

A bill for an act

relating to health occupations; providing for disciplinary action for enumerated conduct; amending Minnesota Statutes 2006, sections 148.571; 148.603; proposing coding for new law in Minnesota Statutes, chapter 148; repealing Minnesota Statutes 2006, section 148.57, subdivision 3.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 2006, section 148.571, is amended to read:

148.571 USE OF TOPICAL OCULAR DRUGS.

Subdivision 1. **Authority.** Subject to the provisions of sections ~~148.57, subdivision 3, and~~ 148.571 to 148.574, licensed optometrists may administer topical ocular drugs to the anterior segment of the human eye during an eye examination in the course of practice in their normal practice setting, solely for the purposes of determining the refractive, muscular, or functional origin of sources of visual discomfort or difficulty, and detecting abnormalities which may be evidence of disease.

Subd. 2. **Drugs specified.** For purposes of sections ~~148.57, subdivision 3, and~~ 148.571 to 148.574, "topical ocular drugs" means:

(1) commercially prepared topical anesthetics as follows: proparacaine HC1 0.5 percent, tetracaine HC1 0.5 percent, and benoxinate HC1 0.4 percent;

(2) commercially prepared mydriatics as follows: phenylephrine HC1 in strength not greater than 2.5 percent and hydroxyamphetamine HBr in strength not greater than 1 percent; and

(3) commercially prepared cycloplegics/mydriatics as follows: tropicamide in strength not greater than 1 percent and cyclopentolate in strength not greater than 1 percent.

Sec. 2. [148.601] GROUNDS FOR DISCIPLINARY AND CORRECTIVE ACTION.

The following conduct is grounds for disciplinary or corrective action, provided that disciplinary or corrective action may not be imposed by the board on any regulated person except after a contested case hearing conducted pursuant to chapter 14 or by consent of the parties:

(1) loaning a license by any licensed optometrist to any person;

(2) splitting or dividing a fee with any person;

(3) obtaining a fee or compensation by fraud or misrepresentation;

(4) employing directly or indirectly any suspended or unlicensed optometrist to perform work covered by sections 148.52 to 148.62 or in any other manner aiding and abetting the unauthorized practice of optometry;

(5) advertising by any means optometric practice or treatment or advice in which untruthful, improbable, misleading, or impossible statements are made;

(6) engaging in conduct prohibited by, or listed as grounds for disciplinary action in, the board's rules, or engaging in conduct that violates any statute or rule enforced by the board;

(7) failing to demonstrate qualifications or satisfy requirements for credentialing, with the burden of proof on the applicant to demonstrate the qualifications or the satisfaction of the requirements;

(8) obtaining a credential by fraud or cheating, or attempting to subvert the examination process;

(9) being convicted of a felony or gross misdemeanor directly related to the practice of optometry, as evidenced by a certified copy of the conviction;

(10) having had a credential revoked, suspended, or surrendered due to the resolution of a complaint or other adverse action related to credentialing in another jurisdiction or country;

(11) failing to: report the revocation, suspension, surrender of a credential in resolution of a complaint, or other disciplinary or adverse action taken against the person's own credential in this or another jurisdiction or country; report that a pending complaint or other pending charges regarding the person's own credential have been brought in this or another jurisdiction or country; or report having been refused a credential by any other jurisdiction or country for reasons that would constitute grounds for discipline or corrective action under this section;

(12) engaging in unprofessional conduct. "Unprofessional conduct" means conduct that may deceive, defraud, or harm the public; that demonstrates a willful or careless

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disregard for the health, welfare, or safety of a client; or practice that is professionally incompetent. Unprofessional conduct also includes any departure from or failure to conform to the minimum standards of acceptable and prevailing practice as established by statute, rule, or a consensus of expert optometric opinion as reasonably necessary for the protection of the public interest, with proof of actual injury not having to be established;

(13) being adjudicated by a court of competent jurisdiction, within or without this state, as currently incapacitated, mentally incompetent, mentally ill, chemically dependent, mentally ill and dangerous to the public, or a psychopathic personality;

