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IN THE SUPREME COURT OF THE STATE OF DELAWARE

KAREN S. WEBSTER Petitioner Below, Appellant, v. DELAWARE BOARD OF MEDICAL LICENSURE AND DISCIPLINE, Defendant Below, Appellee.	)	C.A. No. 593, 2014 Court Below: The Superior Court of the State of Delaware, C.A. No.: N13A-05-011 FSS

OPENING BRIEF OF APPELLANT KAREN WEBSTER

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Dated: December 5, 2014

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NATURE OF THE PROCEEDINGS

On July 18, 2012, the State of Delaware, by and through the Delaware Department of Justice, filed an Amended Complaint (the "Complaint") with the Delaware Board of Medical Licensure and Discipline (the "Board") against Karen Webster. **Tab 2**, p. A7-8. The Complaint alleges that Ms. Webster: (1) "advertises midwifery services, including prenatal and labor and delivery services, in the State of Delaware" on her website and offers "office visits" at an address in Delaware, *Id.*, ¶¶3-4; (2) "provided childbirth services" to a woman at her home in Delaware on December 4, 2011, *Id*. at ¶5; and (3) "provided childbirth services" to woman at her home in Delaware on June 16, 2011. *Id*., ¶6. Based upon these allegations, the Complaint asserts that Ms. Webster has committed the unauthorized practice of medicine, as defined by 24 *Del. C.* § 1702(12) and 24 *Del. C.* § 1702(9)(a) and (c), in violation of 24 *Del. C.* § 1720(a)(1). *Id.*, A8, ¶8.

Ms. Webster submitted a letter motion on August 7, 2012, seeking to have the Complaint dismissed based upon the Board's lack of jurisdiction over non-nurse midwives (Appendix, **Tab 3**, A73-75). The State responded via a letter on August 17, 2012 (Appendix, **Tab 4**, A76-78). The Hearing Officer denied the motion via letter dated September 21, 2012 (Appendix, **Tab 5**, A79-81). A hearing was held by the Division of Professional Regulation on January 17, 2013 ("DPR Hearing") (transcript at **Tab 6**, A82-188**)**. On February 13, 2013, the Hearing Officer issued the Recommendation of the Chief Hearing Officer ("Recommendation") determining that Ms. Webster had engaged in the

unauthorized practice of medicine and recommending sanctions (**Tab 7**, A189-255). On March 19, 2013, Ms. Webster filed Exceptions to the Recommendation, contesting the Hearing Officer's conclusions of law ("Exceptions") (**Tab 8**, A256-267). On April 2, 2013, the Board considered the Recommendation in a closed executive session. No transcript of the session was made. **Tab 9**, A268-270. On May 7, 2013, the Board issued a Public Order (the "Public Order") accepting the recommended sanctions proposed by the Hearing Officer (**Tab 10**, A271-276).

Ms. Webster filed a Notice of Appeal of the Public Order with the Superior Court on June 3, 2013. An Opening Brief was filed on August 29, 2013 (**Tab 11**, A277-317), an Answering Brief on September 19, 2013 (**Tab 12**, A318-343) and a Reply Brief on October 3, 2013 (**Tab 13**, A344-368). Ms. Webster requested oral argument on October 9, 2013 (to which the State objected), and no response was ever received from the Superior Court. Almost eight months later, on May 29, 2014, the parties were informed by the Superior Court that the case had been reassigned. Almost four months after that, on September 22, 2014, the Superior Court affirmed the Public Opinion with a one page Order erroneously referencing the February 13, 2014 Recommendations of Chief Hearing Officer and a May 7, 2014 Public Order of the Board. On November 12, 2014, Ms. Webster filed a timely Notice of Appeal to this Court.

SUMMARY OF ARGUMENT

The Superior Court committed the following reversible errors of law:

I. Affirming that the Board of Medical Licensure and Discipline has statutory jurisdiction to regulate the practice of midwives in Delaware, notwithstanding that the General Assembly has determined that the practice of midwifery is a separate and distinct discipline, by the creation of a separate regulation system for midwives. Under Delaware law, the practice of non-nurse midwifery is exclusively controlled by the Division of Health and Social Services.

II. Failing to hold that the Board violated 24 *Del. C.* § 1734(b) and the precedent established by this Court in *Richardson v. Board of Cosmetology & Barbering of the State of Delaware*, 69 A.3d 353 (Del. 2013) by reviewing the Recommendation of the Chief Hearing Officer during a closed Executive Session without the creation of verbatim transcript.

III. Failing to hold that Ms. Webster's due process rights were violated by the procedure of the DPR Hearing.

The Superior Court also committed an error of law and an abuse of discretion by:

IV. Affirming the Public Order "on the basis of and for the reasons assigned in the Recommendations and Order" without the independent review and explanation for its implicit determination that "substantial evidence exists on the record to support both the findings of fact and the conclusions reached by the hearing officer" (*Attix v. Voshell*, 579 A.2d 1125, 1127 (Del. Super. 1989)) and without reference to Ms. Webster's arguments not addressed in either the Recommendation or the Public Order.

STATEMENT OF THE FACTS

Ms. Webster has been working on women's health and birthing issues for over 30 years. Tab 2, A13. She is highly respected in her field and became the first Certified Professional Midwife in Maryland and Delaware in 1995. *Id*. She is a past member of the Board of Directors of the Midwives Alliance of North America (MANA) and is currently a Qualified Evaluator with the North American Registry of Midwives (NARM). *Id.* At the time this case was heard, Ms. Webster held a license as a non-nurse midwife in the State of Virginia. *Id*. She is also a faculty preceptor for the National College of Midwifery and the Birthwise Midwifery School, both nationally accredited, direct-entry midwifery training programs. *Id*., A14. Ms. Webster is not licensed by the Delaware Board of Medical Licensure and Discipline (*Id*., A7) or by the Delaware Nursing Board (*Id*.). Due to the fact that Ms. Webster does not have a medical or nursing degree, she is ineligible, as a matter of law, to be licensed by either the Delaware Board of Medical Licensure and Discipline or the Delaware Nursing Board. Notwithstanding the fact that Ms. Webster is not a Delaware resident, or that the Board had already determined that her midwifery services constituted the unauthorized practice of medicine in Delaware, early this year the Delaware Department of Health and Social Services ("DHSS"), Division of Public Health invited Ms. Webster to join its newly-formed Direct Entry Midwifery Policy & Regulations Subcommittee to help develop new legislation with respect to non-nurse midwives. **Tab 14**, A369-378.

