Atkins
33 Representing the Florida Optometry Association
34 Mia McKown, Colin & Knight
35 Dr. Tammy Whittman
36 Dr. Kate Lanier
37 Dr. Jason Moore
38

39 Rule 64B13-4.001 – Examination Requirements
40

41 Dr. Kaplan will give each speaker 10 minutes to address the Board.
42

43 Mr. Carson is with the law firm of Carson & Atkins. He is representing the Florida Optometry Association.
44 Mr. Carson made a presentation in favor of retaining the 7 year language in Rule 64B13-4.001. He stated that
45 for the protection and safety of the public it is important that anyone seeking an Optometry license in Florida
46 demonstrate that they possess the minimum level of knowledge necessary to practice safely. The best way to
47 determine whether the applicant possesses the required level of knowledge is to require them to achieve a
48 passing grade on the examination that is tailored to cover all scope of practice in the State of Florida Statutes.
49 The examination should be taken within a reasonable time frame. For the results of the examination to be a
50 useful measure of minimum knowledge to practice within the scope of practice the examination must be taken
51 at a time sufficiently recent to be confident that the examination covers current means and measures of the
52 practice and current Laws and Regulations. Seven years seems to be close to the maximum amount of time.

1 Consistent with the purpose of the Statute, it is consistent with logic and common sense and it is necessary to
2 protect the consumers. It is consistent with several well established rules of statutory construction. In the many
3 years rule that there has been 5 year and 7 year language in the subject rule the Joint Administrative
4 Procedures Committee or JAPC, has neither criticized nor objected to the 5 year or 7 year language. JAPC's
5 failure to object to the language that has been in effect for many years is clear evidence that JAPC is of the
6 view that there is statutory authority for the 7 year language. Long standing rule language that has passed
7 JAPC's scrutiny has served a useful propose consistent with the purposes of the authorizing statute is not the
8 type of language that needs to be deleted or amended. Those that are in favor of deletion of the 7 year
9 language argue that the language is anti-competitive because it requires that they applicants that took the
10 exam 8 or more years prior to application for a Florida license must take the exam again. What that language
11 overlooked is that while the present language is an inconvenience to those who took the exam 8 or more years
12 ago the present language provides a specific benefit to all who have taken the exam within 7 years of their
13 application date. That specific benefit might well be at risk if the 7 year language was deleted from the rule.
14 The 7 year language does have an anti-competitive effect to those who took the exam 8 or more years prior
15 to their application for Florida licensure. It is important to note that not all anti-competitive effects are
16 prohibited by the anti-trust laws. With or without state action anti-trust and Unities State action that has an
17 anti-competitive effect is permissible if there is a reasonable basis for the state action. It is surely reasonable
18 for the state to want to have reasonable assurance that license examination measureable to practice under
19 current circumstances. Therefore it is mostly unlikely that state action for that purpose would fail to pass the
20 FDC Rule of Reason Method of considering whether actions with anti-competitive effect are never the less
21 reasonable. As noted by those who advocate volition of the 7 year language the statute being implemented,
22 463.006 F.S. contains no language stating when the licensure examination may or must be taken. Read
23 literally the statute provides that as a prerequisite to taking the licensure exam each applicant must have
24 completed the application forms and must have remitted several specified fees related to licensure. Stated
25 otherwise the literal language of the subject statute requires that each applicant must complete the application
26 forms and remit the required fees before the department will administer the licensure and certification
27 examination. An implementation of the literal statutory language would be much more anti-competitive than the
28 current 7 year rule language because under the literal statutory language no applicant would be allowed to rely
29 on any examination taken prior to the gate of the state of the Florida application. Consistent with the numerous
30 rules of statutory construction administrative agencies may interrupt and apply statutes in ways that appear to
31 be facially inconsistent with the literal language of the statute. This is especially the case when the agency
32 interrupts more consistent with the purpose of the statute then the literal words of the statute. A number of
33 these rules of statutory construction are discussed in my recent presentation. Other rules of construction are to
34 the effect that the legislators deemed to know how the agency interrupts statutes and if a statute is reenacted
35 after agency reinterpretation. The legislators presume to have adopted the agency interpretation. Application of
36 the rules of statutory construction also supports the validity of the 7 year language in the current rule. The
37 obvious purpose of section 463.006, F.S. is protect the consuming public by acquiring all that seek to practice
38 Optometry in the State of Florida to pass an examination that shows they have the minimum knowledge
39 necessary to practice safely in the current environment. It is always the legislative goal to impose the least
40 restrictive requirements to accomplish the legislative purpose. It is reasonable to conclude, as the Board has
41 done with the 7 year language, that a relatively recent exam is more likely than not to measure adequative of
42 the applicants knowledge to work safely under current circumstances. And because the 7 year language is
43 much less restrictive in the literal statutory language it is to be preferred over the literal language because it is
44 consistent with legislative intent requiring no more than necessary to accomplish legislative purpose. If the 7
45 year language were to be deleted from the rule there would be nothing to prevent the Board or Appellate Court
46 from applying the literal salutary language in requiring all applicants to take a current exam after they have
47 filed their Florida application. Turning now some comments about the US Supreme Court decision in North
48 Carolina State Board of Dental Examination's versus FTC, the phrase strange and unusual is the kindest way
49 to describe that decision. The most significant impact of that decision is that it denies any State action anti-
50 trust annuity to all professional regulatory boards to which a majority of voting members or active practitioners
51 of the regulated profession or occupation unless the actions of the Board are actively supervised. In Florida the
52 majority of voting members of each board regulating professions or occupations are active participants in the

