



IN THE SUPREME COURT OF THE STATE OF DELAWARE

Karen S. Webster,)
)
Petitioner Below,)
Appellant,) C.A. No. 593, 2014
)
v.)
)
Delaware Board of Medical Licensure) Court Below: The Superior Court
And Discipline,) State of Delaware,
) C.A. No.: N13A-05-011-FSS
Respondent Below,)
Appellee)

**ANSWERING BRIEF OF APPELLEE DELAWARE BOARD OF
MEDICAL LICENSURE AND DISCIPLINE**

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Katisha D. Fortune

Katisha D. Fortune (I.D. No. 4857)
Deputy Attorney General
Carvel State Office Building
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8400
Attorney for Respondent Below/
Appellee

January 5, 2015

TABLE OF CONTENTS

TABLE OF CONTENTS..... ii

TABLE OF CITATIONS iv

NATURE OF THE PROCEEDINGS.....1

STATEMENT OF FACTS4

SUMMARY OF THE ARGUMENT5

ARGUMENT8

 I. THE BOARD IS PERMITTED TO ISSUE “CEASE AND DESIST”
ORDERS TO INDIVIDUALS, INCLUDING NON-NURSE MIDWIVES, WHO
ENGAGE IN THE UNLICENSED PRACTICE OF MEDICINE.....8

 1. Delaware Law Permits the Board to Regulate the Unlicensed Practice of
Medicine even when the Unlicensed Practitioner is a Non-nurse Midwife.....9

 2. The Legislation Discussed by Webster at Pages 18-20 of the Opening Brief
does not alter the Board’s Authority to Regulate the Unlicensed Practice of
Medicine.13

 3. The Hearing Officer Correctly Determined that the Board has Authority to
Regulate the Unlicensed Practice of Medicine by Unlicensed, Non-nurse
Midwives.13

 II. THE BOARD DID NOT COMMIT AN ERROR OF LAW WHEN IT DID
NOT RECORD ITS DELIBERATIONS, WHICH WERE HELD IN
EXECUTIVE SESSION.....17

 III. WEBSTER ELECTED TO PROCEED WITH THE HEARING BEFORE
THE HEARING OFFICER WITHOUT COUNSEL AND THAT DECISION
DID NOT CREATE A DUE PROCESS VIOLATION.....23

 IV. THE SUPERIOR COURT’S ORDER, WHICH AFFIRMED THE
BOARD’S PUBLIC ORDER IN ITS ENTIRETY, DID NOT CONSTITUTE
LEGAL ERROR AND SHOULD BE AFFIRMED BY THIS COURT.26

 1. The Hearing Officer Properly Determined that Webster Engaged in the
Unlicensed Practice of Medicine by Managing Pregnancy and Parturition in the
State of Delaware.....27

2. The Recommendation’s Finding that Webster Engaged in the Unlicensed Practice of Medicine when she Managed Pregnancy and Parturition in the State of Delaware is Supported by Substantial Evidence in the Record.28

3. The Recommendation’s Conclusions with respect to 24 *Del. C.* §1702(9)(a) are Supported by Substantial Evidence in the Record.29

4. This Court is not Required to Remand this Case to the Superior Court for Further Analysis.....32

CONCLUSION33

TABLE OF CITATIONS

Cases

<i>Burge v. Fidelity Bond and Mortgage Co.</i> , 648 A.2d 414, 421 (Del. 1994).....	15
<i>Common Cause of Del. v. Red Clay Consolidated School Dist. Bd. of Educ.</i> , 1995 WL 733401, at *4 (Del. Ch. Dec. 5, 1995).....	23
<i>Jain v. Delaware Bd. of Nursing</i> , 2013 WL 3788095, at *3 (Del. Jul. 16, 2013) ...	9,
27	
<i>Jain</i> , 2013 WL 3788095, at *3.....	18
<i>Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N. C.</i> , 452 U.S. 18, 26-27 (1981)	25
<i>Liberty Mutual Ins. Co. v. City Window Cleaning of Delaware, Inc.</i> , 2011 WL 2176519, at *2 (Del. Super.).....	15
<i>Martinez v. California</i> , 444 U.S. 277, 283 n.7 (1980).....	15
<i>Olson v. Halvorsen</i> , 986 A.2d 1150, 1160 (Del. 2009).....	21
<i>Richardson v. Board of Cosmetology & Barbering</i> , 69 A.3d 353 (Del. 2013) 18, 21	
<i>Rochen v. Huang</i> , 1989 WL 5373, *3 (Del. Super. Jan. 6, 1989)	23
<i>Rooney v. Del. Bd. of Chiropractic</i> , 2011 WL 2088111, *4 (Del. Super. Apr. 27, 2011)	22
<i>Stoltz Mgmt. Co. v. Consumer Affairs Bd.</i> , 616 A.2d 1205, 1208 (Del. 1992)	33
<i>Wilson v. Div. of Family Servs.</i> , 988 A.2d 435, 444 (Del. 2010)	26

Statutes

10 <i>Del. C.</i> Chapter 10.....	16
24 <i>Del. Admin. C.</i> § 5300 – 8.0.....	15
24 <i>Del. C.</i> § 1713(a)(5)	11
24 <i>Del. C.</i> § 1734(b).....	20
24 <i>Del. C.</i> §1606(a)-(b).....	16
24 <i>Del. C.</i> §1702(12).....	2, 6, 9
24 <i>Del. C.</i> §1702(9)(c)	11, 28
24 <i>Del. C.</i> §1734(b).....	6
24 <i>Del. C.</i> §1735(a).....	6
29 <i>Del. C.</i> § 10004	6
29 <i>Del. C.</i> § 8735(s).....	6
29 <i>Del. C.</i> §8735	9