Ms. Webster is a Maryland resident, and in 1987, started WomanWise, a company based in Elkton, Maryland, offering a wide range of services for women and families in *Maryland, Delaware, Pennsylvania and New Jersey*, including: traditional non-nurse midwifery care; homebirth services; educational opportunities; workshops related to women's health, pregnancy and birth; guidance; woman and family centered care; empowerment; self-improvement; facilitation services for expectant mothers; information on healthy-lifestyles and good prenatal care; nurturing; annual exams; well-woman care; nutritional counseling; childbirth education; postpartum care; placenta encapsulation; seasonal pre-natal and postpartum gatherings; breastfeeding support; fertility awareness counseling; preconception counseling; referrals to holistic health providers and community resources; a lending library; prenatal visits; in-home continuous labor support; labor, birth, and postpartum care; well-baby visits; phone consultations; breast exams; pelvic exams; pap smear and STD testing; laboratory and blood work; contraception counseling; preconception and fertility counseling; menstrual health counseling; menopausal counseling; and, an individualized approach to health care based on the concept of informed choice. *Id*., A14-16, A20-21, A24-25. WomanWise is associated with a website (http://womanwise.info), accessible by Delaware residents, and at the time Ms. Webster was charged, advertised approximately forty (40) separate services *offered by WomanWise*. *Id*.

1. Charges Under 24 *Del. C.* § 1702(9)(a)

No documentary or other evidence was presented at any point during the DPR Hearing that specifically set out which, if any, of the approximately forty (40)

separate midwifery and health services *advertised* by WomanWise were *actually available* in Delaware at any time, much less *actually provided* by Ms. Webster and not a third-party affiliated with WomanWise. Further, neither the Hearing Officer nor the Board ever determined with specificity which midwifery and health services advertised by WomanWise constitute the "practice of medicine" by "[a]dvertising, holding out to the public, or representing in any manner that one is authorized to practice medicine in this State" as is required under the Board's theory of jurisdiction over Ms. Webster pursuant to 24 *Del. C.* § 1702(9)(a).

Further, the State presented no evidence at the DPR Hearing explaining what information available on the WomanWise website formed the specific basis for its allegation that *Ms. Webster*, was "advertising, holding out to the public, or representing in any manner that [she] is authorized to *practice medicine* in this State" in violation of 24 *Del. C.* § 1702(9)(a). Tab 2, A7, ¶7. Nevertheless, the Hearing Officer concluded the State had proven a violation of 24 *Del. C.* § 1702(9)(a) based entirely upon postings on the WomanWise website (Tab 7, A213) despite his *explicit findings that* on the "WomanWise site *Ms. Webster admits* that the NARM certificate *does not certify her or license her to practice* [midwifery] *in Delaware*" (*Id*.), and that Ms. Webster "*candidly concedes her lack of Delaware* [midwifery] *licensure in a brief statement*." *Id*. Without reconciling the conflicting factual findings, the Hearing Officer explained that his conclusion was based upon the fact that the statements on the WomanWise website "have *presumably* been authored or authorized by Ms. Webster" (*Id*.) and inappropriately

justifying this "presumption" through the fact that Ms. Webster "did not argue to the contrary", inappropriately shifting the burden of proof to Ms. Webster. *Id.*

2. Charges Under 24 *Del. C.* § 1702(9)(c)

The Hearing Officer did not make any factual determination as to whether any of the services *offered* on the *WomanWise* site have actually been *performed* in Delaware by Ms. Webster, as alleged in the Complaint and required for a finding of a violation of 24 *Del. C.* § 1702(9)(c) ("the practice of medicine" through "the management of pregnancy and parturition"). Although the Hearing Officer expressly found that *WomanWise* operates in *four* states "*offer[ing]* traditional midwifery care & homebirth services in *MD, DE, PA, and NJ*," no information was presented regarding whether each of the midwifery services WomanWise provides is available in Delaware. Tab 7, A204. The Hearing Officer listed the "professional midwifery services" described on the *WomanWise* website, and found, without explanation, that the listed services are those "which *Ms. Webster, and perhaps others*, provide" (*Id*., A205) while again failing to make any specific factual finding that *Ms. Webster* affirmatively provided any such services in Delaware.

Further, the Hearing Officer made no specific factual finding regarding which specific acts or services *actually provided* in Delaware constituted "the practice of medicine" through "the management of pregnancy and parturition", or any basis for how such acts fall under the scope of the Medical Practice Act. For example, the Hearing Officer affirmatively found that "*WomanWise* performs breast exams, pelvic exams, pap smears, blood work, menstrual and menopausal

counseling" (*Id*., emphasis added) without attributing such conduct directly to Ms. Webster, either within Delaware or otherwise, or explaining why or what part of the actual provision of any such services falls under the scope of "the practice of medicine" through "the management of pregnancy and parturition".

The Hearing Officer did affirmatively find that "Ms. Webster provides hands-on *assistance* during labor and delivery" and "*refers* women who require obstetrical attention". The Hearing Officer did not, however, offer any explanation or reasoning for his determination that making referrals or providing "hands-on *assistance*" constitutes the "management of pregnancy or parturition", nor what assistance or referrals, if any, were provided by Ms. Webster in Delaware.

At the time the Original Complaint was issued in this case on February 28, 2012, WomanWise "offered appointments" at Synergy Chiropractic in Wilmington, Delaware, as well as at WomanWise's main office in Elkton, Maryland. Tab 2, A15. No documentary or other evidence was presented at any point during the DPR Hearing that explained, with specificity, what services were available or actually performed at the appointments offered in Delaware nor who performed any Delaware services. No witnesses testified as to having attended any appointments with Ms. Webster, or any other representative from WomanWise, in Delaware. In fact, the State provided *no* witness with *any* independent, personal knowledge of any service that had been provided by Ms. Webster or WomanWise to any person, within or without the State of Delaware, at any time.

3. Complaints to Professional Regulation Investigations

On December 6, 2011, a "Statement of Complaint" was allegedly filed with

"Professional Regulation Investigations" ("PRI") by "John Ziemba" asserting that Ms. Webster "is acting as a *midwife* and working as a *midwife* in the state of Delaware without a license [and] acting as a *midwife* and *assisted* with the delivery of a stillborn child at the mother's home" ("the 2011 PRI Complaint"). *Id*., 6.

The 2011 PRI Complaint is the basis for the allegation found at ¶5 of the State's Complaint. Tab 2, A9-12. On February 14, 2012, a second "Statement of Complaint" was allegedly filed with PRI by "Kristen Bennett" alleging Ms. Webster's "*Practice of non-nurse midwifery* without DE Permit" (the "2012 PRI Complaint"). *Id*., A66-69. The 2012 PRI Complaint is the basis for the allegation found at ¶6 of the State's Complaint. Tab 2, A7-8.

At the DPR Hearing neither the 2011 nor 2012 PRI Complaints were introduced through a witness with personal knowledge of their filing, or otherwise authenticated. Neither Mr. Ziemba nor Ms. Bennett was presented by the State to offer testimony.[1] DPR Investigator Kemmerlin, who was the DPR investigator assigned to the case, also did not testify. The documentary evidence submitted by the State at the DPR Hearing was introduced through DPR Investigator Betley. Investigator Betley had no first-hand knowledge of the facts of this case, and prepared for her testimony by reviewing the Division file. Tab 6, A105-106, Tab 7, A197. The Division file was not provided to Ms. Webster.

