

BEFORE THE MINNESOTA

BOARD OF OPTOMETRY

In the Matter of
Thomas Lee Elton, O.D.
License No. 3231

**FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER**

The above-entitled matter came before Administrative Law Judge (“ALJ”) Kimberly Middendorf pursuant to the Notice and Order for Prehearing Conference and Hearing (“Notice of Hearing”) issued by the Minnesota Board of Optometry (“Board”) Complaint Resolution Committee (“Committee”) on November 13, 2019. Nicholas Lienesch, Assistant Attorney General represented the Committee. Thomas Lee Elton, O.D. (“Licensee”) was represented by Brian Karalus, Esq.

On March 11, 2021, the ALJ issued Findings of Fact, Conclusions of Law, and Recommendation (“ALJ’s report”), recommending the Board take disciplinary action against Licensee. (A true and accurate copy of the ALJ’s report is attached hereto and incorporated herein as Exhibit A.)

The Board convened to consider the matter on May 18, 2021, via WebEx videoconference. Nicholas Lienesch, Assistant Attorney General, appeared and presented oral argument on behalf of the Committee. Licensee appeared, represented by attorney Brian Karalus, Esq., who presented oral argument on behalf of Licensee. Committee members Patrick O’Neill, O.D.; Eric Bailey, O.D.; and Shari Koll, public member, did not participate in deliberations and did not vote in the matter. Gregory Schaefer, Assistant Attorney General, was present as legal advisor to the Board.

FINDINGS OF FACT

The Board has reviewed the record of this proceeding and hereby accepts the March 11, 2021, ALJ's report and accordingly adopts and incorporates by reference the Findings of Fact therein. The facts from the ALJ's report are as follows:

1. On June 22, 2011, Licensee was licensed by the Board to practice optometry in Minnesota.
2. In 2018, Licensee owned and managed an optometry practice, Elton Eyecare, Inc. Prior to the events in question, Licensee saw patients in two Target Optical clinics, one of which was located in Edina (Edina Clinic).
3. Around the end of April 2018, Licensee was approached to take over the optometry clinic at Target in Lakeville (Lakeville Clinic), as the optometrist on staff, Dr. Toni Scheper, was retiring from practice. Licensee was approached because he was known to be interested in expanding Elton Eyecare. The Lakeville Clinic is a "high volume" "million dollar location."
4. Elton Eyecare entered in a contract to provide optometry services for Target Optical in Lakeville. Pursuant to the contract, Licensee was required to see patients at the Lakeville Clinic in May 2018, although Elton Eyecare did not become the owner and operator of the Lakeville Clinic until June 1, 2018.
5. Licensee was scheduled to see patients at the Edina Clinic for seven days in May for which he had also agreed to see patients at the Lakeville Clinic.
6. Licensee did not reschedule the patients to be seen at the Lakeville Clinic. Instead, Licensee secured an unlicensed optometry student, Andrew Mackner (Mackner) to cover his appointments at the Lakeville Clinic.
7. Mackner saw approximately 50 patients at the Lakeville Clinic on May 6, 7, 8, 10, 11, 12, and 13, 2018. Mackner provided primary eye care to most of the patients he saw.
8. Primary eyecare includes testing the visual system, determining prescriptions for corrective lenses, screening for eye diseases or abnormalities, diagnosing and treating most eye conditions, determining the need for and referral to specialists, and educating patients about their eye health.
9. No licensed optometrist was on-site while Mackner conducted full eye examinations in lieu of Licensee.
10. On those seven days in May, Mackner performed tests including taking patients' medical history and conducting refraction tests and slit lamp tests.

11. Mackner conducted full eye examinations typical of primary eye care. Mackner evaluated patients for eyeglasses and contacts, conducted ocular health examinations, and proposed courses of treatment.

12. An ocular health examination included a battery of tests conducted to evaluate the health of a patient's eyes. This includes an examination of the internal anatomy of the eye. A slit lamp is used to perform part of the ocular health examination.