67 Del. Laws, c. 226, § 14 (1990).....	20
77 <i>Del. Laws</i> , c. 325, §§ 15-19 (2010)	20
Freedom of Information Act, 29 <i>Del. C.</i> Chapter 100.....	21, 22

NATURE OF THE PROCEEDINGS

The Delaware Division of Professional Regulation (“DDPR”) opened these cases after receiving two complaints filed against Appellant Karen Webster (“Webster”). The first complaint, filed on or about December 6, 2011, alleged that Webster worked and acted as a midwife in the State of Delaware without a license and that Webster assisted with the delivery of a stillborn child at the mother’s home in Delaware. *See* Appendix to Webster’s Opening Brief (“Appendix”), at pp. A9-A12.¹ The DDPR received a second complaint regarding Webster on February 14, 2012. The complaint, filed by a Delaware Division of Public Health (“DDPH”) employee, alleged that Webster served in the capacity of midwife and delivered a baby born at her mother’s Delaware home on June 16, 2011. *See Recommendation of Chief Hearing Officer*, dated February 13, 2013 (the “Recommendation”), at p. 18 (A206); Statement of Complaint, dated February 14, 2012 (A66-A69).

On or about July 18, 2012, the State filed an Amended Complaint (“Complaint”) against Webster that alleged violations of the Medical Practice Act, 24 *Del. C.* §1701, *et seq.* (the “Medical Practice Act”) (A7-A8). Specifically, the Complaint alleged that Webster engaged in the unauthorized practice of medicine,

¹ References to A-__ refer to the Appendix to Webster’s Opening Brief, filed with this Court on or about December 5, 2014.

as defined by 24 *Del. C.* §1702(12), when she advertised and provided prenatal, labor and delivery services in the State of Delaware.

Counsel for Webster filed a letter motion to dismiss the Complaint on August 7, 2012 (the “Motion to Dismiss”) (A73-A75). The Chief Hearing Officer (“Hearing Officer”) denied the Motion to Dismiss by written decision (A79-A81) and a formal hearing was held on January 17, 2013. Sitting on behalf of the Board of Medical Licensure and Discipline (the “Board”), the Hearing Officer listened to the testimony of the parties, their witnesses, and accepted evidence into the record of the case. *See* Transcript of Hearing held on January 17, 2013 (the “Transcript”) (A82-A188). On February 13, 2013, the Hearing Officer issued the Recommendation. The Recommendation concluded that the State proved the allegations of the Complaint by a preponderance of the evidence. *See* Recommendation at p. 24-25 (A212-213). The Hearing Officer, *inter alia*, recommended that the Board issue a “cease and desist order” directing Webster to refrain from any acts constituting the practice of medicine, including any and all acts constituting the management of pregnancy and parturition. *See* Recommendation at pp. 27-28 (A215-A216).

Through counsel, Webster filed a Statement of Exceptions to the Recommendation on March 19, 2013 (the “Exceptions”) (A256-A267). Neither Webster nor her attorneys requested argument before the Board. On April 2, 2013,

the Board deliberated on the Recommendation in executive session. On May 7, 2013, the Board issued a Public Order (the “Public Order”) adopting the Recommendation in its entirety.

Webster retained counsel for her appeal to the Superior Court of the State of Delaware, which affirmed the decision of the Board in its entirety by Order dated September 22, 2014. The instant appeal followed and Webster filed an Opening Brief (the “Opening Brief”) on December 5, 2014.²

² Herbert W. Mondros, on behalf of fourteen *amicus curiae*, filed a “Brief of Amicus Curiae” for this Court’s consideration on December 12, 2014. Because this Court’s review is limited to the record before it, the Board objects to the Court’s consideration of the arguments raised by amicus at pp. 1-7 and 11-17 of the brief. These issues were not presented to the Board or to the Superior Court and are not properly before this Court. The remaining arguments of amicus, regarding the jurisdiction of the Board to issue “cease and desist” orders to non-nurse midwives who practice medicine without a license in the State of Delaware, are substantially similar to Webster’s arguments on this topic and will be addressed herein.

STATEMENT OF FACTS

The State incorporates the “Summary of Evidence” and “Findings of Fact” included in the Recommendation as if fully set forth herein. *See* Recommendation at pp. 7-18 (A195-A206).

SUMMARY OF THE ARGUMENT

Appellee denies that the Superior Court committed any reversible errors of law. Specifically:

I. **DENIED** that the Superior Court erred in its determination that the Board had statutory jurisdiction to issue the Public Order to Webster. The State proved by a preponderance of the evidence in the record that Webster illegally engaged in the unlicensed practice of medicine within the meaning of 24 *Del. C.* §1702(12) when she delivered two babies at her clients' homes in the State of Delaware. The Hearing Officer's written Recommendation was adopted by the Board in its entirety after its review of the record before the Hearing Officer. Therefore, the Board properly exercised its authority when it issued the Public Order demanding that Webster "cease and desist" the unlicensed practice of medicine in the State of Delaware. The Board has authority to issue such orders pursuant to 24 *Del. C.* §1735(a) and 29 *Del. C.* § 8735(s), and there is no merit to the argument that the Board lacked authority to do so simply because Webster defines herself as a non-nurse midwife.

