

**BOARD OF OPTOMETRY
BOARD MEETING
NOVEMBER 14, 2001**

TIME AND PLACE: The meeting was called to order at 12:00 noon on Wednesday, November 14, 2001 at the Department of Health Professions, 6606 West Broad Street, 5th Floor, Room 1, Richmond, Virginia.

PRESIDING OFFICER: Thomas R. Cheezum, O.D.

MEMBERS PRESENT: Samuel C. Smart, O.D.
Jeff Smith, Citizen Member
Roxann L. Robinson, O.D.
Gary St. Clair, O.D.
Paula Boone, O.D.

STAFF PRESENT: Howard M. Casway, Assistant Attorney General, Board Counsel
Elaine Yeatts, Policy Analyst
Elizabeth A. Carter, Ph.D., Executive Director
Carol Stamey, Administrative Assistant

OTHERS PRESENT: Betty Graumlich, McSweeney, Burtch & Crump
Elizabeth B. McCallum, Johnson & Johnson
Cal Whitehead, VA Society of Ophthalmology
Thomas P. Dove, 1-800 Contacts (The Furth Firm)
Bruce B. Keeney, Sr., VOA
Allison Bennett, Walmart

QUORUM: With six members of the Board present, a quorum was established.

REVIEW AND APPROVAL OF AGENDA: Dr. Cheezum introduced and welcomed Paula Boone, O.D. as its new Board member.

The agenda was revised to allow Mr. Hasty to present his farewell address prior to public comment.

FAREWELL ADDRESS FROM MR. HASTY: Mr. Hasty addressed the Board regarding his retirement departure. He shared agency statistics to include

customer service and re-engineering as well as accomplishments of the agency.

PUBLIC COMMENT:

Beth McCallum, Attorney, representing Johnson & Johnson, gave a presentation regarding the disposable contact lens antitrust litigation settlement agreement of Johnson & Johnson. Ms. McCallum requested the Board's interpretation of § 54.1-3202 and § 54.1-3204.7, specifically the sale of contact lenses from sources not licensed in the Commonwealth of Virginia. A copy of Ms. McCallum's comments dated September 7, 2001 and November 7, 2001 are incorporated into the minutes as Attachment 1.

Thomas P. Dove, Attorney, representing 1-800 Contacts, Inc., presented comments in response to Ms. McCallum's presentation.

Bruce Keeney, Executive Director, Virginia Optometric Association, apprised the Board that a question had surfaced with the VOA about a year ago, the Board had contacted the Food and Drug Administration and had asked for some clarification as to whom complaints could be filed should there be an issue of alleged failure to comply with the FDA requirements for the Medical Devices Act. The FDA responded to the Board with where to file complaints, should be a public document on file. The Association disseminated the information. The FDA did site the FDA rule for medical devices act that required certain provisions for compliance with valid prescriptions.

His formal request by the Association, in looking at the request in filing complaints with the FDA, with a growing number of documented cases where prescriptions are being filled by various sources that are without a doctors valid prescription, with a prescription existing at all, beyond an expiration date, modifying the prescription without the doctor's authorization, etc. when you file this complaint through the FDA, one of the first things they do is ask you for the doctors and patient's name. In that this Board has responsibility to enforce and regulate the practice of your licensees, particularly optometrists, one question becomes is it in fact a violation of patient confidentiality or a optometrist one of your licensees

whom you regulate or have the authority to regulate to provide that information or are they first required to obtain that from the patient. That same issue comes now into some recent situations where particularly and I can say has been identified by some phone calls, I personally have received calls. In fact the patient is the one authorizing and making that request. It is particularly disturbing because for the record, my office sometimes I have the pleasure of answering the phone, it not a doctors office and nobody in my office is a doctor of any, the point being my office has received a couple of phone calls automated specifically identified by 1-800 contact advising me that they would be ascertaining whether or not our office had a policy releasing contact lens prescriptions and if we did, punch 1 and there were no other choices. If you made no response the next recording advised me that our office has a policy of refusing to release contact lens prescriptions. I thought that it was ironic in that in VA if an OD to my knowledge complies with the laws and regulations of the Board of Optometry that there are provisions that you in fact require stipulates circumstances that an optometrist must provide the patient with a copy of the contact lens prescription. I mention that because years ago when the then Attorney General Gilmore got involved with this lawsuit, the Association questioned the application of that re: involvement of VA. We had a statute on the books, regulations from this Board that the association of professions did in fact support making sure that the consumer had access to the patients prescription. To this board's credit, the regulations specify exactly what constitutes a contact lens prescription. I mention that because also in my office as well as confirmed by a number of our members the same company has again automated contacted recordings according to answering machines 1:00 or 2:00 a.m. and advising me that they are calling to get authorization for release of records and prescription of (give patient's name) and in my case it was questionable why they were calling my office, which is not a doctors office when a particular patients name when we are obviously not in a situation to render that care, I have had reported from a number of our members in that case that what had transpired is in fact it is a patient, sometimes it is not a patient. When the doctors is called up the patient to confirm that they would like release of