13. At the end of each day, Licensee reviewed the tests results, validity of the tests, and records generated by Mackner regarding each patient Mackner saw that day. Although he did not examine the patients himself, Licensee issued prescriptions for many of the patients.

14. Some patients seen by Mackner received prescriptions and purchased prescription corrective lenses immediately after their appointments, before Licensee reviewed Mackner's records of the examination. Target retail associates were able to obtain Mackner's prescriptions from the patients' medical charts.

15. Licensee was paid under his contract with Target for the patients Mackner saw at the Lakeville Clinic, and Licensee was separately compensated for the patients he saw at the Edina Clinic on the same days.

16. Dr. Amy Rudser has been a licensed optometrist in Minnesota since 2005. She is knowledgeable about optometry standards of practice and is qualified as an expert witness.

17. Dr. Roman Gerber has been an optometrist since 2011 and has practiced optometry in Minnesota since 2014. He is knowledgeable about optometry standards of practice and is qualified as an expert witness.

18. Neither expert – Dr. Rudser or Dr. Gerber – is aware of optometry examinations performed by students in a clinical setting without some oversight by a licensed optometrist in real time.

19. The standard of practice of optometry in Minnesota requires an optometrist to personally examine each patient, even when a student or technician conducts some of the tests. It is never acceptable for an unlicensed individual to practice optometry in lieu of the optometrist.

20. Mackner graduated optometry school in 2018 and was licensed in New York on September 11, 2018, and in New Jersey on October 18, 2018. Mackner held no optometry license in any state in May 2018 and was not licensed in Minnesota until September 20, 2019.

21. By 2020, Licensee was providing optometry services at eight Target Optical locations in the Twin Cities area. All of these clinics are staffed by licensed optometrists. Elton Eyecare has become Target Optical's largest practice in the United States.

CONCLUSIONS

The Board accepts the March 11, 2021, ALJ's report and accordingly adopts and incorporates the Conclusions therein. The conclusions from the ALJ's report are as follows:

1. The Board and the Administrative Law Judge have jurisdiction to consider this matter under Minn. Stat. §§ 14.50, .52, .57, 214.103 (2020).

2. It is the duty of the Administrative Law Judge to, among other things, take "notice of the degree to which the agency has . . . (ii) fulfilled all relevant procedural requirements of law or rule"

3. The Committee has complied with all relevant procedural requirements of law or rule.

4. Minn. Stat. § 148.607 (2020) vests the Board with authority to impose discipline, including revocation, suspension, censure, and civil penalties, when it finds that a licensed optometrist has violated the Optometry Practice Act (Minn. Stat. §§ 148.52 to 148.62) or related rules.

5. An optometry license is required to perform the following actions: to "employ any means, including the use of autorefractors or other automated testing devices, for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof;" "to diagnose any disease, optical deficiency or deformity, or visual or muscular anomaly of the visual system consisting of the human eye and its accessory or subordinate anatomical parts," and to "prescribe lenses, including plano or cosmetic contact lenses, or prisms for the correction or the relief of the same."

6. The Committee bears the burden of proving violations of the Act and related rules, by a preponderance of the evidence. A "preponderance of the evidence" means that the ultimate facts must be established by a greater weight of the evidence. "It must be of a greater or more convincing effect and . . . lead you to believe that it is more likely that the claim . . . is true than . . . not true."

7. A licensee may be disciplined for "engaging in any unethical conduct; conduct likely to deceive, defraud, or harm the public, or demonstrating a willful or careless disregard for the health, welfare, or safety of a patient; or practice of optometry which is professionally incompetent, in that it may create unnecessary danger to any patient's life, health, or safety[.]" Actual proof of injury in any of these cases need not be established.

8. The Committee established, by a preponderance of the evidence, that Licensee engaged in unethical conduct, in violation of Minn. Stat. § 148.603(7).

9. Aiding or abetting an unlicensed person in the practice of optometry is grounds for discipline.

10. A preponderance of the evidence demonstrates that Licensee aided and abetted an unlicensed person in the practice of optometry.