II. **DENIED** that the Superior Court erred when it did not remand this case back to the Board for the creation of a verbatim transcript of its deliberations. The Board deliberated in closed, executive session as permitted by 24 *Del. C.* §1734(b) and the Administrative Procedures Act, 29 *Del. C.* § 10004. As a result,

the Board was not required to transcribe those deliberations for purposes of an on-the-record review of this case on appeal.

III. **DENIED** that the Superior Court erred in its determination that Webster, who was provided notice of the hearing before the Hearing Officer and the Board, and an opportunity to be heard after she elected to proceed at the hearing without counsel, was afforded due process at all stages of the administrative proceedings. Additionally, Webster failed to raise her due process concerns in her Exceptions to the Recommendation, which were filed on her behalf by counsel. Therefore, Webster failed to preserve this issue for this appeal. A remand to the Board for an additional hearing on the merits is not required by principles of procedural due process.

IV. **DENIED** that a remand to the Superior Court is necessary solely because the court did not address each of Webster's arguments in its decision affirming the Board's Public Order. This Court must address any issues of law before the Board and the Superior Court *de novo*. Therefore, this Court may consider the legal question of whether the Board was required to make an on the record transcript of its deliberations, which were held in executive session, *sua sponte*. Remanding the issue to the Superior Court for an ultimate determination of this question is not required. However, because the Board was not required to

conduct its deliberations on the record, the Court should affirm the decision of the Superior Court and the Board.

ARGUMENT

I. THE BOARD IS PERMITTED TO ISSUE “CEASE AND DESIST” ORDERS TO INDIVIDUALS, INCLUDING NON-NURSE MIDWIVES, WHO ENGAGE IN THE UNLICENSED PRACTICE OF MEDICINE

A. Question Presented: Did the Superior Court err by affirming the Hearing Officer’s and Board’s determinations that the Board had authority under the Medical Practice Act and 29 *Del. C.* §8735 to issue the Public Order to Webster, who engaged in the unlicensed practice of medicine when she managed pregnancy and parturition within the meaning of 24 *Del. C.* §1702(12)?

The State, on behalf of the Board, addressed this argument in its Answering Brief to the Superior Court at pp. 3-10 (A323-A330).

B. Scope of Review: Whether the Board had the statutory authority to issue the Public Order to Webster under the circumstances of this case is a question of law. “This Court reviews a Superior Court ruling that, in turn, has reviewed a ruling of an administrative agency, by examining directly the decision of the agency . . . [this Court reviews] questions of law *de novo*. Absent an error of law, we review a Board's decision for abuse of discretion.” *Jain v. Delaware Bd. of Nursing*, 2013 WL 3788095, at *3 (Del. Jul. 16, 2013).

C. Merits of Argument

1. Delaware Law Permits the Board to Regulate the Unlicensed Practice of Medicine even when the Unlicensed Practitioner is a Non-nurse Midwife.

The Opening Brief contends that the Board lacks jurisdiction to regulate non-nurse midwives because that authority is exclusively delegated to the Delaware Department of Health and Social Services (“DDHSS”). *See* Recommendation at p. 20 (A208); Opening Brief at pp. 11-18. However, Webster blurs the real the issue in this case, which is whether the Board may issue a cease and desist order to a person like Webster who is engaged in the unlicensed practice of medicine; not whether the Board may regulate the practice of non-nurse midwifery.

Despite Webster’s concessions regarding a midwife’s “overlapping skills with regard to the management of pregnancy and parturition,”³ Webster argues that the DDHSS has “exclusive jurisdiction” to regulate Webster when she manages pregnancy and parturition in the State of Delaware simply because she considers herself a certified non-nurse midwife.⁴ Webster also argues that by focusing on the phrase “the management of pregnancy and parturition,” the Hearing Officer ignored the plain language requiring “the management” of pregnancy and

³ *See* Motion to Dismiss at p. 2 (A74); Transcript at p. 43, lines 13-15 (A125); Transcript at pp. 82-83 (A164-165).

⁴ Webster is not, and has never been, licensed by the DDHSS to legally practice in Delaware as a non-nurse midwife.

parturition in order to create a violation of §1702(12). *See* Opening Brief at pp. 29-30. Webster advances this argument despite conceding that her midwifery practice involves the management of pregnancy and parturition within the meaning of 24 *Del. C.* §1702(9)(c). *See* Transcript at p. 80, lines 6-20 (A162).

Webster's position is not supported by the plain language of the Medical Practice Act. Pursuant to 24 *Del. C.* § 1713(a)(5) and 29 *Del. C.* §8735(s),⁵ the Board is vested with jurisdiction to investigate complaints of unauthorized practice of medicine and hold hearings. The Medical Practice Act unambiguously defines the practice of medicine to include "the management of pregnancy and parturition." 24 *Del. C.* § 1702(9)(c); Recommendation at p. 20. (A208).

Section 1703 of the Medical Practice Act provides exceptions to the statute including an exception for "nurses and . . . persons engaged in other professions or occupations who are certified, licensed, or registered according to law and are acting within the scope of the activity for which they are certified, licensed, or registered." Thus, if Webster had been properly licensed as a certified nurse midwife or permitted by the DDPH as a non-nurse midwife, the provisions of

⁵ At the time of administrative proceedings in this case, the APA permitted licensing boards to issue cease and desist orders to any person or business engaged in the unlicensed practice of a profession listed at 29 *Del. C.* §10161. *See former* 29 *Del. C.* §§10161 (c) and (d) (amended by S.B. 90 (2013 Del. Laws, ch. 168 (2013)) (attached hereto as "Exhibit A"). This section of the statute was removed after the addition of §8735(s) to Title 29 in August 2013. 29 *Del. C.* §8735(s) expands the authority of professional boards to regulate the unlicensed practice of a given profession. The State submits that these amendments did not alter or limit the Board's ability to issue "cease and desist" orders to persons who illegally engage in the unlicensed practice of medicine.