1 regulated professions or occupations. Florida has a statutory scheme that requires all agencies to comply with
2 extensive due process requirements that serves as a check against improper agency actions. Those
3 requirements have worked well for over 40 years. As a final check against agency misconduct all agencies
4 decisions in Florida are subject to Appellate Court review upon the request of any affected party. The extensive
5 due process requirements in effect in Florida are insufficient to constitute the active supervision required by the
6 North Carolina Dental decision. Further the active supervision required by the Supreme Court is totally
7 incompatible with the due process required by Florida law. Nevertheless while the North Carolina Dental
8 Examiner's case is a disappointment it is by no means a disaster. It is not a reason to suggest any major
9 changes in the way professions and occupations are regulated in Florida. Even in the absents of Parker type
10 State action anti-trust annuity it is still possible for professional regulatory boards in Florida to take effective
11 regulatory action with relatively little if any risk of running afoul of the anti-trust law. This is demonstrated in
12 some length in an FTC document that was issued in October of 2015. The guideline document makes specific
13 note of the fact that even without state action anti-trust annuity a regulatory board may assert defenses
14 ordinarily available to an anti-trust defendant. It also points out that reasonable restraint and competition do not
15 violate the anti-trust laws even where the economic interest of a competitor has been injured. The guidelines
16 also mention that ministerial non-discretionary acts of a regulatory board engaged in good faith implementation
17 of an anti-competitive statutory regime do not give rise to an anti-trust liability. Also notes, a disciplinary action
18 taken by a regulatory board effecting a single licensee will typically only have a minimal effect on competition.
19 The take away message from the FTC guidelines is that if a regulatory board acting in good faith takes
20 reasonable regulatory action by rule or by order and that action has an anti-competitive impact it is most
21 unlikely that the board or it's member have violated the anti-trust laws so long as the board's actions is
22 "reasonable restraint on completion". Just about any logical regulation that can be shown to have a reasonable
23 relationship to the protection to the consumers who use the services provided by the regulated professionals
24 will be found to be a reasonable restraint on competition. Even when economic interest of a competitor has
25 been injured. In response to arguments that exposing board members to the anti-trust liability would cause
26 people to be unwilling to serve as members of professional regulatory boards the Supreme Court included the
27 following in its opinion "And of course the State's may provide for the defense and indemnification of any team
28 members in the event of litigation." As suggested by the court the most simple and effective way to address
29 any of the potential consequences of the North Carolina Dental case would be to protect board member of the
30 consequences of the anti-trust litigation by paying their expenses incurred by defending themselves in such
31 litigation and by emdentifying them from any judgement that might be entered against them. Of course any such
32 defence or emdentifying would not be provided for board members that intentional harmed others or whose
33 conduct was motiavated by malice. Similar defense and emdentification is already being provided to a
34 number of state officers and employees in other circumstances where the performance of their duties exposes
35 them to litigation risks. It should be a simple matter to make similar protection to board members.

36
37 Will now take questions.

38
39 Mr. Carson asked if everyone had received the handout.

40
41 Dr. Kaplan called roll to be sure everyone had received the handout. All responded "yes".

