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NO. 86061
STATE OF NEBRASKA
OFFICIAL
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DEPT. OF JUSTICE

DATE: July 23, 1986

SUBJECT: Scope of Rule Making Authority by the Department of Health to Implement Laws 1986, LB 131

REQUESTED BY: Gregg F. Wright, M.D., M.Ed.
Director of Health, Department of Health

WRITTEN BY: Robert M. Spire, Attorney General
Marilyn B. Hutchinson, Assistant Attorney General

The Department of Health is in the process of preparing rules and regulations to implement the provisions of Laws 1986, LB 131. You have asked several questions about that bill because the answers may affect the substance of those rules and your authority to make them.

1. May current licensees be treated differently than new licensees? We have concluded they may not, as discussed below.

In this bill the Legislature has redefined the scope of practice for the profession of optometry. Such practice now includes the use of topical ocular pharmaceutical agents, excluding anti-glaucoma agents, for diagnosing and treating visual defects or abnormal conditions of the human eye or lid. Laws 1986, LB 131, Section 1. Treatment with such pharmaceutical agents is a new function.

With respect to such new function, the Legislature then draws two lines. The first is between optometrists who may use topical ocular pharmaceutical agents in that way and those who may not. Those who meet educational requirements and are certified as qualified to use topical ocular pharmaceutical agents for diagnostic or therapeutic purposes may do so. Those who do not meet such educational requirements and are not thus certified may not use such pharmaceutical agents.

L. Jay Bartel, John M. Boehm, Dale D. Brodkey, Martel J. Bundy, Janie C. Castaneda, Dale A. Comer, Laura L. Freppel, Lynne R. Fritz, Ruth Anne Evans, Yvonne E. Gates, Jill Gradwohl, Royce N. Harper, William L. Howland, Marilyn B. Hutchinson, Mel Kammerlohr, Sharon M. Lindgren, Charles E. Lowe, Steven J. Moeller, Harold I. Mosher, Bernard L. Packett, LeRoy W. Sievers, James H. Spears, Mark D. Starr, John R. Thompson, Susan M. Ugai, Linda L. Willard

The Legislature may classify persons for different treatment under the law so long as there is a rational basis for the classification without invidious discrimination and all persons in each class are treated the same. See, Jacobberger v. Terry, 212 Neb. 145, 322 N.W.2d 620 (1982) and Thompson v. Board of Regents, 187 Neb. 252, 188 N.W.2d 840 (1971). In this case, protection of the public from unqualified practitioners seems an appropriate basis for classification. All persons in each class are treated the same. Thus there does not appear to be any violation of the Equal Protection Clause of the U.S. Constitution or of Art. III Sec. 18 of the Nebraska Constitution which proscribes special legislation.

The second line drawn by the Legislature is between those who are licensed to practice optometry in this state on July 17, 1986, the effective date of LB 131, and those not so licensed at that time. Those licensed by the state at that time may continue to practice optometry in Nebraska without certification to use topical ocular pharmaceutical agents. Any one else must have such certification as a condition for licensure.

Under the Privileges and Immunities Clause of the U.S. Constitution, a state must have a substantial reason to treat persons having contact with the state differently than those from other states who may want to come here. See, Truax v. Raich, 239 U.S. 33 (1915) and Supreme Court of New Hampshire v. Piper, ____ U.S. ____, 105 S.Ct. 1272 (1985). We can think of no substantial state interest which would justify allowing our state licensees to be licensed and practice optometry without such certification, but would not allow any person applying for licensure in this state, either for an initial license or by reciprocity, to be certified first to use such topical ocular pharmaceutical agents for diagnostic and therapeutic purposes. Thus, such a classification appears to violate both the Equal Protection and the Privileges and Immunities Clauses of the U.S. Constitution and is special legislation under Nebraska law. Accordingly, if the Department submits rules and regulations to us to implement the line drawn between current licensees and new licensees we cannot approve them.

2. May the Department specify the educational requirements for certification? We have concluded it may not, as discussed below.