Chapter 17 would not apply to her provided that she acted within the scope of her licensure. *See* Recommendation at pp. 22-24 (A210-A212). As Webster is not otherwise licensed or permitted to manage pregnancy and parturition in Delaware, the hearing officer correctly determined as a matter of law that Webster engaged in the unlicensed practice of medicine when she delivered two babies at her clients' homes (i.e. managed "parturition") in Delaware. *Id.*

This finding was based on substantial evidence in the record of the case. Webster unequivocally acknowledged at the hearing and in her written submissions to the Board that as a non-nurse midwife, she is engaged in the "management of pregnancy and parturition." *See* Recommendation at p. 21-22 (A209-A210); Transcript at p. 80, lines 6-20 (A162); Motion to Dismiss at p. 2 (A74). Thus, there is no legal error in the Hearing Officer's conclusion that Webster engaged in the unlicensed practice of medicine by managing pregnancy and parturition in Delaware.

While the Opening Brief claims that the Hearing Officer erroneously determined that Title 16 of the Delaware Code and 24 *Del. C.* §1702(9)(c) are ambiguous, Webster does not point to any portion of the Recommendation discussing an ambiguity in the statutes. *See* Opening Brief at pp. 16-18. This case required the Hearing Officer to determine whether non-nurse midwives are engaged in the unlicensed practice of medicine when they manage pregnancy and

parturition within the meaning of the Medical Practice Act; not whether the Board is permitted to regulate the practice of midwifery. *See* Recommendation at p. 20 (A208). After examining the statutes at issue, the Hearing Officer correctly determined that Webster engaged in the unlicensed practice of medicine when she illegally delivered two babies in Delaware homes without first obtaining a permit to work as a non-nurse midwife from the DDHSS. The Recommendation is also clear in its conclusion that each word of 24 *Del. C.* §1702(9)(c) is to be given its plain meaning. *See* Recommendation at p. 20 (A208) (“In interpreting the Delaware Code, one is instructed to read words within their context. If a word has not acquired a ‘peculiar’ meaning in the law, it is to be construed according to the common and approved usage of the English language.”).

Webster also concludes that “[t]he Hearing Officer’s determination results in the language and purpose of 16 *Del. C.* §1223(3)(h) being superfluous.” Opening Brief at p. 18. However, if the General Assembly did not intend to give the Board the authority to regulate the unlicensed “management of pregnancy and parturition,” it is unclear why that phrase is explicitly included in the definition of “practice of medicine.” Accepting Webster’s interpretation of the statute thus leads to a nonsensical result even though the statute can be interpreted without creating any confusion.

2. The Legislation Discussed by Webster at Pages 18-20 of the Opening Brief does not alter the Board’s Authority to Regulate the Unlicensed Practice of Medicine.

Webster argues for the first time that “[r]ecent and proposed legislation of the General Assembly confirms Webster’s interpretation that only DDHSS, and not the Board, has statutory jurisdiction to regulate the practice of non-nurse midwifery.” Opening Brief at pp. 18-20. However, the legislation cited by Webster does not support her argument that the DDHSS has exclusive jurisdiction to sanction a non-nurse midwife engaged in the unlicensed practice of medicine, or that the Board may not regulate the unlicensed practice of medicine simply because it is a non-nurse midwife who is engaged in the unlicensed practice of medicine. Indeed, Webster’s contradicting argument at p. 20 of the Opening Brief (i.e., that recently approved HB 319 would include non-nurse midwifery within the scope of the Board’s jurisdiction) bolsters the State’s position--the legislature intended that the Board have authority to regulate the unlicensed practice of medicine, even and especially when engaged in by non-nurse midwives.

3. The Hearing Officer Correctly Determined that the Board has Authority to Regulate the Unlicensed Practice of Medicine by Unlicensed, Non-nurse Midwives.

Webster argues that the Board failed to prove that the Board possesses jurisdiction to regulate unlicensed, non-nurse midwives engaged in the “practice of medicine” because non-nurse midwives are regulated by Title 16 of the Delaware

Code. *See* Opening Brief at pp. 10-12. Notwithstanding that the Board has the statutory authority to regulate the unlicensed practice of medicine, which explicitly references the management of pregnancy and parturition, Webster contends that the Board's failure to specifically identify a grant of concurrent jurisdiction constitutes legal error. *Id.*

Concurrent jurisdiction routinely occurs between administrative bodies, between a court and an administrative body, or even between two courts even where the General Assembly has not expressly conferred such jurisdiction. *See Martinez v. California*, 444 U.S. 277, 283 n.7 (1980) (state and federal courts have concurrent jurisdiction over § 1983 claims); *Burge v. Fidelity Bond and Mortgage Co.*, 648 A.2d 414, 421 (Del. 1994) (Superior Court has concurrent jurisdiction with the Court of Chancery in mortgage foreclosure proceedings); *Liberty Mutual Ins. Co. v. City Window Cleaning of Delaware, Inc.*, 2011 WL 2176519, at *2 (Del. Super. May 26, 2011) (Superior Court and the IAB have concurrent jurisdiction to determine the effective date of the insurance policy). For example, a licensed massage therapist who provides chiropractic services may be prosecuted before the Board of Massage and Bodywork for practicing beyond the scope of their license and may also be prosecuted before the Board of Chiropractic for unlicensed activity. *See, e.g.*, 17 *Del. C.* § 5313(4); 24 *Del. Admin. C.* § 5300 – 8.0; 17 *Del. C.* §§ 712-13; 29 *Del. C.* §§ 10161(c)-(d). An adult entertainment

establishment may be fined by the DDPR, or investigated as a nuisance via nuisance abatement proceedings. *Contra 24 Del. C. §§1606(a)-(b) and 10 Del. C. Chapter 10.* None of these statutes specifically grant concurrent jurisdiction to the agencies that have statutory authority in each instance to prosecute the professionals covered by their statutes.

