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Public Hearing Comments to **172 NAC 053 & 172 NAC 057**

The Department is limited in its rulemaking authority to powers granted to the agency by the statutes which they are to administer, and it may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute. *Mahnke, v. Department of Health and Human Services Regulation and Licensure*, 276 Neb. 57, 751 N.W.2d 635 (2008). In order to be valid, a rule or regulation must be consistent with the statute under which it is promulgated. *Dozler v. Conrad*, 532 N.W.2d 42, 50, 3 Neb.App. 735, 746 (Neb.App. 1995).

During the April 19, 2019, the Board of Dentistry approved the Department's drafts of 172 NAC 53 and 172 NAC 56, ignoring the issues listed below, thereby violating *Mahnke* and *Dozler*

- a. Allowing restorative expanded function education *to be part of* an accredited dental assistant/hygiene program – the education for this duty was NEVER contemplated to be taken during a dental assistant/hygiene program.
- b. Removal of Dental X-Ray requirements of the current Regulations.

Restorative Expanded Function Education

The 407 Application which led to LB 18 contained a proposed section of regulations regarding expanded function education:

002.01H Expanded Function Restorative Dental Hygienist

The Board shall issue an Expanded Function Restorative Dental Hygienist permit upon receipt of a completed application form, payment of the appropriate fee specified in the Uniform Credentialing Act, **and proof that the dental hygienist has completed a board approved expanded functions training course**. The requirements of this section must be completed within one (1) year of the date of submission of the application form. The board-issued expanded functions permit must be displayed in plain view in any facility where the dental hygienist will be providing expanded functions prior to delegation of expanded functions to that dental hygienist. Dental hygienists shall renew expanded functions permits in accordance with the requirements established by the Board of Dentistry. A licensed dental hygienist may use continuing education hours obtained for license renewal to renew an expanded functions permit. The Restorative Functions listed below may be performed under the indirect supervision of a dentist.

If this education was intended to be part of a program, a dental hygienist would not be taking the course.

Section 8 of LB 18 defined an expanded Function dental hygienist: *Expanded function dental hygienist means a licensed dental hygienist who has met the requirements to practice as an expanded function dental hygienist pursuant to section 10 of this act.* If the education required of an expanded function dental hygienist were included as part of a standard hygiene program, then this definition would be unnecessary.

Section 10(1) and (2) of LB 18 set forth the requirements for an expanded function permit:

(1) Every applicant for a permit to practice expanded function dental hygiene shall:

(a) present proof of current, valid licensure under the Dentistry Practice Act as a licensed dental hygienist at the time of application,

(b) present proof of at least one thousand five hundred hours of experience as a licensed dental hygienist,

(c) present proof of successful completion of courses and examinations in expanded function dental hygiene approved by the board,

(d) pass a jurisprudence examination approved by the board that is based on the Nebraska statutes, rules, and regulations governing the practice of expanded function dental hygiene, and

(e) complete continuing education as a condition of the permit if required by the board.

(2) Upon completion of these requirements, the department, with the recommendation of the board, shall issue the applicant **the applicable permit** to practice expanded function dental hygiene.

If expanded function dental hygiene was included as part of a standard hygiene program, why is proof of completion of courses and examinations for that particular duty required when no proof of individual course work for the other duties of a licensed hygienist listed in NEB.REV.STAT. 38-1131 are required? Also, why would the department issue a separate permit for performing this duty, when none of the duties listed in NEB.REV.STAT. 38-1131 receives a permit?

Dr. Jessica Meeske testifying in support of LB 18 stated:

In addition, a licensed dental assistant with additional education and testing can apply to receive permits to perform expanded functions. *Second, **the bill increases the scope of practice for dental hygienists. Just like licensed dental assistants with additional education and testing, the licensed dental hygienists can apply to receive permits to perform additional expanded functions** which, again, are outlined in the handout.*

Health and Human Services Committee Hearing, 105th Leg., 1st Sess. p.3 (January 18, 2017).

