

IN THE MATTER OF *THE OPTICIANS ACT, 2010*
AND IN THE MATTER OF A COMPLAINT AGAINST CHRISTINE JOHNSON

Counsel for Professional Conduct Committee: Ian D. McKay, Q.C.
Counsel for Ms. Johnson: Kenneth M. Cornea

DECISION OF THE DISCIPLINE COMMITTEE

Ms. Johnson, a practicing member of the Saskatchewan College of Opticians, was charged with alleged disciplinary offenses in the following terms:

While a licensed optician employed by [REDACTED] at [REDACTED] Saskatchewan did provide opticianry services to a client outside of the legally mandated authorized area of practice, by measuring the patients refracting errors through the use of an alternated [sic] refractor to determine the patient's visual correctness or diagnosis. The cause or attempt to cause to be made a pair of glasses from the reading/prescription without the patient being prescribed by a licensed optometrist contrary to s.27(c) of *The Opticians Act* and 26(h) of the Bylaws as well as s.22(3)(e) of the Bylaws.

The reference to an "alternated refractor" was undoubtedly intended to be a reference to an "automated refractor".

The statutory and bylaw provisions cited within the above charge are as follows:

The Opticians Act

Professional misconduct

27 Professional misconduct is a question of fact, but any matter, conduct or thing, whether or not disgraceful or dishonorable, is professional misconduct within the meaning of this Act if:

(c) it is a breach of this Act or the bylaws; or ...

The Opticians Regulatory Bylaws

Professional misconduct

26 For the purposes of The Opticians Act, professional misconduct means any misconduct relating to the provision of services to the public by a member and includes but is not limited to:

(h) representing himself or herself as possessing special qualifications that he/she does not possess...

Limitations of Practicing Members

(3) Subject to the terms and conditions of that member's license no practicing member shall:

(e) except as may be otherwise provided in these bylaws, no member shall measure refractive error, determine its correction or diagnose conditions of the eye.

For the reasons summarized below, the Committee has determined that Ms. Johnson is guilty of professional misconduct pursuant to section 27(c) of *The Opticians Act*, by reason of having violated section 22(3)(e) of *The Opticians Regulatory Bylaws*.

INTERPRETATION OF SECTION 22 (3)(e) OF THE OPTICIANS REGULATORY BYLAWS

In the opinion of the Committee, in so far as relevant to the facts of this case, this provision means that no member shall use an automated refractor to measure refractive error in order to prescribe a refractive correction.

EVIDENCE AND ANALYSIS

Four witnesses testified. The Professional Conduct Committee adduced the testimony of two opticians employed [REDACTED] [REDACTED] namely [REDACTED] [REDACTED] and [REDACTED]. Mr. Cornea adduced the testimony of the member charged, Christine Johnson, an optician employed at [REDACTED] at the relevant time, and [REDACTED], a [REDACTED] vision customer frequently serviced by Ms. Johnson.

The exhibits filed, and testimony of the witnesses leave no doubt that on October 15, 2018, Ms. Johnson used an automated refractor to measure refractive error in the eyes of [REDACTED] [REDACTED] and thereafter wrote a prescription for eyeglasses that she placed in a tray for processing. Ms. Johnson admitted having done so.

However, Ms. Johnson testified that she was directed to do so by [REDACTED]. Although [REDACTED] was not then a supervisor of Ms. Johnson, she had been in the past, and Ms. Johnson testified that she felt obliged to follow orders.

[REDACTED] denies having given any such direction and maintains that the automated refractive testing and prescription were the independent acts of Ms. Johnson.

It is not necessary to resolve this conflict in the evidence. Ms. Johnson admits having measured refractive error and written the prescription. She cannot be excused from such

misconduct, even if she was ordered to do so. In the opinion of the Committee, “following orders” is not a defense to the charge pursuant to section 22(3)(e) of the Regulatory Bylaw.

Ms. Johnson testified that she measured refractive error and wrote the prescription on an urgent basis, as [REDACTED] optometrist was not available at the time and [REDACTED] was leaving in a few days on a trip to Italy. She added that she intended to follow up with [REDACTED]. Nevertheless, Ms. Johnson put the order through without having [REDACTED] verify the prescription.

In the opinion of the Committee, this explanation, if true, would not exonerate Ms. Johnson. She did precisely what the Regulatory Bylaw in question forbids.