Webster has yet to cite authority for the proposition that it is impermissible for the Board to sanction her when she engages in the unauthorized practice of medicine even though the DDPH is permitted to regulate her illegal practice of non-nurse midwifery. The fact that regulations exist for non-nurse midwives under the DDPH does not foreclose prosecution by the Board. Neither is vested with exclusive jurisdiction and the General Assembly clearly intended both administrative bodies to have subject matter jurisdiction. The Hearing Officer correctly concluded that:

[t]he Medical Practice Act contains an important provision which precludes a jurisdictional conflict as between the Board and DHSS. As noted above, the Act carves out an exemption with regard to its disciplinary provisions for those who are acting within the scope of professional practice for which they are otherwise ‘certified, licensed or registered.’ *24 Del. C. §1703(3).* As I read that provision, if Ms. Webster has undertaken to receive a ‘permit’ for the performance of her professional services, then her activities would fall outside the jurisdiction of the Board. If she has not, then the Board may consider a disciplinary case which alleges that she has performed unauthorized medical practice.

Hearing Officer's Decision on Motion to Dismiss at p. 3 (A81). There is no legal error in this determination and as a result, this finding must be upheld by this Court on appeal.

II. THE BOARD DID NOT COMMIT AN ERROR OF LAW WHEN IT DID NOT RECORD ITS DELIBERATIONS, WHICH WERE HELD IN EXECUTIVE SESSION.

A. Question Presented: Is the Board required to record its deliberations when those deliberations are held in Executive Session as permitted by the Medical Practice Act and the APA?

The Board addressed this question at pp. 19-23 of its Answering Brief to the Superior Court (A339-A343).

B. Scope of Review: Whether the Board is required to record deliberations held in executive session is a question of law. “This Court reviews a Superior Court ruling that, in turn, has reviewed a ruling of an administrative agency, by examining directly the decision of the agency . . . [this Court reviews] questions of law *de novo*. Absent an error of law, we review a Board's decision for abuse of discretion. *Jain*, 2013 WL 3788095, at *3.

C. Merits of Argument:

Webster implores this Court to remand this case back to the Board for further deliberation, contending that the record of the administrative proceedings is not complete. *See* Opening Brief at pp. 21-22 (citing *Richardson v. Board of Cosmetology & Barbering*, 69 A.3d 353 (Del. 2013)). However, Webster’s reliance on *Richardson* is misplaced.

Richardson involved a cosmetologist whose license was suspended after he leased space in his hair salon to an unlicensed nail technician. *See id.* at 355. Following the hearing and recommendation of the hearing officer, Richardson’s attorney submitted written exceptions to the Board of Cosmetology (“BOC”) and specifically requested to comment on the hearing officer’s recommended discipline to the BOC at the time of its deliberations. *See id.* Citing 29 *Del. C.* § 8735(v)(1)(d), the BOC refused to permit Richardson’s attorney to address the BOC because it believed that the hearing officer’s “*findings of fact* [were] binding on the Board.” *Id.* (emphasis supplied). “The Board then unanimously approved the Hearing Officer’s Recommendations without any further *argument* or discussion.” *Id.* at 355 (emphasis supplied). On appeal, Richardson argued that the BOC failed to create a complete record for review *and* failed to consider his exceptions. *See id.* at 358.

The *Richardson* Court expressly held that a complete record must include a verbatim transcript of the licensee’s requested argument before the Board, and—contrary to Webster’s assertion in her Opening Brief—expressly declined to hold that a transcript of deliberations was required. *See Richardson*, 69 A.3d at 358 (“Richardson contends that the Board failed to consider Richardson’s exceptions during the September 26 meeting. *We need not address this argument*, because a remand is required for a record to be made of the proceedings with the opportunity

for Richardson to be heard through his counsel.”) (emphasis supplied). *Richardson* did not address a situation where, as here, the appellant failed to request oral argument before the administrative Board. Further, Webster does not point this Court to a single use of the word “deliberations” in the *Richardson* decision. Thus, *Richardson* does not support Webster’s argument that a remand to the Board for further deliberation is necessary

Finally, as Webster herself concedes, the Board’s enabling statute specifically permits it to deliberate in executive session. *See* Opening Brief at 21; 24 *Del. C.* § 1734(b) (“ . . . *the Board may conduct executive session for deliberations and purposes permitted by § 10004 of Title 29.*” (emphasis supplied)). Thus, the Board’s deliberations on the Recommendation in executive session were legislatively permissible, appropriate under the Board’s statutory scheme, and necessary. As a result, the Board’s discussion of Webster’s actions and the identity of her “patients” were shielded from potentially embarrassing public disclosure. *See* 67 *Del. Laws*, ch. 226, § 14 (1990) (amending § 1734(b) to permit disciplinary hearings to be conducted *entirely* in executive session); 77 *Del. Laws*, ch. 325, §§ 15-19 (2010) (further amending § 1734(b) to its current language).