(14) being unable to practice with reasonable skill and safety to clients by reason of a current mental or physical condition, use of alcohol, drugs, chemicals, or any other material;

(15) revealing a privileged communication from or relating to a client except when otherwise required or permitted by law;

(16) directly or indirectly engaging in threatening, dishonest, or misleading fee collection techniques;

(17) obtaining or attempting to obtain money, property, or services from clients, third party payors, or others through deception or fraud, including violations of the federal Medicare and Medicaid laws or state medical assistance laws;

(18) violating an order issued in good faith by the board following a contested case hearing, upon consent of the parties, or pursuant to sections 148.602 and 148.603;

(19) practicing outside the scope of practice authorized by sections 148.52 to 148.62;

(20) making a false statement or misrepresentation to the board;

(21) engaging in sexual contact with a client, as defined in section 148A.01, or conduct that is or may reasonably be interpreted by the client as sexual, engaging in verbal behavior that is or may reasonably be interpreted as sexually seductive or sexually demeaning to a client, or engaging in conduct that violates section 617.23;

(22) being convicted, including a finding or verdict of guilt, whether or not the adjudication of guilt is withheld or not entered, on admission of guilt, or a no contest plea, of a crime against a minor;

(23) being convicted, including a finding or verdict of guilt, whether or not the adjudication of guilt is withheld or not entered, on admission of guilt, or a no contest plea, of a violation of section 609.23, 609.231, 609.342, 609.343, 609.344, 609.345, 609.465, 609.466, or 609.52; or

(24) unreasonably failing to cooperate once an investigation has been initiated by the board. Cooperation includes responding fully and promptly to questions raised by or on behalf of the board relating to the subject of the investigation; providing copies

of client and other records in the regulated person's possession relating to the matter under investigation as requested by the board; and assisting the board in its investigation, including executing releases for records as requested by the board, and appearing at conferences or education meetings scheduled by the board, as referenced in chapter 214.

Sec. 3. [148.602] EXAMINATION BASED ON PROBABLE CAUSE.

Subdivision 1. **Examination.** If the board has probable cause to believe that grounds exist under section 148.601, clause (14), against a regulated person, the board may authorize the issuance of an order directing the regulated person to submit to a mental or physical examination or chemical dependency evaluation. For the purpose of this section, every regulated person is considered to have consented to submit to a mental or physical examination or chemical dependency evaluation when ordered to do so and to have waived all objections to the admissibility of the examiner's or evaluator's testimony or reports on the grounds that the testimony or reports constitute a privileged communication. An order for examination under this section and the evaluators' or examiners' reports are private data on an individual. Nothing in this subdivision precludes a regulated person from submitting to an additional examination or evaluation by an examiner or evaluator selected by the regulated person and at the regulated person's expense.

Subd. 2. **Failure to submit to examination.** Failure to submit to and complete an examination or evaluation, unless the failure was due to circumstances beyond the control of the regulated person, constitutes an admission that grounds exist under section 148.601, clause (14), against the regulated person, based on the factual specifications in the examination or evaluation order, and may result in an application being denied or, after a contested case hearing as described in this subdivision, a disciplinary order. The only issues to be determined at the hearing are whether the board had probable cause to authorize the examination or evaluation order and whether the failure to submit was due to circumstances beyond the control of the regulated person. Neither the record of a proceeding under this subdivision nor the orders entered by the board are admissible, subject to subpoena, or to be used against the regulated person in a proceeding in which the board is not a party.

Subd. 3. **Access to data and records.** In addition to ordering a physical or mental examination and notwithstanding section 13.384, 144.335, 144.651, or 595.02, or any other law limiting access to medical or other health records, the board may authorize obtaining data and health records relating to a regulated person without the regulated person's consent if the board has probable cause to believe that grounds exist under section 148.601, clause (14), against the regulated person. A regulated person, insurance

company, health care facility, government agency, or provider as defined in section 144.335, subdivision 1, paragraph (b), shall comply with any written request under this subdivision and is not liable in any action for damages for releasing the data requested if the data are released with a written request made under this subdivision. Information on individuals obtained under this subdivision is investigative data under section 13.41.