11. Prescriptions furnished to the patient shall be signed by the examining optometrist.

12. The Committee failed to establish that Licensee was an "examining optometrist" such that he was required to sign the prescriptions.

13. No licensed optometrist shall sign or cause to be signed a refractive prescription without first making a personal examination of the eyes of the person for whom the prescription is made.

14. Licensee caused to be signed refractive prescriptions without first making a personal examination of the patients' eyes.

15. An optometrist licensed in the state must maintain a medical record for each patient. For each "encounter with a patient," the medical record must contain "adequate identification of the patient and treating health care professional."

16. Licensee violated Minn. Stat. § 148.603(7), (9), Minn. R. 6500.0600, and Minn. R. 6500.0700.

ORDER

Based on the foregoing Findings of Fact and Conclusions and upon the recommendation of the ALJ, the Board issues the following Order:

1. NOW, THEREFORE, IT IS HEREBY ORDERED that the Board imposes a **CIVIL PENALTY** in the amount of \$24,988.70 upon Licensee's license. The Board has determined a civil penalty is appropriate based on the facts herein and to reimburse the Board for the cost of the investigation and proceeding. The civil penalty shall be paid by cashier's check or money order made payable to the Minnesota Board of Optometry and shall be delivered personally or by mail to the Minnesota Board of Optometry, c/o Randy Snyder, Executive Director, 2829 University Avenue S.E., Suite 403, Minneapolis, Minnesota 55414. Licensee must pay the civil penalty in quarterly payments of at least \$1,000. The first payment is due 90 days from the

date of this Order, with subsequent payments due quarterly thereafter. Licensee may make payments for future installments or pay the remaining balance at any time.

2. IT IS FURTHER ORDERED that the Board imposes the following **CONDITION** on Licensee's license:

a. Notification. Within 60 days of the date of this Order, Licensee shall provide proof to the Board that he has taken steps to contact all patients who were seen under the unlawful arrangement described above, and to contact all insurance payors who were billed for services provided to patients under the unlawful arrangement described above. To satisfy this requirement, Licensee must provide proof that he: 1) notified all impacted patients that they were seen by an unlicensed individual, specifying the date in May 2018 that each patient was seen; and 2) notified all insurance payors that they were billed for optometry services provided by an unlicensed individual, specifying the date in May 2018 upon which service was provided. The Board reserves the right to audit this notification process by contacting patients and payors to ensure that notification was provided as required.

3. IT IS FURTHER ORDERED that Licensee may petition the Board to have the condition upon his license removed upon satisfactory completion of the requirements imposed by the condition.

4. IT IS FURTHER ORDERED that Licensee must provide any additional information reasonably requested by the Board during the petition process.

5. IT IS FURTHER ORDERED that Respondent's violation of this Order shall constitute the violation of a Board order for purposes of Minnesota Statutes section 148.603(6), and provide grounds for further disciplinary action.

6. IT IS FURTHER ORDERED that the Board may, at any regularly scheduled meeting following Respondent's petition for reinstatement pursuant to paragraph 3 above, take any of the following actions:

- a. Grant unencumbered optometry license to Licensee;
- b. Continue the limitations and conditions on Licensee's license; or
- c. Deny Licensee's petition.

Dated: 05/19/2021

STATE OF MINNESOTA
BOARD OF OPTOMETRY


MICHELLE SHIH-MING FALK, O.D.
Board Secretary

March 11, 2021

VIA EFILING ONLY

Randy Snyder
Executive Director
Minnesota Board of Optometry
2829 University Ave SE Ste 403
Minneapolis, MN 55414
randy.snyder@state.mn.us

Re: *In the Matter of Thomas Lee Elton, D.O., License No. 3231*
OAH 21-0905-36507

Dear Executive Director Snyder:

Enclosed and served upon you is the Administrative Law Judge's **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** in the above-entitled matter. The official record, along with a copy of the recording of the hearing, is also enclosed. The Office of Administrative Hearings' file in this matter is now closed.