42 Dr. Maule

43 Dr. King

44 Dr. Kepley

45 Dr. Spear

46 Mr. Griffin

47
48 Dr. Kate Lanier is in the process of applying for her Florida license and asked why all three parts of the
49 National exam are included? Why is Part I included?

50
51 Mia McKown, with Holland & Knight, would like to state, for the record, that the existing rule is an invalid
52 exercise of your statutory authority. Specifically 463.0062, F.S., provides that the Board may by rule substitute
53 a National examination as part or all of the examination and may by rule offer a practical examination in

1 addition to the written examination. She does agree with Association counsel that the statute in that language
2 does in fact purpose to protect the consumers. However the rules goes further than your statutory authority. It
3 is nothing more than economic protectionism. The board does not have the authority to establish a 7 year
4 criteria or any other perimeter. It can only establish a National exam. So not only is this rule subject to a
5 challenge it is going to be challenged if it is not fixed. Would like to see the deletion of the 7 year requirement.
6

7 She was asked to submit her presentation in writing as much of her statement could not be heard. She will
8 send it to Dr. Anthony Spivey and
9

10 John Griffin- Ms. McKown would you agree that the Board has the authority to require a state practical exam?
11

12 Ms. McKown- Yes, the statute that was read does give you the authority for a state or National exam.
13

14 John Griffin- Ms. McKown do you agree that the Board has the statutory authority to require an applicant to
15 pass a state practical exam at the time of application for licensure?
16

17 Ms. McKown- Yes, you may by rule you may offer a practical examination in addition to the written
18 examination. You have the authority under 463 or 456 to require that the people coming into the State of
19 Florida understand the Laws and Rules but I believe you do not have the authority to require a time perimeter
20 to the National examination.
21

22 Mr. Griffin- Ms. McKown would you agree that the board has the authority under 463 to administer a practical
23 exam to every applicant prior to licensure?
24

25 Ms. McKown - under certain conditions they have given you the ability to set out certain requirements and
26 certain examinations, but you do not have the authority to set time perimeters.
27

28 Mr. Griffin - Is it your position that the board cannot require an applicant to take and pass a State developed
29 practical exam prior to licensure?
30

31 Ms. McKown - Under provision of 456 as it relates to Florida Law you have the authority to require passage of
32 Florida Law. Has nothing to do with the time requirement for the National exam.
33

34 Diane Guillemette read statute 463.006(2).
35

36 Dr. Moore – Nothing at this time.
37

38 Dr. Whittman – Nothing at this time.
39

40 Dr. Lanier – Two thoughts, one if you did offer a state exam 1 state exam is a lot different than having to take 3
41 parts of the National Board exam that are \$725 each and are only offered several times a year. Can you
42 please answer my question why you require Part I and why you require the basic science to be repeated?
43

44 John Griffin – There is language in the current rule that spells out the Board's rationale for imposing the 7 year
45 requirement and it is applicable to each part of the National Board.
46

47 Dr. Kaplan asked Dr. Lanier what her suggestions would be.
48

49 Dr. Lanier suggested that there only be a part II and III of the exam or have it be the National CPBO exam. It is
50 one exam and is give 2 times a year. Would also need for out of state applicants to show proof that they have
51 been working in another state.
52

53 Dr. Whitten asked did Florida have their own exam at one time and then went to the National exam, why was
54 that done?
55

1 Dr. King explained that DOH defunded the portion of that department so there was no longer any funding going
2 into that department so there was a need to find a new exam. Proposals were put out without any coming back
3 other than the National Board.
4

5 Dr. Whittman would like to see the 7 year rule dropped completely. If someone is licensed in another state that
6 requires more CE than Florida then they shouldn't have to take another exam since they have already taken
7 the exam.
8

9 Dr. Kaplan asked if anyone had any further questions. Called roll and no one had any further questions.
10

11 Dr. Spivey did reference page 93 of the materials to share the public comment from Dr. Alexandra Huston Kim.
12 She could not attend the meeting but did put her comments in writing for the Board.
13

14 Ms. Lanier asked what will happen going forward. Ms. Gulliemette explained that the meeting today was a
15 workshop for the Board to get input from the public. The Board could choose to change the rule or leave it as it
16 is. There doesn't have to be a next step.
17

18 Dr. Spear moved to adjourn the workshop. Dr. King second.
19 6 yeas/0 opposed, meeting adjourned.
20
21
22
23
24

DRAFT