this information to this third party, the patient advises that those lenses had already been received 2 or 3 weeks previously. I mention all this because there is within the profession a concern about compliance with the FDA requirements, a valid prescription, I will also mention to you and make you a formal request if it the Board's choice to perhaps either to the Commonwealth's Attorney's Association or thru the Attorney General's Office and/or the VA Board of Hairdressers and Cosmetology, to request, provide some notice that what we are now seeing in VA, particularly, in communities of larger number of African Americans, perhaps what I understand for ethnic comesmetic reasons, the sale and distribution of planeo contact lenses, colored contact lenses from beauty parlors. The patients are now showing up in the optometrists office with obrasions, infections and in two cases corneal ulcers. Requested that the Board disseminate information to the appropriate parties.

With regard to the Stark Legislation, Mr. Keeney reported that the VOA's Executive Committee had gone on record opposing the proposed legislation. The decision of the Committee was based upon the fact that Virginia's statutes and regulations governing contact lens prescription release was adequate in that the regulations addressed what constitutes a contact lens prescription, the prescriptions were patient specific and that the prescriptions were released to patients upon request. Further, Mr. Keeney urged the Board to

The Stark legislation, the Association's Executive Committee, discussed the issue and after analyzing VA law, the Boards regulations regarding what is a contact lens prescription and the requirement of release to make sure the patient's specific contact lens prescription is available and is patient specific. The Association has gone on record in opposing the Stark legislation on the grounds that the proposal is going backwards in consumer protection for the citizens in VA. It is much more lenient and fails to address some visual welfare of public health concerns. Also, bias, called attention to a handout, through the Attorney General's office, a sample letter for consideration, apparently by AG's of the various states urging the FDA to consider adopting a trade rule in

this regard. Cautioned that the authors may omit, mislead, though maybe unintentional such as the statement that refers to the AOA which not speaking on behalf of, but they agreed to settlement. It fails to note that in the parties of the settlement, that in no time did any parties admit any wrong doing. It also suggested that there was agreement by parties to essentially not oppose the release of contact lens prescriptions. He cautioned the Board in its discussion and deliberation some on the sample draft letter from the Attorney Generals as well as the issue of the Stark Legislation, with regard to issues related to interstate commerce, assure compliance with the FDA. Recognizing the FDA's requirements in purview over medical devices, particularly the contact lens that the commonwealth of Virginia will do what it can to assure compliance of that to protect the public's visual welfare.

ELECTIONS:

On properly seconded motion by Dr. Robinson, the Board voted to close the nominations and approved the following block:

President	Samuel C. Smart, O.D.
Vice-President	Thomas R. Cheezum, O.D.
Sec/Treasurer	Gary St. Clair, O.D.

On properly seconded motion by Dr. Cheezum, the Board voted unanimously to approve the following members for Committee assignment:

Endorsement Committee
Dr. Smart, Dr. Cheezum, Dr. Boone
Professional Designation Committee
Dr. Robinson, O.D. and Dr. Boone, O.D.
Continuing Education Committee
Dr. Smart, O.D. and Dr. St. Clair, O.D.
Newsletter Committee
Dr. Cheezum, O.D. and Dr. Boone, O.D.

APPROVAL OF MINUTES:

On properly seconded motion by Dr. Cheezum, the Board voted unanimously to approve the minutes of the July 13, 2001 meeting as amended.

BOARD DISCUSSION:

HR 2663, Contact Lens Prescription Release Act of 2001

CLOSED SESSION:

On properly seconded motion by Dr. St. Clair, the

Committee recessed Open Session and convened in Closed Session pursuant to § 2.2-3711A) (7) of the Code of Virginia for consultation with and the provision of legal advice by the Assistant Attorney General to discuss the questions posed by Howrey Simon Arnold & White regarding the rendering of an advisory opinion. Additionally, it was moved that Dr. Carter, Howard Casway, Elizabeth Carter, Ph.D. and Carol Stamey attend the closed meeting because their presence would aid the Board in its deliberations.