If you have any questions, please contact me at (651) 361-7888, lisa.armstrong@state.mn.us, or via facsimile at (651) 539-0310.

Sincerely,



LISA ARMSTRONG
Legal Assistant

Enclosure

cc: Docket Coordinator
Nicholas Lienesch
Brian Karalus



STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BOARD OF OPTOMETRY

In the Matter of Thomas Lee Elton, D.O.,
License No. 3231

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

The above-entitled matter came before Administrative Law Judge Kimberly Middendorf for a hearing on November 9, 2020. The record closed on December 23, 2020, upon receipt of written closing argument.

Nicholas Lienesch, Assistant Attorney General, appeared on behalf of the Complaint Review Committee (Committee) of the Minnesota Board of Optometry (Board). Brian Karalus, Karalus Law, appeared on behalf of Thomas Lee Elton (Licensee).

STATEMENT OF THE ISSUES

1. Did Licensee engage in unethical conduct; conduct likely to deceive, defraud, or harm the public, or demonstrating a willful or careless disregard for the health, welfare, or safety of a patient; or practice of optometry which is professionally incompetent in violation of Minn. Stat. § 148.603(7) (2020)?
2. Did Licensee aid and abet the unlicensed practice of optometry, in violation of Minn. Stat. § 148.603(9) (2020)?
3. Is Licensee responsible for furnishing prescriptions to patients that were not signed by the examining optometrist, in violation of Minn. R. 6500.0600 (2019)?
4. Did Licensee cause a refractive prescription to be signed without first making a personal examination of the eyes of the person for whom the prescription is made, in violation of Minn. R. 6500.0600?
5. Did Licensee sign a medical record for a patient that he did not personally examine and fail to identify the professional who actually examined the patient, in violation of Minn. R. 6500.0700, subp. 1C (2019)?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that Licensee's conduct violated Minn. Stat. § 148.603(7), (9) and Minn. R. 6500.0600, .0700. Accordingly, it is recommended that the Board impose appropriate discipline.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On June 22, 2011, Licensee was licensed by the Board to practice optometry in Minnesota.¹

2. In 2018, Licensee owned and managed an optometry practice, Elton Eyecare, Inc. Prior to the events in question, Licensee saw patients in two Target Optical clinics, one of which was located in Edina (Edina Clinic).²

3. Around the end of April 2018, Licensee was approached to take over the optometry clinic at Target in Lakeville (Lakeville Clinic), as the optometrist on staff, Dr. Toni Scheper, was retiring from practice.³ Licensee was approached because he was known to be interested in expanding Elton Eyecare.⁴ The Lakeville Clinic is a “high volume” “million dollar location.”⁵

4. Elton Eyecare entered into a contract to provide optometry services for Target Optical in Lakeville.⁶ Pursuant to the contract, Licensee was required to see patients at the Lakeville Clinic in May 2018, although Elton Eyecare did not become the owner and operator of the Lakeville Clinic until June 1, 2018.⁷

5. Licensee was scheduled to see patients at the Edina Clinic for seven days in May for which he had also agreed to see patients at the Lakeville Clinic.⁸

6. Licensee did not reschedule the patients to be seen at the Lakeville Clinic. Instead, Licensee secured an unlicensed optometry student, Andrew Mackner (Mackner) to cover his appointments at the Lakeville Clinic.⁹

7. Mackner saw approximately 50 patients at the Lakeville Clinic on May 6, 7, 8, 10, 11, 12, and 13, 2018.¹⁰ Mackner provided primary eye care to most of the patients he saw.¹¹

8. Primary eyecare includes testing the visual system, determining prescriptions for corrective lenses, screening for eye diseases or abnormalities,

¹ Joint Stipulation of Facts (Stip.) ¶ 1.

² Transcript (Tr.) 100

³ Tr. 102-3.

⁴ *Id.*

⁵ Tr. 111.

⁶ Tr. 63.

⁷ Stip. ¶ 2; Tr. 64-6; 110-111.

⁸ Tr. 63-Tr. 63-4, 69.

⁹ Tr. 63.