As a result of the lack of independent testimony, the evidence contained in the PRI Complaints is insufficient to support the charges against Ms. Webster. For

[1] Ironically, Ms. Bennett actually attended the DPR Hearing and was called as a witness by Ms. Webster, to testify on a different matter. Despite her availability, the State declined to question her about the 2012 PRI Complaint.

example, the finding that Ms. Webster violated the Medical Practice Act with respect to the 2012 PRI Complaint is based entirely on the allegation, made on the face of the 2012 PRI Complaint, that Ms. Webster's name appears on a Certificate of Live Birth as the "Certifier" for a baby "Hadassah", born on June 16, 2011 (Tab 2, A70-71, Tab 6, A111-117) and a "Birth Summary Sheet" of unknown origin regarding a baby "Hadassah" born on May 16, 2011 (*Id*., A72). At the DPR Hearing the State stipulated that Ms. Webster did not sign the Certificate of Live Birth (Tab 6, A116) and offered no evidence that she signed the Birth Summary Sheet nor how it was obtained. The Hearing Officer made his finding that Ms. Webster was "practicing medicine" with respect to the 2012 PRI Complaint on the basis that "it *appears* that Ms. Webster had signed the form *as the midwife*. The signature on that form is substantially similar to Ms. Webster's signature on RX 5." Tab 7, A206. In other words, the Hearing Officer found that completely unverified allegations supporting a conclusion that Ms. Webster, a midwife, *may* have *attended* a birth (the only information the documents provide), was sufficient to support a determination that she was "practicing medicine" through "*management* of pregnancy and parturition" in the State of Delaware. Even if Ms. Webster were to concede the jurisdiction of the Board, the documents presented in support of the 2012 PRI Complaint contain no legal or factual support for the Hearing Officer's determination (or its adoption by the Board) that Ms. Webster provided unlicensed *medical care* to patient "Hadassah". Tab 10, A272.

ARGUMENT

I. THE BOARD OF MEDICAL LICENSURE AND DISCIPLINE LACKS JURISDICTION TO REGULATE THE PRACTICE OF MIDWIFERY

A. Question Presented: Did the Superior Court err by affirming the Hearing Officer's decision that the Board of Medical Licensure and Discipline has jurisdiction under Chapter 17 of Title 24 to regulate the practice of non-nurse midwives in Delaware?

This issue was raised in a letter motion prior to the DPR Hearing (Tab 3, A73-75) and also raised in Ms. Webster's Opening Brief to the Superior Court. Tab 11, A290-303.

B. Scope of Review: "[W]here, as here, the issue is one of construction of statutory law and the application of the law to undisputed facts, the court's review is plenary. *Stoltz Mgmt. Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992).

C. Merits of Argument:

The Public Opinion is based on the flawed premise that the Board has jurisdiction under the Medical Practices Act, 24 *Del. C.* § 1701, *et seq.*, to regulate the practice of non-nurse midwifery.

A different statute, however, expressly grants DHSS the power to "[c]ontrol the practice of non-nurse midwives …." 16 *Del. C.* § 122(3)(h). Further, Title 16, Section 4106 of the Delaware Administrative Code at 8.0, requires that investigation of complaints of about non-nurse midwives will be conducted by the Division of Public Health. Tab 17, A413-414. It further provides that "[a]ny

person who practices as a direct entry/non-nurse midwife, as defined in Section III, in the State of Delaware without a permit issued by the Division of Public Health shall be subject to a fine pursuant to 16 *Del. C.* § 107." *Id*.

In this case, the Hearing Officer determined that the Board, under the Medical Practices Act, shares concurrent jurisdiction with DHSS to regulate the practice of non-nurse midwifery. That threshold jurisdictional determination, later affirmed by the Superior Court, constitutes reversible error. Under well-settled principles of statutory interpretation, the Board lacks statutory jurisdiction to regulate the practice of non-nurse midwifery.

The Public Opinion must therefore be vacated as a matter of law.

1. The Medical Practices Act Does Not Grant the Board Jurisdiction Over Non-Nurse Midwifery

An administrative agency's jurisdiction must be specifically defined and may not be inferred. The Superior Court has explained:

> The powers, the authority and the jurisdiction of Administrative Agencies *must affirmatively appear* from the legislation under which they claim to act *and are not to be inferred*; it is for the General Assembly to *define and specify the authority* given to an Agency *so clearly that no doubt can reasonably arise in the mind of the public as to its extent*.
>
> Any Administrative Agency or Officer clothed with Administrative powers *must place his finger upon legislation* couched *in express and non ambiguous language to support the making of an order* if an order is challenged; the power granted by the General Assembly *must be worded in terms so clear that no doubt can reasonably arise in the mind of the public*.

Wilmington Vitamin & Cosmetic Corp. v. Tigue, 183 A.2d 731, 748 (Del. Super. 1962) (internal brackets and quotations omitted) (emphasis added); *see also id.* at

740 ("[t]he powers of administrative agencies. . . must affirmatively appear from the enactment under which they claim to act. . . . *Any reasonable doubt as to the existence of any particular power should be resolved against it*. . . ."). Further, "unless the statute authorizes the Administrative Agency to make the order appealed from, the challenged order *must be vacated as illegal*." *Id*.

Thus, the Board may exercise jurisdiction over the practice of non-nurse midwifery only if such jurisdiction is specifically granted by the General Assembly. It is not. The plain text of the Medical Practice Act contains no affirmative grant of jurisdiction over the practice of non-nurse midwifery. But the plain text of Title 16 *does* vest such jurisdiction with DHSS.

a. Title 24 Is Unambiguous and Does Not Grant the Board Jurisdiction to Regulate Non-Nurse Midwifery

The pertinent language of 24 *Del. C.* § 1702 is found in Section 1702(7), which defines "medicine" as "the *science* of restoring or preserving health and includes allopathic medicine and surgery, osteopathic medicine and surgery, and all the respective branches of the foregoing," and Section 1702(9)(c), which defines the "practice of medicine". Reading Section 1702(9)(c) in light of the definition of "medicine" in Section 1702(7) shows that that "the practice of medicine" is the practice of using "the science of restoring or preserving health", which, under the statute *per se* encompasses all allopathic and osteopathic medicine and surgery and their respective branches, when:

> Offering or undertaking to prevent or to diagnose, correct, and/or treat in any manner or by any means, methods, or devices a disease, illness, pain, wound, fracture, infirmity, defect, or abnormal physical or

> mental condition of another person, including the management of pregnancy and parturition.

24 *Del. C.* § 1702(9)(c).