Later in her testimony, Dr. Meeske stated, “*Now this staff person has to have **additional education, certification, in some cases licensure.**” *Id.* p.4*

Cindy Cronick, testifying in support of LB 18 on behalf of the Nebraska Dental Assistants Association, echoed Dr. Meeske’s comments:

These courses would have education in both the classroom, laboratory, and clinical components to ensure knowledge and competency. Once a licensed dental assistant has established experience at this level, **they could take further courses**, as Dr. Meeske just talked about, to place a filling in a tooth that a doctor has removed the decay from or the old filling from. *Id.* p.7

Karen Fiala, testifying in support of LB 18 as the president of the Nebraska Dental Hygienists' Association, believed that LB 18 did not allow expanded function education to be part of a standard hygiene education because they expressed their concern:

We do, however, **have just a couple of concerns** regarding the education and experience requirements in this bill, and those concerns are twofold: the first would be that students finishing their schooling will be required to wait a year before being able to perform these duties or procedures and two, that if the 1,500 hours of education does not fulfill the requirements of LB18, then dental and dental hygiene programs are not obligated to provide the education required by LB18. The Commission on Dental Accreditation, or **CODA, only requires dental programs to prepare entry-level dental hygienists**. And on the second page you have is a small outline of what our current state programs offer in the years of the dental hygiene program and the hours that are spent didactically, clinically, and in laboratory. And anything else we do outside of the school is additional hours of practice. The NDHA believes that, upon graduation from an accredited Nebraska dental hygiene program, that Nebraska students will have completed enough didactic, clinical, and lab hours to meet the 1,500-hour requirement of LB18 and should be able to apply for expanded duty license. **We would like our future graduates to have been instructed in these areas required to be an expanded function dental hygienist**, to be able to perform these duties upon completion of their degree and successful completion of the appropriate testing.

Including expanded function education as part of dental programs to prepare entry-level hygienists is inconsistent with LB 18 and increase the educational burden on dental assistants and hygienists, when this duty was intended to allow a smaller percentage of individuals to seek advanced training. As such, the current draft Regulations regarding this issue are impermissible alterations prohibited by *Mahnke* and inconsistent with the statute under which it is promulgated as prohibited under *Dozler v. Conrad*, 532 N.W.2d 42, 50, 3 Neb.App. 735, 746 (Neb.App. 1995).

Therefore, 172 NAC 53.007.01 and 172 NAC 57.008.01 must be modified as follows:

172 NAC 53.007.01 – Strike the language below:

~~Be part of an accredited dental assisting training program or~~ offered as a separate course by a program accredited by the American Dental Association Commission on Dental Accreditation or a substantially equivalent accrediting organization;

172 NAC 57.008.01 – Strike the language below:

~~Be part of an accredited dental hygiene training program or~~ be provided as a separate course by a program accredited by the American Dental Association Commission on Dental Accreditation or a substantially equivalent accrediting organization;

Conflict of Interest

Requiring all hygiene students to take additional advanced courses would certainly benefit any institution with a hygiene curriculum. Three of the Board of Dentistry members voting in support of Regulations approving that the Expanded Function Education be part of a standard hygiene program are also on staff with educational institutions with hygiene programs: Dr. David Blaha (Creighton University), Cynthia R. Gaskill, RDH (*Dental Hygiene Instructor*, Central Community College), and Lisa M. Kucera, RDH (*Dental Hygiene Instructor*, Iowa Western Community College)

Dr. Blaha, Ms. Gaskill and Ms. Kucera have a present conflict of interest voting on Regulations that would benefit their educational institution employers.

DENTAL ROENTGENOGRAMS

The existing Regulations 172 NAC 004 DENTAL ROENTGENOGRAMS has been completely removed from the proposed Regulations. Section 004 states:

Any licensed dental hygienist, by virtue of training and professional ability, is hereby authorized, under the supervision of a licensed dentist, to take dental roentgenograms. **Any other dental auxiliary is hereby authorized under the supervision of a licensed dentist to take dental roentgenograms**, but they shall not be authorized to do so, on or after January 1, 1973, unless they have satisfactorily completed a course in dental radiology approved by the Board and the department.

The only mention of Dental Roentgenograms in the proposed Regulations is the listing of DENTAL X-RAY course requirements under the expanded function Section 007.04.

LB 18, modifying § 38-1135(5), states “Upon completion of education and testing approved by the board, a dental assistant may: (a) Take X-rays under the general supervision of a licensed dentist.” Because Dental X-Ray education is not an expanded function duty, the proposed Regulations must be corrected to be consistent with § 38-1135(5)

The proposed Regulations must remove the DENTAL X-RAY course requirements currently under the expanded function Section 007.04 so the public will not be confused that DENTAL X-RAY is an expanded function, inconsistent with § 38-1135(5). DENTAL X-RAY should have a separate section like Section 009 Coronal Polishing.