¹⁰ Stip. ¶ 3; Exhibits (Exs.) 1, 2.

¹¹ Ex. 2; Tr. 24-6.

diagnosing and treating most eye conditions, determining the need for and referral to specialists, and educating patients about their eye health.¹²

9. No licensed optometrist was on-site while Mackner conducted full eye examinations in lieu of Licensee.¹³

10. On those seven days in May, Mackner performed tests including taking patients' medical history and conducting refraction tests and slit lamp tests.¹⁴

11. Mackner conducted full eye examinations typical of primary eye care. Mackner evaluated patients for eyeglasses and contacts, conducted ocular health examinations, and proposed courses of treatment.¹⁵

12. An ocular health examination includes a battery of tests conducted to evaluate the health of a patient's eyes. This includes an examination of the internal anatomy of the eye. A slit lamp is used to perform part of the ocular health examination.¹⁶

13. At the end of each day, Licensee reviewed the tests results, validity of the tests, and records generated by Mackner regarding each patient Mackner saw that day.¹⁷ Although he did not examine the patients himself, Licensee issued prescriptions for many of the patients.¹⁸

14. Some patients seen by Mackner received prescriptions and purchased prescription corrective lenses immediately after their appointments, before Licensee reviewed Mackner's records of the examination.¹⁹ Target retail associates were able to obtain Mackner's prescriptions from the patients' medical charts.²⁰

15. Licensee was paid under his contract with Target for the patients Mackner saw at the Lakeville Clinic, and Licensee was separately compensated for the patients he saw at the Edina Clinic on the same days.²¹

16. Dr. Amy Rudser has been a licensed optometrist in Minnesota since 2005. She is knowledgeable about optometry standards of practice and is qualified as an expert witness.²²

¹² Tr. 24-26; see Ex. 2.

¹³ Stip. ¶ 5; Tr. 67.

¹⁴ Stip. ¶ 4.

¹⁵ Ex. 2; Tr. 24.

¹⁶ Tr. 24-26.

¹⁷ Stip. ¶ 6.

¹⁸ Tr. 70-71.

¹⁹ Exs. 4, 5; Tr. 78-82, 90-2, 185.

²⁰ Tr. 72, 80-2.

²¹ Tr. 69-70.

²² Tr. 21-24.

17. Dr. Roman Gerber has been an optometrist since 2011 and has practiced optometry in Minnesota since 2014. He is knowledgeable about optometry standards of practice and is qualified as an expert witness.²³

18. Neither expert – Dr. Rudser or Dr. Gerber – is aware of optometry examinations performed by students in a clinical setting without some oversight by a licensed optometrist in real time.²⁴

19. The standard of practice of optometry in Minnesota requires an optometrist to personally examine each patient, even when a student or technician conducts some of the tests. It is never acceptable for an unlicensed individual to practice optometry in lieu of the optometrist.²⁵

20. Mackner graduated optometry school in 2018 and was licensed in New York on September 11, 2018, and in New Jersey on October 18, 2018. Mackner held no optometry license in any state in May 2018 and was not licensed in Minnesota until September 20, 2019.²⁶

21. By 2020, Licensee was providing optometry services at eight Target Optical locations in the Twin Cities area.²⁷ All of these clinics are staffed by licensed optometrists. Elton Eyecare has become Target Optical's largest practice in the United States.²⁸

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Board and the Administrative Law Judge have jurisdiction to consider this matter under Minn. Stat. §§ 14.50, .52, .57, 214.103 (2020).

2. It is the duty of the Administrative Law Judge to, among other things, take "notice of the degree to which the agency has . . . (ii) fulfilled all relevant procedural requirements of law or rule" ²⁹

3. The Committee has complied with all relevant procedural requirements of law or rule.

4. Minn. Stat. § 148.607 (2020) vests the Board with authority to impose discipline, including revocation, suspension, censure, and civil penalties, when it finds

²³ Tr. 122.

²⁴ Tr. 34-5, 143.

²⁵ Tr. 29-35; *see also* Tr. 138.

