



THE ATTORNEY GENERAL OF TEXAS

JOHN BEN SHEPPERD
ATTORNEY GENERAL

AUSTIN 11, TEXAS

January 11, 1956

Honorable W. F. Baber, President
Texas State Board of Examiners
in Optometry
Austin, Texas

Letter Opinion No. MS-252

Re: Authority of the Board of
Examiners in Optometry to
limit number of examina-
tions after failures.

Dear Dr. Baber:

You have requested an opinion on the authority of the State Board of Examiners in Optometry to limit the number of examinations that will be permitted applicants. Your specific question concerns the validity of the following rule adopted by the Board:

"The fee for taking the examination is \$35.00. Any applicant who is refused a license because of failure to pass the first examination shall be permitted to take a second examination upon the payment of \$12.50, provided, the second examination is taken within a period of one year. No applicant who has failed to pass both the first examination and the second examination as provided for in Article 4565 of the Revised Civil Statutes of Texas shall be permitted to again take an examination of the Board until he shall furnish to the Secretary of the Board satisfactory sworn evidence that he has satisfactorily completed a course of instruction equivalent to one full term of not less than four months duration at a College of Optometry approved and accredited by the Board since having failed the Board's second examination; provided, that upon making application to take a third examination after having completed the additional course of instruction as provided for herein the applicant shall file with the Secretary of the Board a new application, on forms to be furnished by the Board, and pay a fee of Thirty-five Dollars (\$35) as in his first examination;

and provided further, that no person shall again be permitted to take an examination of this Board after having failed to pass a third examination. No application fee for examination will be returned to any applicant after his application has been approved by the Board, because of the decision of the applicant not to stand the examination or his failure for any reason to take the examination."

"A rule of an administrative agency is void if it conflicts with the statutes regardless of how long standing such rule may be." Teacher Retirement System v. Duckworth, 260 S.W.2d 632 (Tex.Civ.App. 1953) adopted by the Supreme Court, 264 S.W.2d 98 (1954).

The pertinent provisions of Article 4565, Vernon's Civil Statutes, are:

"The Board shall charge a fee of Thirty-five Dollars (\$35) for examining an applicant for license, which fee must accompany the application. If the applicant who, because of failure to pass the examination, be refused a license, he shall be permitted to take a second examination upon payment of Twelve Dollars and Fifty Cents (\$12.50), provided the second examination is taken within a period of one (1) year. The fee for issuing a license shall be Twenty-five Dollars (\$25) to be paid to the Secretary of the Board. If anyone successfully passing the examination and meeting the requirements of the Board has not paid the fee for issuance of a license within ninety (90) days after having been notified by registered mail at the address given on his examination papers, or at the time of the examination that he is eligible for same, such person shall by his own act have waived his right to obtain his license, and the Board may at its discretion refuse to issue such license until such person has taken and successfully passed another examination."

In addition to the statutory requirements the rule involved attempts to (1) permit an applicant to take only three examinations, and (2) require additional education for those applicants who fail two examinations.

The statute requires that a fee of \$35.00 shall be charged for examining an applicant for a license. The statute does not say this fee is for a "first examination", or "the examination", nor in any manner imply that this fee is limited to one examination. It merely states that, "The Board shall charge a fee . . . for examining an applicant. . . ." Prior to its amendment in 1951 the statute further provided that should an applicant fail to pass an examination, he would be permitted to take a second examination "without additional cost" provided he did so within a one-year period. We are of the opinion that the Legislature did not intend this provision to limit the total number of examinations that an applicant might take, but merely gave an applicant a grace period of one year in which he could take a second examination without cost. In 1951 the Legislature amended the Act and provided that an applicant could take a second examination within a one-year period for a fee of \$12.50. We believe that the statute, as amended, is to be construed in the same manner as before, and that the provision for a second examination within the one-year period at a cost of \$12.50 is not a limitation upon the number of examinations that may be taken by an applicant, but is merely a provision allowing applicants to take a second examination within a one-year period at a "cut-rate" cost.

The statute makes no affirmative limitation on the number of examinations that may be taken by an applicant. Attorney General's Opinion V-190 (1947) held that the Board of Medical Examiners did not have the authority to limit the number of examinations that an applicant may be permitted to take after numerous failures. We are of the opinion that where the statute is silent as to any limitation on the number of examinations that may be given an applicant, the rule as announced in Opinion V-190 is correct, and that the Board does not have the authority to limit the number of examinations that an applicant may be permitted to take. It was pointed out in Opinion V-190 that the court in Medcraf v. Dept. of Licenses, 221 Pac. 613 (Wash. Sup. 1923), held that where a statute provided for two examinations the applicant was not entitled to subsequent examination after failing two. In that case, however, the court pointed out that the rule announced applied only to applicants coming within the Grandfather Clause of the Act, stating:

". . . If it had been the intention of the Legislature to allow such a person to make a second application after two failures in examinations upon his application filed within six months, it

could and doubtless would have said so. On the contrary, the Legislature provided what it considered sufficient opportunity for those who had been practicing without a license to qualify or show that they should be regularly licensed to practice, and the regulators, failing in that, are without any further right in the matter, and are not again entitled to file an application and take an examination unless and until they become graduates of some reputable dental college. . . ."

Under the direct authority of the statute the Board is required to charge a fee of \$35.00 for examining an applicant, unless the examination is the second one given within a one-year period, for which the applicant is required to pay only \$12.50. Thus, a fee of \$35.00 must be paid for each examination, except that the fee is \$12.50 for a second examination within one year after an examination taken upon payment of the \$35.00 fee.

The Legislature has prescribed the minimum educational requirements of all applicants for examination. Article 4557, V.C.S. In addition to these minimum requirements, the rule of the Board requires an applicant who fails two examinations to complete an additional course of instruction at a college of optometry. Insofar as these applicants are concerned, this rule constitutes a change in the minimum educational requirements prescribed by the Legislature, and is without lawful authority and therefore void. We are not questioning the wisdom of imposing additional educational requirements on applicants who have failed to pass the examination. In fact, we are in accord with the desire of the Board to raise the standards and qualifications of the optometry profession, but this office can only interpret the law as it is written. The statute as now written does not impose a requirement as to additional education, nor does it give your Board the authority to impose such a requirement by administrative rule. Any correction of the situation or addition to the educational requirements must come from the Legislature through amendment of the law.

In view of the foregoing you are advised that the order of the Board of Examiners in Optometry is void insofar as it attempts to limit the number of examinations or raise

the minimum educational requirements prescribed by the Legislature, being inconsistent with the provisions of Articles 4557 and 4565, V.C.S.

APPROVED:

J. Fred Jones
State Affairs Division

Elbert M. Morrow
Reviewer

Milton Richardson
Reviewer

Mary K. Wall
Special Reviewer

Davis Grant
First Assistant

John Ben Shepperd
Attorney General

Yours very truly,

JOHN BEN SHEPPERD
Attorney General

By *Will D. Davis*
Will D. Davis
Assistant