In any case, [REDACTED] testified that she was planning a trip to Italy, but not until sometime in December. She further testified that there was no urgency to her visit to the [REDACTED] [REDACTED] department on October 15 and that she had attended for the sole purpose of having her frames adjusted. It may be that something was said to [REDACTED] about a trip to Italy, but any urgency for a new prescription and new glasses was a perception of Ms. Johnson not warranted by anything said to her by [REDACTED]. In the end, whether Ms. Johnson genuinely believed in any such urgency is neither here nor there. It would not excuse conduct in violation of the Regulatory Bylaw.

It was argued on behalf of Ms. Johnson that because the measurements on the prescription she wrote did not match the automated refractive testing results, it should be inferred that the data for the testing was dictated by [REDACTED]. As stated above, whether Ms. Johnson acted on her own or on the urging of [REDACTED] is irrelevant to the question of guilt or innocence.

It is noted that it was argued on behalf of Ms. Johnson that section 22(3)(e) of the Regulatory Bylaw is prefaced by the words “except as may be otherwise provided in these bylaws”. In other words, the prohibition in this section does not apply where the bylaws otherwise permit measurement of refractive error, determination of its correction or diagnosis of conditions of the eye. Specifically, it was contended on behalf of Ms. Johnson, that sections 22(2)(b) and (d)

authorize the refractive testing and prescription by Ms. Johnson. Those sections of the Regulatory Bylaw read as follows:

(2) Subject to the terms, conditions and limitations of that member's License, a member may perform the following authorized practices in accordance with Section 23(1) of The Opticians Act.

(b) verify corrective lenses and supply ophthalmic appliances to the patient, and provide opticianry practices and follow up care;

(d) verify to the prescription embedded in existing lenses; fit and dispense eyeglass lens duplications, replacements, reproductions or repetitions without a prescription; provide opticianry practices and follow up care;

The reference to verification of corrective lenses in section 22(2)(b) involves verification that finished glasses match the prescription as prescribed by a licensed optometrist or ophthalmologist and is not engaged on the facts of this case. Similarly, the services and procedures authorized by section 22(2)(d) simply do not correspond to anything that occurred, based on the evidence in this case.

Accordingly, the Committee finds Ms. Johnson guilty of violating section 22(3)(e) of Regulatory Bylaw, and therefore guilty of misconduct, pursuant to section 27(c) of the Act.

THE OTHER CHARGE

The charge, reproduced above, also alleged violation of clause 26(h) of the Regulatory Bylaw which, in enumerating conduct deemed to be misconduct, includes as misconduct representing one's self as possessing special qualifications that he/she does not possess. That count in the charge is dismissed, as there is no evidence to support it.

Prior to the close of the hearing, it became apparent that the reference to section 26(h) in the charge, which was read into the record at the opening of the hearing, was a typographical error. Counsel for the Conduct Committee advised that the intent was to refer to clause 26(f) regarding falsification of a record in respect of prescription. A prior version of the charge was put into evidence, and it did indeed refer to clause 26(f). This prior version was served on Ms. Johnson, but it was never provided to Mr. Cornea, who was retained only a short while before the hearing. Ms. Johnson acknowledges that she did receive the version of the charge referring to clause 26(f) a number of months before the hearing. However, she said that she

provided it to her lawyer at the time and simply assumed that her then lawyer provided it to Mr. Cornea. That obviously did not happen. The Committee notes that in his closing argument, Mr. Cornea made specific reference to clause 26(h) and did not make submissions about clause 26(f) which refers to falsification of records.

Mr. McKay, Q.C. asked the committee to amend the charge to conform to the evidence, and the earlier version of the charge that did not have the typographical error.

The Committee declines to amend the charge. All of the witnesses have testified, and for the most part, heard each other's testimony. Mr. Cornea submits that the case he would have presented and the cross-examination he would have conducted, had he known there was a charge of falsification of records, would have been much different. In the circumstances, the Committee considers that it would be inappropriate and unfair to amend the charge and declines to do so.

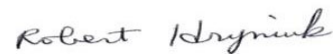
FURTHER HEARING AS TO PENALTY

The sole remaining item is determination of an appropriate penalty. The Committee will be asking its counsel, Mr. Ehmann, to arrange for a hearing date in that regard that is workable for all concerned. Mr. Ehmann is also directed to explore the possibility of concluding that aspect of the matter on written submissions, but such a course would be followed only if Mr. Cornea and Mr. McKay agree to it.

DATED this 5th day of September, 2019.



Name: Al Brooks, Chair



Name: Robert Hryniuk



Name: Letitia Lam



Name: Arlene Miller