²⁶ Stip. ¶ 2.

²⁷ Tr. 61-2, 117.

²⁸ Tr. 150.

²⁹ Minn. Stat. § 14.50.

that a licensed optometrist has violated the Optometry Practice Act (Minn. Stat. §§ 148.52 to 148.62) or related rules.

5. An optometry license is required to perform the following actions: to “employ any means, including the use of autorefractors or other automated testing devices, for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof;” “to diagnose any disease, optical deficiency or deformity, or visual or muscular anomaly of the visual system consisting of the human eye and its accessory or subordinate anatomical parts,” and to “prescribe lenses, including or cosmetic contact lenses, or prisms for the correction or the relief of the same.”³⁰

6. The Committee bears the burden of proving violations of the Act and related rules, by a preponderance of the evidence. A “preponderance of the evidence” means that the ultimate facts must be established by a greater weight of the evidence.³¹ “It must be of a greater or more convincing effect and . . . lead you to believe that it is more likely that the claim . . . is true than . . . not true.”³²

7. A licensee may be disciplined for “engaging in any unethical conduct; conduct likely to deceive, defraud, or harm the public, or demonstrating a willful or careless disregard for the health, welfare, or safety of a patient; or practice of optometry which is professionally incompetent, in that it may create unnecessary danger to any patient's life, health, or safety[.]” Actual proof of injury in any of these cases need not be established.³³

8. The Committee established, by a preponderance of the evidence, that Licensee engaged in unethical conduct, in violation of Minn. Stat. § 148.603(7).

9. Aiding or abetting an unlicensed person in the practice of optometry is grounds for discipline.³⁴

10. A preponderance of the evidence demonstrates that Licensee aided and abetted an unlicensed person in the practice of optometry.

11. Prescriptions furnished to the patient shall be signed by the examining optometrist.³⁵

12. The Committee failed to establish that Licensee was an “examining optometrist” such that he was required to sign the prescriptions.

13. No licensed optometrist shall sign or cause to be signed a refractive prescription without first making a personal examination of the eyes of the person for whom the prescription is made.³⁶

³⁰ Minn. Stat. § 148.56, subds. 1(2), (4), (5), 2 (2020).

³¹ 4 Minnesota Practice, CIV JIG 14.15 (2020).

³² *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).

³³ Minn. Stat. § 148.603(7).

³⁴ Minn. Stat. § 148.603(9).

³⁵ Minn. R. 6500.0600.

14. Licensee caused to be signed refractive prescriptions without first making a personal examination of the patients' eyes.

15. An optometrist licensed in the state must maintain a medical record for each patient. For each "encounter with a patient," the medical record must contain "adequate identification of the patient and treating health care professional."³⁷

16. Licensee failed to maintain medical records for each patient seen at Lakeville Clinic that adequately identified the treating health care professional.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge concludes that Licensee violated Minn. Stat. § 148.603(7), (9), Minn. R. 6500.0600, and Minn. R. 6500.0700. It is respectfully recommended that the Board impose appropriate discipline.

Dated: March 11, 2021



KIMBERLY MIDDENDORF
Administrative Law Judge

Reported: Digitally Recorded
Transcript Prepared

NOTICE

This Report is a recommendation, not a final decision. The Board will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2020), the Board shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Board must consider the exceptions in making a final decision. Parties should contact Randy Snyder, Executive Director, Minnesota Board of Optometry, 2829 University Avenue SE, Suite 403, Minneapolis, Minnesota 55414 (651) 201-2762, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the

³⁶ Minn. R. 6500.0600.

³⁷ Minn. R. 6500.0700, subp. 1(C).

presentation of argument to the Board, or upon the expiration of the deadline for doing so. The Board must notify the parties and Administrative Law Judge of the date the record closes. If the Board fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2020). In order to comply with this statute, the Board must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline to be imposed.

