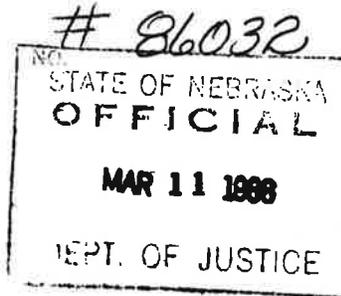


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509



ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: March 11, 1986

SUBJECT: LB 131 Section 1 (1)

REQUESTED BY: Senator Ernest Chambers
Nebraska State Legislature

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

You have asked whether the definition of the practice of optometry in LB 131, Section 1 (1) means that any person who makes a referral for consultation or treatment in connection with any abnormal condition of the human eye or lid is engaging in the practice of optometry and, if so, whether such a definition is overbroad. We have concluded that the answer to both questions is, no, as discussed below.

A citizen clearly has the right to engage in any occupation not detrimental to the public health, safety, and welfare. Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends.

Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 785, 104 N.W.2d 227 (1960). Thus, the Legislature under the exercise of its police power can keep unlicensed persons from acts which it has determined can be safely done only by persons having the training and experience which qualify them for licensure, as evidenced by such licensure. However,

[t]he construction of statutes and the determination of the reasonableness is the ultimate province, responsibility, and duty of the courts and must be exercised by them if state and federal constitutional guarantees of liberty and property rights are not to be made subservient to pressure groups which seek and frequently secure the enactment of statutes advantageous to a particular industry and detrimental to another under the guise of police power regulations.

Id. at 787, 788.

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A definition of the practice of a profession is an exercise of the police power of the Legislature. It draws the line between what the licensed person can do and what others cannot do unless they are exempted from such licensure.

LB 131 Section 1 proposes that the Legislature define the practice of optometry by three categories of acts. Without the use of surgery, any one of them alone or in combination with one or both of the others would be the practice of optometry. Thus they are acts which a licensed optometrist or those exempted from licensing may do. Anyone else may not. They include:

(1) The examination of the human eye to diagnose, treat, or refer for consultation or treatment any abnormal condition of the human eye or lid.

The basic act in that definition is the examination of the human eye for the purpose of diagnosing any abnormal condition of the human eye or lid. Treatment or referral for consultation and treatment are the alternative ways in which the examiner may dispose of the case. Thus a referral without the preliminary examination for the purpose of diagnosis would not be the practice of optometry.

Two rules of statutory construction support this conclusion. One is the rule that where a statute enumerates the things upon which it is to operate or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned unless the Legislature has plainly indicated a contrary purpose or intention. See, Ledwith v. Bankers Life Insurance Co., 156 Neb. 107, 54 N.W.2d 409 (1952). The things upon which the definition of the practice of optometry is to operate are subsections (1) to (3), not the individual acts in any of them when taken out of context unless covered by another subsection as both diagnosing and treating abnormal conditions of the eye are.

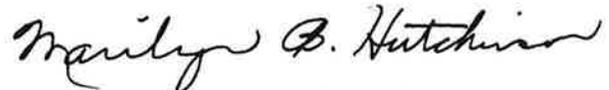
In construing an act of the Legislature, all reasonable doubt must be resolved in favor of constitutionality. See, Mann v. Wayne County Board of Equalization, 186 Neb. 752, 186 N.W.2d 729 (1971). As pointed out above, measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. If subsection (1) kept the general public from directing another to a source for help or information, it would not meet that test.

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In conclusion, to "refer for consultation or treatment any abnormal condition of the human eye or lid" as used in LB 131 Section 1 (1) is the practice of optometry only when it is done by a person holding himself or herself out as qualified to examine the human eye to diagnose such a condition and treat it himself or herself as an alternative to such a referral. Thus it is not overbroad in the sense that it would make the definition an unconstitutional exercise of the police power by the Legislature.

Sincerely,

ROBERT M. SPIRE
Attorney General



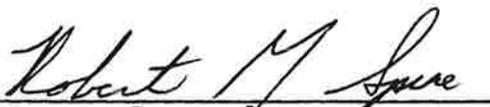
Marilyn B. Hutchinson
Assistant Attorney General

MBH:jem

cc: Patrick J. O'Donnell
Clerk of the Legislature

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APPROVED



Attorney General