It must be noted that the amendment to § 1734(b), permitting the Board’s deliberations to be conducted in executive session, was enacted in 2010. *Id.* That

is, later in time than the statutory provision relied on by Webster—29 *Del. C.* § 10125(d)—which was last amended in 1980. *See* 62 Del. Laws, ch. 301, § 2 (1980); Opening Brief at 22. Section 1734(b) is also more specific to the instant matter as it pertains directly and solely to the Board. The two sections, therefore, must be read cumulatively. It should not be presumed, as Webster contends, that 24 *Del. C.* § 1734(b) was destructive of the provisions of 29 *Del. C.* § 10125. *See Olson v. Halvorsen*, 986 A.2d 1150, 1160 (Del. 2009) (holding that when the General Assembly enacts a later statute in an area covered by a prior statute, it has in mind the prior statute, and thus, statutes on the same subject must be construed together so that effect is given to every provision) (internal citations omitted).

Had Webster requested to address the Board, such proceeding would also have taken place in open public session, on the record. 24 *Del. C.* § 1734(b); *see also Richardson* at 358. Nonetheless, with or without argument from the licensee, deliberations of the Board are conducted in executive session. *Id.*

Finally, Webster's argument that conducting deliberations in executive session somehow warrants remand of the Board's Public Order under the APA highlights her misunderstanding of both that Act, and the separate and—inapplicable to the instant matter—Freedom of Information Act, 29 *Del. C.* Chapter 100. Although not cited for this proposition in her Opening Brief, Webster's appeal to this honorable Court is permitted only through the APA. *See*

29 *Del. C.* § 10142(a) (“Any party against whom a case decision has been decided may appeal such decision to the Court.”); *but see* 29 *Del. C.* § 10005(a) (“Any action taken at a meeting in violation of [the Freedom of Information Act, such as an improper executive session] may be voidable by the Court of Chancery.”). The primary purpose of the APA is “to standardize the procedures and methods whereby certain state agencies exercise their statutory powers” in order to protect those directly impacted by an agency’s case decision or promulgated regulation. 29 *Del. C.* § 10101. *See also* *Rooney v. Del. Bd. of Chiropractic*, 2011 WL 2088111, *4 (Del. Super. Apr. 27, 2011) (holding administrative hearings against individuals are governed by the fundamental requirements of fairness, due process, and discussing in great detail the statutory requirements of the APA). Webster does not point to a single provision in the due process protections of the APA that require the Board to deliberate on the Recommendation in open public session.

In contrast, the Freedom of Information Act was enacted to ensure “that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials” in order to “further the accountability of government to the citizens of this State.” 29 *Del. C.* § 10001. In this chapter, the General Assembly created and defined the term “executive session,” recognizing those instances in which a public body may close its

proceedings to the general public. *Id.* at § 10004. Delaware Courts have long recognized that where an executive session is permitted by statute, an agency's conduct of the same *neither* violates an individual's due process protections *nor* requires a verbatim transcript of such session be produced. *Rochen v. Huang*, 1989 WL 5373, at *3 (Del. Super. Jan. 6, 1989) (recognizing that "important policy considerations" exist for § 1724(b)'s confidentiality of Board's disciplinary hearings); *Cf. Common Cause of Del. v. Red Clay Consolidated School Dist. Bd. of Educ.*, 1995 WL 733401, at *4 (Del. Ch. Dec. 5, 1995) (declining to find "a clearly implied statutory requirement to summarize the subjects discussed with any degree of specificity in the minutes of executive sessions.").

The record of this case is complete, the Board's decision is supported by substantial evidence, is free from legal error, and Webster has provided this Court with no rational basis for remand. Accordingly, the Board respectfully requests that its decision be affirmed.

III. WEBSTER ELECTED TO PROCEED WITH THE HEARING BEFORE THE HEARING OFFICER WITHOUT COUNSEL AND THAT DECISION DID NOT CREATE A DUE PROCESS VIOLATION

A. Question Presented: Was Webster denied procedural due process when she elected to proceed with the hearing before the Hearing Officer without the assistance of legal counsel?

The Board responded to this question at page 14 of its Answering Brief to the Superior Court.

B. Scope of Review: Whether Webster opted to proceed at the hearing before the hearing officer, and whether this decision violated her due process rights, is a mixed question of law and fact. This Court does not “make its own factual findings” and reviews questions of law *de novo*. *Jain*, 2013 WL 3788095, at *3. However, “[a]bsent an error of law, we review a Board's decision for abuse of discretion.” *Id.*

C. Merits of Argument:

Webster argues that she is entitled to a remand because she was not afforded an opportunity to obtain counsel prior to the hearing before the Hearing Officer. *See* Opening Brief at pp. 23-25. The record created in this case does not support Webster’s argument.

The notice of hearing, sent to Webster on December 20, 2012, informed Webster of her “right to appear with counsel.” *See* Notice of Hearing, attached hereto as “Exhibit C.”⁶ Nonetheless, Webster affirmatively elected to proceed with the hearing without the assistance of counsel. Raising the issue herself, Webster testified as to her unsuccessful attempts to obtain counsel. *See* Transcript at p. 9, lines 1-16 (A91) (“I’m representing myself *pro se* in this hearing.”). Webster did not request a continuance of the hearing to seek the assistance of counsel, and chose to represent herself at the hearing.