OPEN SESSION:

On properly seconded motion by Dr. St. Clair, the Board moved to certify that only public business matters lawfully exempted from open meeting requirements and only such public business matters as were identified in the motion for Closed Session were heard, discussed or considered during the Closed Session.

On properly seconded motion by Dr. Cheezum, the Board voted unanimously that having no statutory or regulatory authority other than regulation of the practice of optometry in the Commonwealth, the Board declines to render an opinion for the request from legal counsel for Johnson and Johnson.

**BOARD DISCUSSION
CONTINUED:**

Letter from Howard Budner, O.D., 1-800 Contacts

The Board agreed that it did not have jurisdiction in the matter.

Regulatory Review, Elaine Yeatts

Ms. Yeatts presented an updated regulatory chart and noted that three sets of regulations were in process. She reported that permission had been granted to go forward with the proposed changes. Ms. Yeatts requested that the Legislative/Regulatory Review Committee meet prior to the next meeting to draft the proposed language relating to the summarized changes in the Notices of Intended Regulatory for 18 VAC 105-20-10 and 18 VAC 105-30.

Vision 2020 Program

On properly seconded motion by Dr. Robinson, the Board voted unanimously to adopt the following resolution in support of the VISION2020 program; *The Virginia Board of Optometry feels this program is a worthwhile endeavor and strongly encourages our Virginia licensees to*

participate in this program.

The Board also recommended that the adopted resolution be placed on the agency's website.

American Optometric Association Resolution, CE

On properly seconded motion by Dr. Cheezum, the Board recommended that no response be made regarding the adoption of American Optometric Association's resolution 2003.

Letter from Carillion, Electronic Record Keeping

On properly seconded motion by Dr. Cheezum, the Board voted unanimously that in response to Carillion Health System's request, the Board endorses Dr. Carter's letter of response dated October 11, 2001.

Co-Management, Letter from Cornell Trimber, M.D.

The Board noted that this issue had been previously discussed and the Board

On properly seconded motion by Dr. Cheezum, consistently as in the past, a TPA certified optometrist in Virginia has the authority to provide co-management services for post-operative co-management services as well as co-management services for medical conditions of the eye. Further, the authority to do so has been reaffirmed by CMS, CSS,???

Letter from American Printing House for the Blind, Inc.

On properly seconded motion by Dr. Cheezum, the Board voted unanimously in accordance with Virginia law, we are not aware of prohibitions against this practice but it must be assured that the devices are prescribed by a Virginia optometrist or ophthalmologist and there is a bonafide patient doctor relationship.

Free Vision Screening

On properly seconded motion by Dr. Smart, the Board voted unanimously that when free vision services are used in conjunction with a public service organization, in the best interests of the public, this will not be construed as a violation of §54.1-3215.9; however, when it is done in the interest of propagation of the business itself and self-

promotion within the doctor's office or pursuant to his practice then this may be considered a violation.

Dr. Carter was requested to forward a letter to Dr. Eckermann regarding the free screening issue.

Calendar

The Board established the calendar meeting dates as follows:

January 25, 2002 - Full Board, Informals

April 26, 2002 - Full Board, Informals

June 20, 2002 - Full Board, Informals

September 27 - 2002, Full Board, Informals

November 15, 2002 - Full Board, Informals

REQUEST FOR CE WAIVER

On properly seconded motion by Dr. Cheezum, the Board voted unanimously to grant a waiver of the continuing education requirements for Charles E. Cook, O.D., License No. 0601000579 for the 2001 licensure renewal period.

On properly seconded motion by Dr. Cheezum, the Board voted unanimously that upon renewal of his license to grant a waiver of the continuing education requirements for Herman H. Gensler, O.D., License No. 0601000537 for the 2001 licensure renewal period. Further, that he be informed of the availability of CE by correspondence.

COMMITTEE REPORTS:

There were no committee reports presented.

PRESIDENT'S REPORT:

Dr. Smart requested that the Board draft a formal statement of appreciation to Mr. Hasty.

On properly seconded motion by Dr. Cheezum, the Board voted unanimously that the Board of Optometry thank Mr. Hasty for his service and insight to our Board in the various areas that he was able to provide expert advice on.

EXECUTIVE DIRECTOR'S REPORT:

Dr. Carter noted the handouts regarding the Board's statistics.

Dr. Carter apprised the Board that at the ARBO meeting, it was reported that there was a thirty percent reduction in the number of students in the optometric schools and it

could effect the number of students applying for licensure in Virginia.

ADJOURNMENTS:

On properly seconded motion by Mr. Smith, the Board voted unanimously to adjourn.

Samuel C. Smart, O.D., President

Elizabeth A. Carter, Ph.D., Executive Director