Under Minn. Stat. § 14.62, subd. 1 (2020), the Board is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Introduction

The Committee contends that Licensee violated the Act when he employed an unlicensed individual to practice optometry in his stead, while he practiced at another clinic. The Committee alleged that Licensee's unlicensed substitute employed means to measure the power of vision, conducted ocular health examinations to diagnose diseases or deformities of the eyes, and prescribed corrective lenses. In addition, Licensee prescribed corrective lenses without having made a personal examination of the eye.

Licensee argues that he "conducted personal examinations of the work of the student that he was offsite violates no requirement of the law. His review was personal as the law requires, it just was not face to face with a patient which the law does not require."³⁸ In Licensee's view, his review of records generated by Mackner relieves him of the consequences of employing an unlicensed student to perform optometry. Licensee's arguments fail as discussed below.

Analysis

First, the Committee alleged that Licensee engaged in unethical conduct. Minn. Stat. § 148.603(7) authorizes the Board to discipline an optometrist for "unethical conduct; conduct likely to deceive, defraud, or harm the public, or demonstrating a willful or careless disregard for the health, welfare, or safety of a patient[.]"

Licensee's conduct in turning patients over to a student without any supervision falls far below conduct expected of a licensed medical professional. Dr. Rudser testified Licensee's conduct was unethical and failed to meet the standard of care required of an optometrist. Dr. Gerber, even though a friend of Licensee and his expert witness, had to concede that aspects of Licensee's arrangement with Mackner were problematic. The testimony of both experts made clear that allowing a student to perform all the functions in place of a fully licensed optometrist is well below the required standard of care.

³⁸ Licensee's Closing Argument at 1.

Dr. Gerber's expert testimony is afforded less weight than is Dr. Rudser's testimony. Dr. Gerber is close friends with Licensee. They went to optometry school together, were roommates, and "have never not been in contact" since.³⁹ Dr. Gerber was led by counsel frequently on direct examination. Further, during direct testimony, Dr. Gerber opined that he was familiar the Optometry Practice Act and that Licensee's conduct did not violate the law. On cross-examination, he conceded that, at a minimum, the law requires that a licensed optometrist review an eye examination before a prescription is issued. Dr. Gerber nevertheless hedged his answer, claiming, "I haven't had time to review the statute well enough, so I can't state that with a huge amount of certainty."⁴⁰ Dr. Gerber's opinions were somewhat colored by his long friendship with Licensee.

Licensee's testimony was not persuasive. Much of it was irrelevant, such as the testimony regarding the amendment to Minn. Stat. § 145.713. This language was not in effect when Licensee committed the violations of the Act that are at issue. The amendment added language regarding the use of digital technology to provide care in remote settings. This matter has nothing to do with "remote care." Remote care was, and remains, required to be provided by a licensed optometrist. Licensee, however, provided no care to any of the 50 patients Mackner examined. Instead, Licensee employed an unlicensed individual to deliver care that is required to be provided by a licensed optometrist.

Licensee's arrangement with Mackner violated professional ethics in a number of ways. It is doubtful that many of the patients seen by Mackner even realized they were being seen by an optometry student. Licensee did not examine any of the patients' eyes to determine whether Mackner performed tests correctly and identified all ocular health issues. Because Licensee was not on site, or participating in the examinations remotely, none of these patients had the ability to ask questions of Licensee. Although they were never seen by an optometrist, the patients were charged for having been examined by one. The records of these examinations indicate that Licensee, not Mackner, performed the eye examinations. This type of unethical conduct is precisely the sort the Act is designed to prevent.

Second, the Committee alleged that Licensee aided and abetted the unlicensed practice of optometry. Minnesota law makes it unlawful for an unlicensed person to practice optometry.⁴¹ Optometry, as defined by the Optometry Practice Act, means to "employ any means, including the use of autorefractors or other automated testing devices, for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof," "to diagnose any disease, optical deficiency or deformity, or visual or muscular anomaly of the visual system consisting of the human eye and its accessory or subordinate anatomical parts," and to "prescribe lenses, including plano or cosmetic contact lenses, or prisms for the correction or the relief of the same."⁴²

³⁹ Tr. 123.

⁴⁰ Tr. 138.