In the exercise of its police power the Legislature may determine that certain acts may be done safely only by persons having certain qualifications. See, Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 785, 104 N.W.2d 227 (1960). It may then specify that only persons licensed for a certain profession may

do those acts and require that persons licensed in that profession have the qualifications that will make them safe to do such acts. Licensing itself is a classification drawing a line between those who can do certain acts safely and those who may not do them at all. Thus, the Legislature must draw the line. See, Seignious v. Rice, 273 N.Y. 44, 6 N.E.2d 91, 93 (1936). This includes specifying the qualifications that are necessary to safely perform the acts which the general public is barred from performing. The Legislature cannot delegate that function although it may delegate the responsibility for determining whether an applicant for licensure meets those qualifications. See, Id. and Eason v. Morrison, 181 Ga. 322, 182 S.E. 163, 166 (1935).

In LB 131, Section 3 the Legislature has provided that an optometrist may not use topical ocular pharmaceutical agents

> unless such person submits to the Board of Examiners in Optometry evidence of satisfactory completion of all educational requirements as adopted by the department upon the recommendation of the Board of Examiners in Optometry and has been certified by the department upon the recommendation of the Board of Examiners in Optometry as qualified to use topical ocular pharmaceutical agents for diagnostic purposes.

Thus the intent of the Legislature to delegate to the Department upon the recommendation of the board the determination of the educational requirements for certification is clear and no reference to the legislative history is necessary to find it. See, Schutz v. Hunt, 212 Neb. 228, 322 N.W.2d 414 (1982).

However that section not only does not contain any specification of the educational requirements which the optometrist must complete as the basis for certification by the Department; it also does not contain any limitations on the power granted except the recommendation of the board and no clear and definite statement of standards for exercising that power. See, Lincoln Dairy Co., above. We cannot read a meaning into a statute that is not warranted by the legislative language. Ragland v. Norris, 208 Neb. 492, 304 N.W.2d 55 (1981). Thus we have no recourse to the legislative history to find the substance of the law.

Even if we could refer to the legislative history for the substantive law, we would not find it there in this case. That history makes it clear that additional education and clinical training is necessary for certification. See, Floor Debate on LB

131 at 9380, 9382, 9383 and 9389. That history gives us some idea about the differences in training and clinical experience between the 70 opthamologists in the state and the 160 optometrists here and between the 700 primary care physicians in the state and the 160 optometrists here. See, for example, the Committee Hearing on LB 131 at 8, 11, 12, 13, 23, 24, 25, 33 and 36. However, that legislative history does not specify how much additional training is needed, which additional training is needed, when that training must be taken and in which setting it must be taken.

We do not see how we can approve any educational requirements you might propose in rules and regulations. Recommendations for such requirements should go to the Legislature for incorporation into the statute.

3. May the Department define by regulation terms in the statute not defined in the statute? We have concluded it may, as discussed below.

It is a rule of statutory construction that when a term is not defined in the statute and in the absence of anything to indicate the contrary it is to be given its usual and ordinary meaning. Kellogg Co. v. Herrington, 216 Neb. 138, 343 N.W.2d 326 (1984). Usually it is that dictionary definition which is appropriate in the context in which the word is used in the statute. However, sometimes a word is used as a term of art in a particular context. In that case, the usual and ordinary meaning would be other than that in the dictionary. In this case terms should not be defined in a way specifically rejected by the Legislature. See, Floor Debate at 10047-10060.

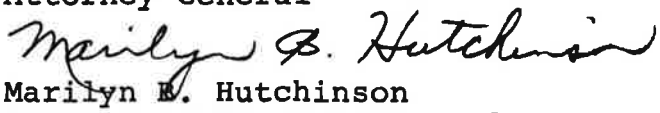
Consistent with the above, the Department may define terms in the statute which are not defined in the statute. In this way it can clarify the statutes which it enforces.

In conclusion, the law as enacted by the Legislature in Laws 1986, LB 131 must have several amendments before the Department will be in a position to implement it. The Legislature itself needs to specify the additional qualifications an optometrist must meet before he or she can be certified to use topical ocular pharmaceuticals in the diagnosing and treatment of any visual defects or abnormal conditions of the human eye or lid. The Legislature also needs to expand the class of persons who may practice optometry in this state without certification to use topical ocular pharmaceutical agents so that persons not licensed in Nebraska on the effective date of the bill are not barred from such limited practice permitted for our own licensees. The

Legislature need not define the terms in the statute unless they wish them to have some meaning other than the usual and ordinary meaning of them as qualified by the rejection of an amendment limiting such drugs.

Sincerely yours,

ROBERT M. SPIRE
Attorney General



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APPROVED:

Attorney General