Midwifery is neither the science of restoring or preserving health, nor allopathic or osteopathic medicine and surgery, nor a branch of either discipline. Had the General Assembly intended midwifery to be encompassed by the Medical Practice Act, it could have done so by simply inserting the word "midwifery" after the word "includes" in Section 1702(7). There is no denying that the General Assembly was aware of the practice of midwifery, seeing as 16 *Del. C.* § 122(3)(h) became effective on January 1, 2000, over five and a half years *before* the current form of the Medical Practice Act was approved. *See*, House Bill No. 102, Approved July 20, 1999 (approving the language of 16 *Del. C.* § 122(3)(h)) (**Tab 15**, A379) and House Bill No. 75 Approved July 12, 2005 (approving the current pertinent language of Title 24) (**Tab 16**, A380-A412). Further, the decision of the General Assembly to affirmatively place the "control" of the practice of non-nurse midwifery into the hands of DHSS, and explicitly leave it out of the language of the Medical Practice Act, shows that the statutes are clear and unambiguous.

b. Title 16 is Unambiguous and Grants DHSS Jurisdiction to Regulate Non-Nurse Midwifery

In Title 16, the Delaware Assembly unambiguously granted DHSS the power of "*[s]upervision of all matters* relating to the preservation of the life and health of the people of the State." 16 *Del. C.* § 122(1) (emphasis added). In the same subsection, the legislature granted to DHSS the power to:

> [a]dopt, promulgate, amend, and repeal regulations consistent with law, which regulations shall not extend, modify, or conflict with any law of this State or the reasonable implications thereof, and which shall be enforced by all state and local public health officials to: . . . (h) *Control the practice of non-nurse midwives* including the issuance of permits and protect and promote the health of all mothers and children.

16 *Del. C.* § 122(3)(h) (emphasis added).

DHSS also has the right to prosecute violations of its regulations:

> [a]ll prosecutions and proceedings instituted by the Department [of Health and Social Services] or Division [of Public Health] for the violation of any law or laws to be enforced by the Department or Division, or for the violation of any order or regulation of the Department or Division shall[2] be instituted by the Secretary or the Secretary's designated representative.

16 *Del. C.* § 106. Under this plain and unambiguous statute, DHSS, and no other agency, must prosecute violations pertaining to the unpermitted practice of midwifery in Delaware.

Further, Administrative Code Section 4106, created under 16 *Del. C.* § 122(3)(h), allows DHSS to "*control* the practice of non-nurse midwives." *See* § 4106 at ¶ 2.0 (**Tab 17**, A413-414). Section 4106 explicitly contemplates the scenario of this case: a person practicing midwifery as a non-nurse midwife in the State of Delaware without a permit issued by the Division of Public Health. *Id.* A414, ¶ 9.0. The penalty for failure to comply with the regulations under Section 4106 is that such person "*shall* be subject to a fine pursuant to 16 *Del. C.* 107." *Id*.

[2] "The use of the verb 'shall' in legislation generally connotes a mandatory requirement while the verb 'may' is deemed permissive." *Miller v. Spicer*, 602 A.2d 65, 67 (Del. 1991).

The language of 16 *Del. C.* § 122(3)(h) is unambiguous. Jurisdiction for the prosecution of the unauthorized practice of non-nurse midwifery is vested in DHSS, and only DHSS.

2. The Relevant Statutory Provisions Are Not Ambiguous

This Court recently explained:

> The rules of statutory construction are well settled. First, we must determine whether the statute under consideration is ambiguous. It is ambiguous if it is susceptible of two reasonable interpretations. If it is unambiguous, then we give the words in the statute their plain meaning. If it is ambiguous, however, then we consider the statute as a whole, rather than in parts, and we read each section in light of all others to produce a harmonious whole. We also ascribe a purpose to the General Assembly's use of statutory language, construing it against surplusage, if reasonably possible.

Taylor v. Diamond State Port Corp., 14 A.3d 536, 538 (Del. 2011).

A statute is ambiguous in only two circumstances. First, if it "is reasonably susceptible of different conclusions or interpretations." *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985). And second, if a literal interpretation would lead to an unreasonable or absurd result. *DiStefano v. Watson*, 566 A.2d 1, 4 (Del. 1989). "If there is no reasonable doubt as to the meaning of the words used, a statute is unambiguous and the Court's role is limited to an application of the literal meaning of the words." *Jackson v. Multi-Purpose Criminal Justice Facility*, 700 A.2d 1203, 1205 (Del. 1997).

In reaching its decision, the Hearing Officer determined that Section 1702 of the Medical Practices Act is "not at odds" with the relevant provisions of Title 16 of the Delaware Code and Delaware Administrative Code. Tab 5, A81. In

adopting the Hearing Officer's unrecognized "not at odds" test, the Board and Superior Court both erred as a matter of law. Neither Code section is ambiguous, and the language each contains is directly at odds.

Notwithstanding the clarity of the statutory language, the Board agreed with the Hearing Officer's determination and apparent finding of ambiguity that the mere inclusion of the words "management of pregnancy and parturition" in Section 1702(9)(c) was a sufficient affirmative grant of authority under *Tigue* to give the Board jurisdiction to regulate the practice of non-nurse midwifery.[3] Even if this Court determines that there is ambiguity within the statutes, the Board's determination of "concurrent jurisdiction" is incorrect as a matter of law. In his "concurrent jurisdiction" conclusion, the Hearing Officer ignored the canon of statutory construction that, when determining legislative intent, "it is important to give effect to the whole statute, and leave no part superfluous. Furthermore, the General Assembly is presumed to have inserted every provision into a legislative enactment for some useful purpose and construction." *See Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Memorial Hospital*, 36 A.3d 336, 343-344 (Del. 2012) ("We affirm the canon of statutory construction that every word chosen by the legislature (and often bargained for by interested constituent groups) must have

[3] Although the Hearing Officer does not make a finding of ambiguity in the statutes, he attempts to harmonize the statutes, and under established principles of statutory construction, a finding of ambiguity is a predicate step required before any attempt to harmonize the statutes. *Diamond State Port Corp.*, 14 A.3d at 538.

meaning.") (internal citations and quotations omitted). The Hearing Officer's determination results in the language and purpose of 16 *Del. C.* § 122(3)(h) being superfluous and completely encompassed within the Medical Practice Act and, therefore, cannot be correct.

Further, it is impossible to reconcile the explicit grant of "control" given to DHSS by the General Assembly in 16 *Del. C.* § 122(3)(h) and the Board's "concurrent jurisdiction" reading of 24 *Del. C.* § 1702(9). It is not surprising, therefore, that the Hearing Officer made no attempt to do so. That is, if jurisdiction is concurrent, DHSS is, *per se*, divested of its control. "Where statutes conflict, it is our duty to harmonize them if we reasonably can. In so doing, the specific prevails over the general." *Hamilton v. State*, 285 A.2d 807, 809. There can be no question that the specific provision of 16 *Del. C.* 122(3)(h) contains a definite provision relating to the regulation of non-nurse midwifery. The statutes can only be reasonably harmonized by concluding that the Board does *not* have the authority to regulate the practice of midwifery. The Board, therefore, must abandon its inappropriate attempts to obtain "concurrent" jurisdiction.

