

# RULES AND REGULATIONS

## Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

### STATE BOARD OF OPTOMETRY [49 PA. CODE CH. 23] Therapeutic Certification

The State Board of Optometry (Board) amends §§ 23.201 and 23.202 (relating to qualifications for certification; and application procedure) to conform to the ruling by the Commonwealth Court (Court) in *Rand v. Pennsylvania State Board of Optometry*, 762 A.2d 392 (Pa. Cmwlth. 2000).

#### *Statutory Authority*

Section 3(b)(14) of the Optometric Practice and Licensure Act (act) (63 P. S. § 244.3(b)(14)) authorizes the Board to promulgate all rules and regulations necessary to carry out the purposes of the act.

#### *Background and Need for the Final-Omitted Rulemaking*

This final-omitted rulemaking is required by section 4.1 of the act (63 P. S. § 244.4a), as interpreted by the Court in *Rand*. In *Rand*, the Court determined that § 23.201 was “invalid and unenforceable.” The Court remanded, instructing the Board to apply the criteria in section 4.1 of the act, to determine whether Dr. Rand met the qualifications to become certified to prescribe and administer pharmaceutical agents for therapeutic purposes. Because the Court has determined that § 23.201 is invalid and that the Board should apply the criteria in section 4.1 of the act, the Board is deleting § 23.201.

Section 23.202, which makes reference to § 23.201, is also being amended. The Board will simply replace the portions of § 23.202 that refer to optometrists meeting provisions of § 23.201 with references to the requirements in section 4.1 of the act.

Section 204 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1204) (CDL), permits State administrative agencies to promulgate regulations with proposed rulemaking omitted when the agency finds that the procedures for proposed rulemaking are, in the circumstances, “impracticable, unnecessary, or contrary to the public interest.” The amendments make changes to conform to the decision of the Court interpreting the act and the § 23.201. The Court held that § 23.201 was invalid and the Court instructed the Board to apply the criteria in section 4.1 of the act, to determine an optometrist’s eligibility for certification to prescribe and administer pharmaceutical agents. The Board finds that it is unnecessary to publish proposed rulemaking in this case because, given the Court’s finding that § 23.201 is invalid, it must be stricken and given the Court’s directive to apply the statutory criteria, it would be duplicative to amend the regulation to simply repeat the statutory language. In addition, the continued presence of § 23.201 has created public confusion. Finally, § 23.202 must be amended to replace references to the qualifications in § 23.201 with references to the qualifications in section 4.1 of the act.

#### *Compliance with Executive Order 1996-1*

The Board reviewed this final-omitted rulemaking and considered its purpose and likely impact upon the public and the regulated population under the directives of Executive Order 1996-1, “Regulatory Review and Promulgation.” This final-omitted rulemaking addresses a compelling public interest as described in this Preamble and otherwise complies with Executive Order 1996-1.

#### *Fiscal Impact and Paperwork Requirements*

This final-omitted rulemaking will have no fiscal impact on the Commonwealth or its political subdivisions. Candidates for certification to administer and prescribe pharmaceutical agents for therapeutic purposes must meet the requirements set forth in the act and in § 23.202.

#### *Regulatory Review*

Under section 5.1(c) of the Regulatory Review Act (71 P. S. § 745.5a(c)), on May 1, 2002, the Board submitted a copy of the final-omitted rulemaking to the Independent Regulatory Review Commission (IRRC), the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) and the House Professional Licensure Committee (HPLC). On the same date, the final-omitted rulemaking was submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506).

In accordance with section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), this final-omitted rulemaking was deemed approved by the HPLC and by the SCP/PLC on May 21, 2002. IRRC met on May 30, 2002, and approved the final-omitted rulemaking.

#### *Additional Information*

Individuals who desire information are invited to submit inquiries to Deborah Smith, Board Administrator, State Board of Optometry, P. O. Box 2649, Harrisburg, PA 17105-2649, [www.dos.state.pa.us](http://www.dos.state.pa.us).

#### *Findings*

The Board finds that:

(1) Public notice of the Board’s intention to amend its regulations as adopted by this order, under the procedures specified in sections 201 and 202 of the CDL (45 P. S. §§ 1201 and 1202), has been omitted under the authority contained in section 204(3) of the CDL, because the Board has, for good cause, found that the procedures specified in sections 201 and 202 of the CDL are in this circumstance, unnecessary because the regulations conflict with section 4.1 of the act, as interpreted by the Court.

(2) The amendment of the regulations of the Board in the manner provided in this order is necessary and appropriate for administering the Board’s authorizing statute.

#### *Order*

The Board, acting under its authorizing statute, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 23, are amended by deleting § 23.201 and by amending § 23.202 to read as set forth in Annex A.

(b) The Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as to form and legality as required by law.

(c) The Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall become effective immediately upon publication in the *Pennsylvania Bulletin*.

STEVEN RETO, O.D.,  
*Chairperson*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 32 Pa.B. 2954 (June 15, 2002).)*

**Fiscal Note:** 16A-5210. No fiscal impact; (8) recommends adoption.

**Annex A**

**TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS**

**PART I. DEPARTMENT OF STATE**

**Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS**

**CHAPTER 23. STATE BOARD OF OPTOMETRY  
 CERTIFICATION IN PHARMACEUTICAL AGENTS  
 FOR THERAPEUTIC PURPOSES**

§ 23.201. (Reserved).

§ 23.202. Application procedure.

(a) An applicant for certification under section 4.1(a)(1) of the act (63 P.S. § 244.4a(a)(1)) shall submit the following to the Board:

(1) A completed application obtained from the Board together with the certification fee required by § 23.91 (relating to fees).

(2) Certification on a form provided by the Board from an accredited optometric educational institution in the

United States or Canada that the applicant graduated from the institution and that a condition for the applicant's graduation was the successful completion of a minimum of 100 hours in the prescription and administration of pharmaceutical agents for therapeutic purposes.

(3) Certification from the NBEO that the applicant obtained a passing score on the licensure examination to practice optometry which examination included the prescription and administration of pharmaceutical agents for therapeutic purposes.

(b) An applicant for certification under section 4.1(a)(2) of the act shall submit the following to the Board:

(1) A completed application obtained from the Board together with the certification fee required by § 23.91.

(2) Certification on a form provided by the Board from an accredited optometric educational institution in the United States or Canada that the applicant has successfully completed its course consisting of a minimum of 100 hours in the prescription and administration of pharmaceutical agents for therapeutic purposes.

(3) Certification from the NBEO that the applicant has obtained a passing score on an examination on the prescription and administration of pharmaceutical agents for therapeutic purposes, which examination was prepared and administered by a qualified and approved testing organization.

(c) On and after June 6, 1998, applicants for licensure as optometrists by examination who meet the qualifications set forth in the act shall be certified to prescribe and administer pharmaceutical agents for therapeutic purposes without further application.

[Pa.B. Doc. No. 02-1049. Filed for public inspection June 14, 2002, 9:00 a.m.]