Although Webster contends that the Hearing Officer was obligated to create a record concerning Webster’s decision to proceed *pro se*, Webster fails to cite any case law requiring such steps to protect Webster’s procedural due process rights in the administrative hearing. Indeed, the State is unaware of any case law stating that a *pro se* litigant participating in a civil, administrative hearing must be afforded counsel, or informed of the right to obtain counsel, in order to satisfy the dictates of procedural due process. *Contra Lassiter v. Dep’t of Soc. Servs. of Durham Cnty., N. C.*, 452 U.S. 18, 26-27 (1981) (“an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process

⁶ This Notice was included at “Tab 7” as part of the “Contents of Administrative Record,” filed by the Board with the Superior Court on or about July 2, 2013. It is attached hereto for the Court’s convenience and ease of reference.

decision must be measured.”); *Wilson v. Div. of Family Servs.*, 988 A.2d 435, 444 (Del. 2010) (“[T]he stricter standard of waiver requiring the court to conduct a personal colloquy with a parent to establish her or his voluntary, knowing and intelligent waiver ordinarily has only been applied where the rights to be waived have been deemed to be ‘fundamental,’ and the proceedings have been those that could result in confinement.” (internal citations omitted))

Moreover, despite Webster’s representations on the record that she was not able to obtain counsel, Webster’s Exceptions (A256-A267) were submitted on her behalf by an attorney. To the extent Webster now claims that she experienced prejudice as a result of her decision to proceed *pro se* (and the State does not concede that Webster was prejudiced or that her due process rights were violated), those issues could have and should have been raised by the attorney she obtained prior to the Board’s consideration of this case. However, Webster did not raise this objection at the hearing before the Board or in the Exceptions. As a result, this objection was not preserved for this appeal. Webster’s decision to proceed with the hearing before the Hearing Officer without the assistance of counsel did not constitute a violation of her due process rights, and does not require that the Board’s Public Order, or any other portion of the administrative proceedings, be vacated.

IV. IV. THE SUPERIOR COURT’S ORDER, WHICH AFFIRMED THE BOARD’S PUBLIC ORDER IN ITS ENTIRETY, DID NOT CONSTITUTE LEGAL ERROR AND SHOULD BE AFFIRMED BY THIS COURT.

A. Question Presented: Did the Superior Court commit an error of law when it affirmed the Board’s Public Order, which was free from legal error and supported by substantial evidence in the record?

The Board discussed the validity of its Public Order in detail at pp. 13-19 of the Answering Brief submitted to the Superior Court.

B. Scope of Review: This Court has held that:

[it] reviews a Superior Court ruling that, in turn, has reviewed a ruling of an administrative agency, by examining directly the decision of the agency. We review the Board's decision to determine if the decision is supported by substantial evidence and free from legal error. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. On appeal, this Court will not weigh the evidence, determine questions of credibility, or make its own factual findings. We review questions of law *de novo*. Absent an error of law, we review a Board's decision for abuse of discretion. The Board will be found to have abused its discretion only where its decision has exceeded the bounds of reason in view of the circumstances.

Jain, 2013 WL 3788095, at *3.

C. Merits of Argument:

Webster disputes the Recommendation’s factual findings, arguing that these findings are contradicted by the record evidence. *See* Opening Brief at pp. 27-33.

However, the Superior Court did not commit legal error when it affirmed the Public Order because the Recommendation and Public Order are based on substantial evidence in the record. For the reasons discussed below, the Recommendation and Public Order should be affirmed by this Court.

1. The Hearing Officer Properly Determined that Webster Engaged in the Unlicensed Practice of Medicine by Managing Pregnancy and Parturition in the State of Delaware.

Webster argues that the Hearing Officer fundamentally misunderstood the issue in this case and that the State “repeatedly attempt[s] to incorrectly and impermissibly change the definition of the practice of medicine contained in 24 *Del. C.* §1702(9)(c).” *See* Opening Brief at pp. 29-31. This argument lacks merit because the Hearing Officer properly determined that Webster, who (i) admitted to managing pregnancy and parturition in the State of Delaware (*see, e.g.*, A60); and (ii) admitted that midwives manage pregnancy and parturition (*see, e.g.*, A125; A164-165), engaged in the unlicensed practice of medicine within the plain meaning of 24 *Del. C.* §§1702(9)(c) and 1702(12).

The Complaint alleged that Webster engaged in the unlicensed practice of medicine by managing pregnancy and parturition in the State of Delaware without a valid license or permit in violation of 24 *Del. C.* §1702(9)(c). The Recommendation outlines each of the facts in the record relied on by the Hearing Officer for the conclusion, as a matter of law, that Webster engaged in the

unlicensed practice of medicine by providing pregnancy and childbirth services (i.e., managing pregnancy and parturition) in Delaware. *See* Recommendation at pp. 16-18 (A204-206); 21-25 (A209-A215). Thus, Webster’s argument that the Recommendation’s legal conclusions are based on “unspecified midwifery ‘services’” is not supported by the analysis in the Recommendation. *See* Opening Brief at pp. 31-32.

2. The Recommendation’s Finding that Webster Engaged in the Unlicensed Practice of Medicine when she Managed Pregnancy and Parturition in the State of Delaware is Supported by Substantial Evidence in the Record.

Webster takes issue with the Recommendation’s finding that Webster engaged in the unlicensed practice of medicine when she offered “professional midwifery services,” claiming that the Recommendation failed to define which of these services constitutes the practice of medicine. *See* Opening Brief at p. 28. This argument is meritless. The Recommendation specifically concluded that Webster “has been engaged in the ‘practice of medicine’ as that term has been defined by the legislature *because she has been engaged in the ‘management or [sic] pregnancy and parturition.’*” Recommendation at p. 24 (A212) (emphasis supplied).