⁴¹ Minn. Stat. § 148.56, subd. 2.

⁴² Minn. Stat. § 148.56, subd. 1(2), (4), (5).

Minn. Stat. § 148.603(9) provides that “[a]iding or abetting an unlicensed person in the practice of optometry” is grounds for discipline. A preponderance of the evidence establishes that Licensee aided and abetted an unlicensed person in the practice of optometry. While the Act permits delegation of limited functions to qualified persons, Licensee delegated *all* the functions of a licensed optometrist to an unlicensed student. Mackner used autorefractors to measure the patients’ power of vision, conducted ocular health examinations, and wrote prescriptions. Reviewing records of Mackner’s work does not change the fact that Mackner performed all the activities of a licensed optometrist without any supervision. The Act does not permit the delegation of the whole of a licensed profession to a student.

The Act allows “an optometrist to employ, supervise, or delegate functions to a qualified person . . . if that person is practicing within the scope of that person’s license or registration or delegated authority.”⁴³ Licensee’s characterization of Mackner as a technician is not persuasive. Mackner was not a mere technician, assisting a licensed optometrist under supervision. Mackner was a substitute optometrist, performing all functions of a licensed occupation without the requisite license. Mackner’s actions fall squarely within the definition of optometry, and Licensee’s arrangement with Mackner constitutes aiding and abetting the unlicensed practice of optometry in violation of Minn. Stat. 148.603(9).

Third, the Committee cited two violations of Minn. R. 6500.0600. First, the Committee alleged that Licensee violated this rule because he was responsible for furnishing prescriptions that were not signed by the examining optometrist. Licensee was not the examining optometrist. Mackner conducted the examinations. The paper records appear to have been signed by Mackner.⁴⁴ The Committee failed to meet its burden of proof with respect to this violation.

Minn. R. 6500.0600 also states “[n]o licensed optometrist shall sign or cause to be signed a refractive prescription without first making a personal examination of the eyes of the person for whom the prescription is made.”⁴⁵ The Committee argues Licensee clearly violated this requirement by signing off on Mackner’s prescriptions without ever examining the patients’ eyes himself.

Licensee argues that this provision is not violated because he examined the records of Mackner’s examinations at the end of the day. To Licensee, this constitutes “a personal examination of the eyes” of the patients. It does not. “Personal” is not ambiguous. It means “relating or belonging to a single or particular person.” A “personal” action is one that is done by someone directly.⁴⁶

Licensee argues, correctly, that “personal examination” does not necessarily mean one conducted “in person.” Licensee misses the point, however, by focusing on

⁴³ Minn. Stat. § 148.603(9).

⁴⁴ See Ex. 3; compare Ex. 2.

⁴⁵ Minn. R. 6500.0600.

⁴⁶ <https://dictionary.cambridge.org/us/dictionary/english/personal>.

“personal examination” to the exclusion of the rest of the text. It is not *where* the examination must occur but rather *what* must be performed by the licensed optometrist himself – an examination of the eye. Licensee did not himself examine any of the fifty pairs of eyes Mackner examined. He examined records of Mackner’s personal examination of those eyes. Despite having not examined the patients’ eyes, he caused prescriptions to be written. Licensee clearly violated this rule.

Last, the Committee contends that Licensee signed medical records for patients that he did not personally examine and failed to identify the professional who examined the patient, in violation of Minn. R. 6500.0700, subp. 1(C). The minimum standards for optometric medical records require, among other things, that for each encounter with a patient, the medical record must contain adequate identification of the treating professional. The medical records of the patients contain no indication on their face that Mackner was the treating professional. A review of the records would lead one to falsely conclude that Licensee, the signatory, conducted the patient examinations. Licensee violated the recordkeeping requirements of Minn. R. 6500.0700.

For the foregoing reasons, the Administrative Law Judge concludes that Licensee violated Minn. Stat. § 148.603(7) and (9), Minn. R. 6500.0600 and .0700. It is appropriate to impose discipline upon Licensee for this conduct.

K. J. M.