Sec. 4. Minnesota Statutes 2006, section 148.603, is amended to read:

148.603 FORMS OF DISCIPLINARY ACTIONS.

Subdivision 1. **Board action.** When grounds exist under ~~section 148.57, subdivision 3, or other~~ statute or rule which the board is authorized to enforce, the board may take one or more of the following disciplinary actions, provided that disciplinary or corrective action may not be imposed by the board on any regulated person except after a contested case hearing conducted pursuant to chapter 14 or by consent of the parties:

(1) deny an application for a credential;

(2) revoke the regulated person's credential;

(3) suspend the regulated person's credential;

(4) impose limitations on the regulated person's credential;

(5) impose conditions on the regulated person's credential;

(6) censure or reprimand the regulated person;

(7) impose a civil penalty not exceeding \$10,000 for each separate violation, the amount of the civil penalty to be fixed so as to deprive the person of any economic advantage gained by reason of the violation or to discourage similar violations or to reimburse the board for the cost of the investigation and proceeding. For purposes of this section, the cost of the investigation and proceeding may include, but is not limited to, fees paid for services provided by the Office of Administrative Hearings, legal and investigative services provided by the Office of the Attorney General, court reporters, witnesses, reproduction of records, board members' per diem compensation, board staff time, and travel costs and expenses incurred by board staff and board members; or

(8) when grounds exist under ~~section 148.57, subdivision 3, or~~ a board rule, enter into an agreement with the regulated person for corrective action which may include requiring the regulated person:

(i) to complete an educational course or activity;

(ii) to submit to the executive director or designated board member a written protocol or reports designed to prevent future violations of the same kind;

(iii) to meet with a board member or board designee to discuss prevention of future violations of the same kind; or

(iv) to perform other action justified by the facts.

Listing the measures in clause (8) does not preclude the board from including them in an order for disciplinary action.

Subd. 2. **Automatic suspension.** (a) Upon notice to the board of an adjudication under section 148.601, clause (13), the board shall automatically suspend the credential of the regulated person. The credential shall remain suspended until the person is restored to capacity by the court and, after a hearing upon the regulated person's petition for reinstatement or after entering into an agreement with the regulated person, the board orders reinstatement of the credential.

(b) Upon notice to the board of a judgment of conviction for a felony as provided in section 148.601, clause (8), or as listed in section 148.601, clause (22), and receipt of findings under subdivision 1 that the conviction directly relates to the credential of the regulated person, the board shall automatically suspend the credential of the regulated person until the person demonstrates, by clear and convincing evidence, rehabilitation as provided in section 364.03. The board shall serve upon the regulated person notice of a suspension under this subdivision by mail or in person within ten days of the board's receipt of notice from the court of its adjudication or judgment and findings.

Subd. 3. **Temporary suspension.** In addition to any other remedy provided by law, the board may, without a hearing, temporarily suspend the credentials of a regulated person if the board finds that the regulated person has violated a statute or rule that the board is empowered to enforce and continued practice by the regulated person would create a serious risk of harm to others. The suspension is in effect upon service of a written temporary suspension order on the regulated person specifying the statute or rule violated. Service of the temporary suspension order is effective upon personal service or service by certified or registered mail evidenced by return receipt upon the regulated person or counsel at the regulated person's or counsel's last known address. The temporary order remains in effect until the board issues an order after a limited hearing described in subdivision 4 or upon agreement between the board and the regulated person.

Subd. 4. **Limited hearing.** Within ten days of service of the temporary suspension order, the board shall conduct a limited hearing before its own members on the sole issue of whether there is a reasonable basis for the temporary suspension order to remain in effect. Evidence presented by the board and the regulated person shall be by affidavit only. Both parties shall be given an opportunity to present oral arguments at the hearing. Within five working days after the hearing, the board shall serve an order and, if the temporary suspension is to remain in effect, initiate a contested case hearing to be commenced within 45 days after service of the order.