This finding was based on a preponderance of evidence in the record. Webster did not deny that the “WomanWise” website advertises the services provided by her midwifery business, and did not object to the admission of these

documents as evidence. *See* Recommendation at p. 25 (A213) (“The [WomanWise] postings have presumably been authored or authorized by Ms. Webster. She did not argue the contrary.”). Additionally, Webster (i) admitted in a April 11, 2011 email to client “Jennifer” that “she [had] been in practice [in Delaware] for over 25 years and [hadn’t] found homebirth to be too fraught with difficulty in DE (A60); (ii) admitted that she owns the business WomanWise; and (iii) admitted that she has provided the midwifery services listed on the website for over 25 years. *See, e.g.*, State’s Exhibit 1 at p. 7 (A13) (“WomanWise was birthed as a labor of love by Karen Webster of Elkton, Maryland”); State’s Exhibit 1 at p. 54 (A60) (“I have been in practice here [i.e., Delaware] for over 25 years and haven’t found homebirth to be too fraught with difficulty in DE.”). As noted by the Hearing Officer, “the clear inference from the information posted on the site is that Ms. Webster is ready, willing and *able* to provide midwife services in [Delaware].” Recommendation at p. 25 (A213).

3. The Recommendation’s Conclusions with respect to 24 Del. C. §1702(9)(a) are Supported by Substantial Evidence in the Record.

The Opening Brief argues that “nothing in the hearing officer’s findings and conclusions demonstrates that all of the evidence was considered and weighed accordingly with the State’s burden in mind.” Opening Brief at p. 33. Webster does not support this argument by pointing to any evidence she feels was ignored by the Hearing Officer. And she cannot. The State alleged that Webster violated

24 *Del. C.* §1702(9)(a) by the statements included on her website that indicate that Webster is authorized to practice medicine, i.e., manage pregnancy and parturition, in the State of Delaware. As discussed at length above, the Hearing Officer carefully examined the evidence in the record for a determination that Webster was engaged in the unauthorized practice of medicine by managing pregnancy and parturition in the State of Delaware. After reviewing the information included on the WomanWise website, the Hearing Officer also concluded that the State met its burden of proving that Webster advertised, held out to the public or represented that she is authorized to practice medicine in the State. *See* 24 *Del. C.* §1702(9)(a). Specifically, the Hearing Officer points to the description on the website of “activities engaged in by Ms. Webster which constitute the practice of medicine,” i.e., the provision of services related to the management of pregnancy and parturition, for his findings. *See* Recommendation at p. 21 (A209); 25 (A213).

It is also clear that the Hearing Officer resolved any inconsistencies in the record in reaching this conclusion. For example, the Hearing Officer specifically acknowledged Webster’s representation on the WomanWise website that she is not licensed to practice midwifery in Delaware, but also considered Webster’s statement of qualifications and experience in the same section of the website. *See* Recommendation at p. 25 (A213). The Hearing Officer was required to reconcile this inconsistency and did so when he concluded that “[i]n my opinion this

experiential information and reference to organization affiliations is a deliberate effort to have the public conclude or infer that she is lawfully practicing in Delaware.” Recommendation at p. 25 (A213). Because these conclusions do not constitute an abuse of discretion, are free from legal error, and are supported by substantial evidence in the record, this Court must affirm the Recommendation and Public Order.

Webster also argues at pp. 31-33 of the Opening Brief that the Hearing Officer failed to explain how he arrived at the conclusion that the provision of some midwifery services is included in the definition of practice of medicine in the Medical Practice Act. Again, this argument distorts the reasoning of the Recommendation. The Recommendation discusses the definition of the practice of medicine at length, includes specific factual findings directly related to the services provided by midwives, and concludes that midwives that manage pregnancy and parturition in Delaware are engaged in the unlicensed practice of medicine unless they are otherwise licensed by a separate State agency. *See, e.g.*, Recommendation at pp. 20-25 (A208-A213).

Ultimately, the Hearing Officer successfully reconciled all undisputed evidence in the case per the requirements of Delaware courts and concluded, based on substantial evidence in the record, that Webster violated Delaware law when

she managed pregnancy and parturition in the State of Delaware. As a result, the Recommendation and Public Order of the Board must be upheld.

4. This Court is not Required to Remand this Case to the Superior Court for Further Analysis.

Webster argues that because the Superior Court did not address each of the issues raised by Webster on appeal, a remand to Superior Court is necessary. *See* Opening Brief at pp.34-35. However, as noted earlier in this brief and by Webster in her Opening Brief, “[w]here there is a review of an administrative decision by both an intermediate and a higher appellate court and the intermediate court received no evidence other than that presented to the administrative agency, the higher court does not review the decision of the intermediate court but, instead, directly examines the decision of the agency.” *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992). Additionally, any legal questions presented to the Board and to the Superior Court are reviewed by this Court *de novo*. *See Jain*, 2013 WL 3788095, at *3.

Because this Court is required to make a separate review of the record before the Board, and must also make an independent determination of the legal questions presented, a remand to the Superior Court is not required or necessary. As argued above, there are no legal errors in the Recommendation or the Board’s Public Order, and both determinations were supported by substantial evidence in the record. Therefore, this Court must affirm the decision of the Board in this case.

CONCLUSION

The Recommendation and Public Order were based on substantial evidence in the record and free from legal error. Therefore, the Public Order must be affirmed by this Court.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/Katisha D. Fortune

Katisha D. Fortune (I.D. No. 4857)

Deputy Attorney General

Carvel State Office Building

820 N. French Street, 6th Floor

Wilmington, DE 19801

(302) 577-8400

Attorney for the Appellee/Respondent

Dated: January 5, 2015