3. Recent Legislation Introduced by the General Assembly Confirms that the General Assembly Does Not Believe The Medical Practices Act Confers the Board with Jurisdiction to Regulate Non-Nurse Midwifery

Recent and proposed legislation of the General Assembly confirms Webster's interpretation that only DHSS, and not the Board, has statutory jurisdiction to regulate the practice of non-nurse midwifery.

a. Amendment to 16 *Del. C.* § 107 changes penalties for violations of §122(3)(h) without any grant of authority to the Board

First, on July 31, 2013, the General Assembly amended 16 *Del. C.* § 107 by adding new subsection (e), which states:

> Notwithstanding the foregoing, whoever refuses, fails, or neglects to perform duties required under §122(3)(h) of this title related to non-nurse midwifery or fails to comply with the duly adopted regulations or orders of the Department regarding non-nurse midwifery shall be guilty of a class F felony, with a term of imprisonment not to exceed 3 years, or subject to a fine imposed by the Secretary of not less than $1,000 nor more than $10,000 per violation, together with costs pursuant to Department regulations and procedures, or both. All fees, fines, costs, and penalties assessed by the Department under this statute shall be retained by the Department in order to defray associated costs. Superior Court shall have original jurisdiction to adjudicate criminal offenses under this subsection.

16 *Del. C.* § 107(e). **Tab 18**, A415-416.

As explained in the Synopsis, the "Legislation aligns the penalty for non-compliance with the non-nurse midwives law and regulations with the penalty for practicing medicine without a license." This is an implicit admission by the General Assembly that non-compliance with the non-nurse midwives law and the practice of medicine without a license are two separate and distinct acts, which now have similar penalties. As this case makes clear, the Board is ready and willing to prosecute midwives. Concurrent jurisdiction by the Board would make the addition of subsection (e) to § 107 superfluous.

Further, this statute explicitly creates "current jurisdiction" between DHSS and the Superior Court to prosecute non-nurse midwives by stating "Superior

Court shall have original jurisdiction to adjudicate criminal offenses under this subsection." The General Assembly has affirmed that DHSS and the Superior Court, not the Board, are responsible for regulating the practice of non-nurse midwifery. If the General Assembly had intended there be further concurrent jurisdiction with the Board of Medicine, such language would have been included in the amendment.

b. The General Assembly is Currently Considering a Bill that Places Regulation of Non-Nurse Midwives Within the Jurisdiction of the Board of Medicine

In May 2014, HB 319, a Bill that would amend Title 24, Chapter 17, to *include* non-nurse midwifery within the scope of the Board's jurisdiction, was approved by the Delaware House of Representatives. The Bill will be presented to the Senate during the next legislative session. **Tab 19**, A417-423. HB 319 adds a new Subchapter XIII to Chapter 17, Title 24 that directs the Board to create a Midwife Advisory Council (*Id.* at § 1799HH(a)), responsible for promulgating rules and regulations governing the practice of midwifery (*Id.* at § 1799HH(c)) and licensing of midwives (*Id.* at § 1799II) and revocation of licenses (*Id.* at § 1799HH(d)). If the General Assembly is just *now* considering the inclusion of non-nurse midwifery within the scope of the Board's jurisdiction, no reasonable argument can be made that on July 18, 2012, when the Board attempted to exercise jurisdiction over Ms. Webster, the Board had a grand of authority to regulate the practice of non-nurse midwifery from the General Assembly, "in terms so clear that no doubt can reasonably arise in the mind of the public" *Wilmington Vitamin & Cosmetic Corp. v. Tigue*, 183 A.2d 731, 748 (Del. Super. 1962).

II. THE FAILURE TO MAKE A TRANSCRIPT OF THE BOARD'S DELIBERATIONS ON THE RECOMMENDATION OF THE CHIEF HEARING OFFICER ON APRIL 2, 2013 WAS AN ERROR OF LAW.

A. Question Presented: Did the Superior Court err in its determination that the Board's failure to transcribe its deliberations on the Recommendation of the Chief Hearing Officer did not require remand pursuant to this Court's decision in *Richardson v. Board of Cosmetology & Barbering of the State of Delaware*, 2013 WL 3088602 (Del. Apr. 17, 2013)?

This issue was raised in Ms. Webster's Opening Brief to Superior Court (Tab 11, A316-317).

B. Scope of Review: This Court reviews *de novo* the application of law to uncontroverted or established facts. *See B.F. Rich & Co., Inc. v. Gray*, 933 A.2d 1231, 1241 & n.13 (Del. 2007).

C. Merits of Argument:

Under Delaware law, the Board's decision to deliberate on the recommendations of the hearing officer in a private executive session without the creation of a transcript is an error of law requiring that this case be remanded back to the Board so that their deliberations can be transcribed and a complete record created.

This Court held in *Richardson v. Board of Cosmetology & Barbering of the State of Delaware*, 69 A.3d 353 (Del. 2013) that:

> the APA does require a record of a contested case hearing before the Board. Pursuant to § 8735(v)(1)(d), Richardson filed exceptions to the Hearing Officer's Recommendations challenging the recommended penalty as excessive. The recommendation of a penalty is not binding upon the Board. Richardson was not contesting the Hearing Officer's

> factual findings, which are binding on the Board. By contesting the Hearing Officer's Recommendations, Richardson triggered the protections of § 10125(d) of the APA which requires that a record be kept of the meeting from which a verbatim transcript could be prepared. *Such a record of the proceedings before the Board, is necessary for appellate review.* Section 10142(d) of Delaware's Administrative Procedures Act ("APA") provides that *if an agency record is insufficient for appellate review, the reviewing court shall remand the case to the agency for further proceedings on the record*. Accordingly, we must remand this case for further proceedings before the Board for on-the-record consideration of Richardson's exceptions as presented at the new hearing by his counsel.

In this case, the undisputed facts show that Ms. Webster also submitted exceptions contesting the conclusions of law found by the Hearing Officer and challenging the Hearing Officer's recommendations. Tab 8, A256-267. As was the case in *Richardson,* neither the Hearing Officer's conclusions of law nor his recommendations are binding upon the Board. Therefore, by contesting such conclusions and recommendations, Ms. Webster triggered the protections of § 10125(d) of Delaware's Administrative Procedures Act ("APA").

Ms. Webster also submitted a motion seeking recusal of certain Board members (Tab 7, A95-96). Due to the closed session of the Board, there is no record of the Board's consideration or determination of that motion. As evidenced by the confirmation from the Division of Professional Regulation, the lack of verbatim transcript makes the record insufficient for appellate review under *Richardson* and requires remand. *See* Tab9, A268-270.

III. THE HEARING OFFICER'S FAILURE TO ALLOW MS. WEBSTER SUFFICIENT OPPORTUNITY TO RETAIN COUNSEL TO REPRESENT HER AT THE DPR HEARING CONSTITUTES A VIOLATION OF HER DUE PROCESS RIGHTS.

A. Question Presented: Did the Superior Court err in its determination that the Board's failure to allow Ms. Webster an opportunity to be represented by counsel at the DPR Hearing, as is her right pursuant to 24 *Del. C.* § 1734(d), was not a violation of her due process rights?

This issue was raised in Ms. Webster's Opening Brief to Superior Court (Tab 11, A307-308).

B. Scope of Review: This Court reviews *de novo* the application of law to uncontroverted or established facts. *See B.F. Rich & Co., Inc. v. Gray*, 933 A.2d 1231, 1241 & n.13 (Del. 2007).