7.1 Subd. 5. **Contested case hearing.** The administrative law judge shall issue a report
7.2 within 30 days after closing the contested case hearing record. The board shall issue a
7.3 final order within 30 days after receiving the administrative law judge's report.

7.4 Subd. 6. **Petition for reinstatement.** A regulated person whose credential has been
7.5 suspended, revoked, or restricted may petition the board for reinstatement of the license.
7.6 The petition must be made in writing. The board shall consider the petition at its first
7.7 regular meeting, or at a special meeting called by the board, after receipt of the petition,
7.8 provided the petition is received 14 days prior to meeting. The board may in its discretion
7.9 grant or deny the petition or modify its original finding to reflect any circumstances which
7.10 have changed sufficiently to warrant the modifications.

7.11 Subd. 7. **Reinstatement.** Upon reinstating a regulated person's credential or
7.12 granting an applicant's credential, the board may, at its discretion, impose any disciplinary
7.13 action listed in subdivision 3, as well as any reinstatement fee, not to exceed the annual
7.14 license renewal fee.

7.15 **Sec. 5. [148.604] EVIDENCE IN CONTESTED CASES.**

7.16 (a) A certified copy of the judgment of conviction is admissible as evidence in a
7.17 contested case without further authentication, constitutes proof of the facts underlying
7.18 the conviction, and creates a presumption in favor of disciplinary action under section
7.19 148.601, clauses (8) and (22). The regulated person may rebut the presumption with clear
7.20 and convincing evidence of rehabilitation under section 364.03. The regulated person may
7.21 not rebut the presumption through a collateral attack on the conviction. Certified copies
7.22 of transcripts in the criminal proceedings are admissible into evidence without further
7.23 authentication and do not constitute hearsay.

7.24 (b) In a contested case alleging grounds under section 148.601, clause (9) or (10),
7.25 a certified copy of the disposition of a proceeding before an administrative agency is
7.26 admissible into evidence without further authentication and constitutes prima facie
7.27 evidence of its contents.

7.28 (c) In a contested case alleging grounds under section 148.601, clause (22), a
7.29 certified copy of the judgment of conviction is admissible into evidence without further
7.30 authentication, constitutes proof of the underlying conviction, and creates a presumption
7.31 that the regulated person is unfit to practice. The regulated person may rebut the
7.32 presumption with clear and convincing evidence of rehabilitation and fitness to practice
7.33 with or without conditions or limitations on the regulated person's credential.

(d) In a contested case based upon section 148.601, clause (8), (20), (21), or (22), evidence of a client's previous sexual conduct is not admissible except as provided in section 148A.05.

Sec. 6. [148.605] ADDITIONAL REMEDY; CEASE AND DESIST ORDER.

The board may in its own name, issue a cease and desist order to stop an uncredentialed person from engaging in an unauthorized practice or violating or threatening to violate a statute, rule, or order which the board has issued or is empowered to enforce. The cease and desist order must state the reason for its issuance and give notice of the person's right to request a hearing under sections 14.57 to 14.62. The order shall be effective upon personal service or service by certified or registered mail evidenced by return receipt. If, within 15 days of service of the order, the subject of the order fails to request a hearing in writing, the order is the final order of the board and is not reviewable by a court or agency. A hearing must be initiated not later than 30 days from the date of receipt of a written hearing request. The administrative law judge shall issue a report within 30 days of the close of the contested case hearing record, notwithstanding Minnesota Rules, part 1400.8100, subpart 3. Within 30 days of receipt of the administrative law judge's report, the board shall issue a final order modifying, vacating, or making permanent the cease and desist order as the facts require. The final order remains in effect until modified or vacated by the board.

In the event of noncompliance with a cease and desist order, the board may institute a proceeding in Ramsey County District Court to obtain injunctive relief or other appropriate relief, including a civil penalty payable to the board not exceeding \$10,000 for each separate violation.

Sec. 7. REPEALER.

Minnesota Statutes 2006, section 148.57, subdivision 3, is repealed.