C. Merits of Argument:

Ms. Webster is explicitly afforded a right to be represented by counsel at a hearing before the Division of Professional Regulation pursuant to 24 *Del. C.* §1734(d). At the commencement of the DPR Hearing, Ms. Webster stated, "I'd like to say that I'm not represented by counsel at this hearing. *This is not by choice*." Tab 6, A90-91. Ms. Webster goes on to say that she has been actively attempting to engage counsel but was unable to do prior to the hearing stating, "I'm extremely frustrated by this and I am concerned about having to represent myself when the State of Delaware and the Medical Board is represented by counsel. But I don't have a choice. No other options. So I am representing myself *pro se* in this hearing." *Id*. p.9. Remarkably, in the "Findings of Fact" section of

the Recommendations, the Hearing Officer's first factual finding is that "Ms. Webster *chose* to represent herself" *pro se* at the DPR Hearing. Tab 7, A204. Both the State and the Hearing Officer had the ability to postpone the DPR Hearing to allow Ms. Webster the opportunity to retain counsel; each *chose* not to do so.

The Hearing Officer's failure to continue the DPR Hearing in order to allow Ms. Webster an opportunity to engage counsel, or to create a clear record for appeal as to her knowing and voluntary waiver of counsel, was plain error constituting a violation of Ms. Webster's due process rights and requiring a new DPR hearing. "The requirements of procedural due process were set by the United States Supreme Court in *Goldberg v. Kelly* as follows: … retained counsel, if desired." *Lawson ex rel. Lawson v. Dep't of Health & Soc. Servs.*, 2004 WL 440405, at *3-4 (Del. Super. Feb. 25, 2004) (citing *Goldberg v. Kelly*, 397 U.S. 254, 266-67 (1970)); *see also id*. at *8 ("Additionally, the DSSM defines a 'fair hearing' as an administrative hearing held in accordance with the principles of due process which include: Timely and adequate notice; the right to confront and cross-examine adverse witnesses; the opportunity to be heard orally; the right to an impartial decision maker *and the opportunity to obtain counsel*.") (Emphasis added). As evidenced by the inclusion of significant hearsay testimony forming a majority of the case against her, Ms. Webster was severely prejudiced by her lack of counsel. The lack of representation allowed the State to object to her introduction of hearsay testimony (Tab 6, A99) despite arguing on appeal that hearsay evidence is admissible in administrative hearings (Tab 12, A330 Sec. III). Further, when a non-lawyer who had accompanied Ms. Webster to the hearing

questioned the objection, the Deputy Attorney General cautioned him that he was "venturing a little bit into the area of acting as an attorney" and telling him to "be a little careful", effectively stifling Ms. Webster's ability to object. *Id.*, A100.

Ironically, the State introduced a significant amount of hearsay evidence due to the fact that the DPR Investigator who had been assigned to investigate the case was "on leave" at the time of the hearing. Tab 7, A197. Therefore, it would have been in the interests of fairness to *both* sides to continue the hearing, but the Hearing Officer and the State chose not to do so, resulting in an unfair advantage to the State. Further, the Hearing Officer made no attempt to engage in a colloquy with Ms. Webster on the record with respect to her apparent "choice" to proceed without counsel. *Smith v. State*, 996 A.2d 786, 791 (Del. 2013) ("Even though Smith adamantly asserted that he would like to proceed *pro se*, the trial judge was still responsible for conducting a comprehensive evidentiary hearing to explore and explain the defendant's options.") (internal quotations omitted).

In addition to being a violation of Ms. Webster's due process rights, the actions of the Hearing Officer and the State by forcing the hearing to go forward, not engaging in a colloquy with Ms. Webster advising her of her rights, and then objecting to the admission of Ms. Webster's allowable hearsay evidence (while presenting its own) were prejudicial to Ms. Webster, the administration of justice, and the public's perception of fairness within the judicial system. The intentional violation of Ms. Webster's due process rights requires that the Recommendations from the DPR Hearing be vacated.

IV. THE SUPERIOR COURT'S AFFIRMATION OF THE PUBLIC ORDER ENTIRELY "ON THE BASIS OF AND FOR THE REASONS ASSIGNED IN THE RECOMMENDATIONS AND ORDER" WAS FACTUALLY IMPOSSIBLE AND LEGALLY IMPERMISSIBLE.

A. Question Presented: Did the Superior Court commit both an abuse of discretion and error in law by affirming the Public Order entirely "on basis of and for the reasons assigned in the Recommendations and Order" without making an independent finding that the Hearing Officer's findings of fact and conclusions of law were supported by substantial evidence?

This issue was raised in the Opening Brief below. Tab 11, A306-314.

B. Scope of Review: This Court has stated:

> Our standard of review mirrors that of the Superior Court. Where 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. On appeal from a decision of an administrative agency the reviewing court must determine whether the agency ruling is supported by substantial evidence and free from legal error.

Stoltz Mgmt. Co., Inc. v. Consumer Affairs Bd., 616 A.2d 1205, 1208 (Del. 1992) (internal citations omitted).

C. Merits of Argument:

Ms. Webster was not "practicing medicine" in violation of 24 *Del. C.* 1702(9). In order for the Hearing Officer to find Ms. Webster to be in violation of 24 *Del. C.* 1702(9)(a) and (c) the State was required to prove by a preponderance of the evidence that the alleged actions: (1) occurred in Delaware; (2) were performed by Ms. Webster; and (3) constituted "the practice of medicine". The

State did not meet this burden and the Hearing Officer's determination to the contrary, without reconciling the contradictory evidence and explicitly defining the scope of "practice of medicine", was an abuse of discretion. The Superior Court also committed an abuse of discretion by not creating a record of its independent determination that the Hearing Officer's conclusions of law were supported by substantial evidence. Further, the Superior Court committed an error of law by citing solely to the reasoning contained in the Recommendation and Public Order to address Ms. Webster's argument that the Board's private deliberations prior to adopting the Recommendation requires the case to be remanded back to the Board. This argument was necessarily raised for the first time *after* the Public Order and Recommendation were issued.

1. The Hearing Officer's "Factual Findings" are Contradicted by the Record Evidence

The "Findings of Fact" contained in the Recommendation provide, at best, only circumstantial evidence to support a conclusion that, over the past twenty-five years, Ms. Webster has provided unspecified "midwifery services" in Delaware. The "Findings of Fact" note, for example, that Ms. Webster "has been in attendance at home births since 1987 in four states, including Delaware"[4] and that "*WomanWise* offers traditional midwifery care & homebirth services in MD, DE, PA and NJ." Tab 7, A204. After explaining that Ms. Webster and WomanWise operate in at least four states, the Hearing Officer goes on to explain that the "WomanWise site lists the following *professional midwifery services* which Ms.

[4] It is unclear if the Hearing Officer means to imply with this finding that attendance at a home birth constitutes the "management of pregnancy and parturition."

Webster, *and perhaps others*, provide: homebirth, comprehensive prenatal care, postpartum care for mother and baby, placenta encapsulation, fertility awareness and preconception counseling and referrals to holistic providers. In addition, WomanWise performs breast exams, pelvic exams, pap smears, blood work, menstrual and menopausal counseling." *Id*., A205 (emphasis added). These general factual findings do not support the specific legal conclusions that are eventually drawn from them.

Neither the Recommendation nor the record, offers any explanation as to which "professional midwifery services" constitute the practice of medicine. More importantly, the Recommendation never specifies when or if *Ms. Webster actually performed* any of the midwifery services that would constitute "the practice of medicine" *in Delaware* in order to support the conclusion that Ms. Webster has been practicing medicine in Delaware without a license. For example, in light of the finding that Ms. Webster has performed many activities in many states over many years, the fact that, for example, WomanWise performs pelvic exams, does not support a legal conclusion that Ms. Webster has ever performed a pelvic exam or otherwise "practiced medicine" *in Delaware*.

In some cases, the Hearing Officer's factual findings forming the basis for his legal conclusions are directly refuted by the record, completely undermining those legal conclusions. In one of the more egregious examples, the Hearing Officer decided to directly question Ms. Webster after she had left the witness stand. The Hearing Officer, after the close of the evidence, asked Ms. Webster, the following general question: "Does a mid-wife, *be she a registered nurse or non-*

nurse midwife, permitted by the Division of Public Health, *does typically do midwife's services* include the management of pregnancy and parturition?" Tab 6, A162. Ms. Webster responded in the affirmative. *Id*. The Hearing Officer then asked the following question: "I'm assuming you've engaged in those sorts of activities here in Delaware?" before advising, "If you don't want to answer that one, fine." *Id*., A162-163. Ms. Webster appropriately responded: "I would prefer not to answer that." *Id.*, A163. Notwithstanding this clear exchange, and the Hearing Officer's statement that she did not have to answer his second question, in the Recommendation, the Hearing Officer found that, as a matter of law, Ms. Webster engaged in the "management of pregnancy and parturition" *in Delaware*, because:

> I read the statutory definition above to Ms. Webster during the hearing. I then asked her if "the management of pregnancy" and parturition is something which she, as a midwife, has done in the performance of her duties as a midwife. She responded in the affirmative.

Tab 7, A208.

The Hearing Officer's failure to make factual findings free from inconsistencies and without disregarding competent evidence means that no substantial evidence can exist to support his legal conclusions. *Attix v. Voshell*, 579 A.2d 1125, 1127 (Del. Super. 1989).

2. The Hearing Officer Impermissibly Attempts to Change the Plain Language of 24 *Del. C.* § 1702(9)

As the State points out, the Hearing Officer fundamentally misunderstood the issues presented by this case. *See* Tab 12, A325 *citing* Recommendation, Tab 7,

A208 ("this case required the Hearing Officer to engage in a statutory analysis to determine whether non-nurse midwives are engaged in the unlicensed practice of medicine when they provide 'pregnancy and parturition *services*'") (emphasis added). The issue in this case is *not* whether midwifery *services* are, *per se*, the practice of medicine. The much narrower issue in this case is what, if any, action made by Ms. Webster, in Delaware, constitutes the "practice of medicine" through "the *management* of pregnancy and parturition".

Although the Recommendation asserts that when interpreting the Delaware Code, "[i]f a word had not acquired a "peculiar" meaning in the law, it is to be construed according to the 'common and approved usage of the English language'" (*Id*.), the Complaint, Recommendation, Public Opinion and the State's Answering Brief to the Superior Court repeatedly attempt to incorrectly and impermissibly change the definition of the "practice of medicine" contained in 24 *Del. C.* § 1702(9)(c) by consistently replacing the statutory phrase "including the management of pregnancy and parturition" with the less stringent standards of provision of "pregnancy and parturition *services*" (*see, e.g.*, Tab 12, A323, 325, 336, and 338) and "the *provision of services related to* the management of pregnancy and parturition." Tab 12, A337. The Recommendation is also riddled with examples of the Board and the Hearing Officer determining that the words "assistance", "attendance", "involvement" and "services" are synonymous with "management".[5] Further, it is clear from the language of Recommendation that the

[5] *See e.g.*, Tab 7, A206 ("Webster provides hands-on *assistance*"); *Id*., A209("the midwifery in which Ms. Webster has been engaged in Delaware and surrounding

findings of Ms. Webster's "assistance", "attendance", "involvement", and unspecified midwifery "services", form the foundation for Hearing Officer's legal conclusion that "the State has proved by a preponderance of the evidence that Ms. Webster has been engaged in the 'management of pregnancy and parturition', as well as postpartum care, in Delaware over an extended period of time." Tab 7, A209. The Hearing Officer makes a similarly impermissible change to the language in 24 *Del. C.* 1702(9)(a), equating "[a]dvertising, holding out to the public, or representing in any manner that one is authorized to *practice medicine* in this State" with being "ready willing and able to provide *midwife services* in this state" Tab 7, A213.

The State and Hearing Officer's fundamental misunderstanding of the issues raised in this case, and their repeated attempts to subvert the plain language of the Statute undermine the validity of every legal conclusion made by the Hearing Officer regarding the Board's jurisdiction over Ms. Webster, as well as the factual and legal conclusions regarding what constitutes the "practice of medicine" under Delaware law.

3. The Hearing Officer's Misunderstanding of the Predicate Step Required of in Determining the Parameters of the "Practice of Medicine" Results in Conclusions of Law that are Unsupported by Substantial Evidence

The conclusions of law contained in the Recommendations are not supported by substantial evidence in the record. The Amended Complaint in this case alleges Ms. Webster: (1) "advertises midwifery services, including prenatal and labor and

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states *involves* parturition" and "[o]n that date Ms. Webster *attended* and was intimately *involved* in "parturition".

delivery services, in the State of Delaware" on her website and offers "office visits" at an address in Delaware, Tab 2, A7, ¶¶3-4; (2) "provided childbirth services" to a woman at her home in Delaware on December 4, 2011, *Id*., ¶5; and (3) "provided childbirth services" to woman at her home in Delaware on June 16, 2011 and *certified the birth as a midwife*. *Id*., A7-8, ¶6.

The Amended Complaint then asserts the following conclusion of law, adopted by the Hearing Officer, without offering any support or explanation:

> By advertising and providing *prenatal, labor, and delivery services* in the State of Delaware, [Ms. Webster] *is engaging* in the unauthorized practice of medicine, as defined in 24 *Del. C.* §1702(12) in violation of 24 *Del. C.* § 1702(a)(1). (Tab 2, A7-8) (emphasis added).

Like the Complaint, the Recommendation and the Public Opinion each beg the ultimate question by predicating their determinations on the unsupported and uncited legal conclusion that unspecified "midwifery services" or "childbirth services" *per se* constitute the "practice of medicine" and/or "the *management* of pregnancy and parturition". The Recommendation, as a predicate to its findings of facts and conclusions of law states outright, without citation, that "[t]he Medical Practice Act states that the performance of *some midwifery services* is the practice of medicine." Tab 7, A202 (emphasis added). At no time does the Hearing Officer explain how he arrived at this legal conclusion, where in the Act this language may be found, explain what acts "the *management* of pregnancy and parturition" encompasses, nor differentiate *which midwifery services* constitute the practice of medicine and which do not. The assertion, however, incorrect as it may be, that only "some" midwifery services constitute the practice of medicine, is a

concession by the Hearing Officer that midwifery services are not, *per se*, the practice of medicine. This concession is, unfortunately, ultimately ignored.

As a result of the Hearing Officer's failure to complete the necessary predicate step in this case by defining what acts constitute the "practice of medicine" with respect to the "management of pregnancy and parturition" this Court does not have sufficient ability to determine if the facts in the record support the Recommendation's legal conclusions. Under *Attix v. Voshell*, 579 A.2d 1125, 1127 (Del. Super. 1989), the Hearing Officer's "findings must be free from inconsistencies and free from a capricious disregard for competent evidence. Thus, the [Hearing Officer] *must consider and reconcile* all undisputed evidence in the record below. *No substantial evidence can exist* if these tasks are not performed by the [Hearing Officer]." (Emphasis added). Further, although neither this Court, nor the Superior Court is meant to substitute its judgment for that of the Hearing Officer, in order "to apply the standard of review, the Court *must independently review* the facts found to determine whether or not, as a matter of law, they support the ultimate conclusions of law made by the hearing officer based upon those facts." *Id*. (Emphasis added).

In this case, as was the case in *Attix*, "[n]othing 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. Public perception of a "level playing field" at administrative hearings remains essential to respect for the law. *The Superior Court cannot waive its legislative mandate to carefully review these cases on the record* by simply blindly ignoring the record not cited by a hearing

officer." *Id.* at 1131. (Emphasis added). The Superior Court committed an abuse of its discretion by not creating a record explaining its independent review of the facts to support its determination that the Hearing Officer's legal conclusions were valid. In light of the fact that the findings of the Hearing Officer do not reconcile the undisputed evidence and are directly contradicted by undisputed facts in the record, no substantial support for the Hearing Officer's legal conclusions can exist. The decision of the Hearing Officer must, therefore, be vacated as a matter of law.

4. The Reasoning of the Superior Court's Affirmation is Factually Impossible and Constitutes an Error of Law.

The Superior Court Order dated September 22, 2014 affirming the Public Order of the Board states that the Public Order should be affirmed "on the basis of and for the reasons assigned in the Recommendations and [Public] Order." However, in her appeal to the Superior Court Ms. Webster challenged the Board's failure to make a written transcript of the Board's deliberations on the Hearing Officer's Recommendation. This issue was not addressed in either the Recommendations or the Public Order. As this issue was brought in the first instance in Ms. Webster's appeal to the Superior Court, it is factually impossible for the Superior Court to resolve it "on the basis of and for the reasons assigned in the [prior] Recommendations and [Public] Order."

The Superior Court committed an error of law by affirming the Public Order without making an independent determination that the findings of fact and conclusions of law were supported by substantial evidence with respect to each of the arguments raised in Ms. Webster's appeal. It is clear from the Order that the

Superior Court made no independent determination with respect to Ms. Webster's argument that the Board's failure to make a written transcript of the Board's deliberations on the Exceptions, the Motion for Recusal, or the Hearing Officer's Recommendation requires the case be remanded back to the Board. This abuse of discretion and error of law requires that the case be remanded back to the Superior Court.

CONCLUSION

For the foregoing reasons, Appellant Karen Webster respectfully requests that this Court either reverse the Superior Court and vacate the Recommendation and Public Opinion of the Board of Medical Licensure and Discipline for lack of jurisdiction over the practice of non-nurse midwives or, alternatively, remand the case back to the Superior Court for a thorough, independent determination of the issues raised on appeal.

COOCH AND TAYLOR, P.A.

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Date: December 5, 2014

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

KAREN S. WEBSTER,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No.: N13A-05-011 FSS
	)	
DELAWARE BOARD OF MEDICAL LICENSURE AND DISCIPLINE,	)	
	)	
Appellee.	)	

ORDER

This 22nd day of September, 2014, the court having carefully reviewed the record from the proceedings below and the briefs submitted here, and having concluded that the thorough, February 13, 2014 Recommendations of Chief Hearing Officer and the May 7, 2014 Public Order of the Board should be **AFFIRMED** on the basis of and for the reasons assigned in the Recommendations and Order:

It is now, therefore, ordered that The Delaware Board of Medical Licensure And Discipline Public Order is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Civil)
Matthew P. D'Emilio, Esquire
Jeremy D. Eicher, Esquire
Katisha D. Fortune, Esquire

BEFORE THE BOARD OF MEDICAL LICENSURE AND DISCIPLINE

IN THE MATTER OF:	)	**FINAL BOARD ORDER**
KAREN WEBSTER	)	**Complaint Nos.: 10-237-11**
	)	**10-31-12**
(Unlicensed)	)	
	)	

PUBLIC ORDER

Pursuant to 29 *Del. C.* § 8735 (v)(1)d[1] a properly noticed hearing was conducted before a hearing officer to consider the above referenced complaint filed by the State of Delaware against Karen Webster with the Board of Medical Licensure and Discipline. The hearing officer has submitted the attached recommendation in which the hearing officer found as a matter of fact and law that the above-captioned complaints have been shown by a preponderance of the evidence presented to establish a violation of the Board's statute and its regulations by Ms. Webster.

The Board is bound by the findings of fact made by the hearing officer. However, the Board may affirm or modify the hearing officer's conclusions of law and recommended penalty. The parties were given 20 days from the date of the hearing officer's proposed order to submit written exceptions, comments and arguments concerning the conclusions of law and recommended penalty.

[1] Section 8735 (v)(1)d provides that hearing officers have the power to conduct hearings, including any evidentiary hearings. The testimony or evidence so taken or received shall have the same force and effect as if taken or received by the board or commission. Upon completion of such hearing or the taking of such testimony and evidence, the hearing officer shall submit to the board or commission findings and recommendations thereon. The findings of fact made by a hearing officer on a complaint are binding upon the board or commission. The board or commission may not consider additional evidence. When the proposed order is submitted to the board or commission, a copy shall be delivered to each of the other parties, who shall have 20 days to submit written exceptions, comments and arguments concerning the conclusions of law and recommended penalty. The board or commission shall make its final decision to affirm or modify the hearing officer's recommended conclusions of law and proposed sanctions based upon the written record.

Prior to the hearing, Ms. Webster filed three Motions with the hearing officer and following the hearing, submitted exceptions to the hearing officer's recommendation asking the Board to find that she did not provide unlicensed medical care in the state of Delaware. Ms. Webster filed two Motions to Dismiss and exceptions to the hearing officer recommendations on the ground that this Board does not have jurisdiction to regulate her conduct. Ms. Webster contended that by acting as a non-permitted mid-wife, she violated statutes regulated by the Division of Public Health, not the Division of Professional Regulation; therefore, this Board cannot regulate her actions. In addition, Ms. Webster filed a Motion Seeking Recusal alleging that she was unable to become a permitted non-nurse midwife because she could not secure a collaborative relationship with a Delaware physician. She contends that this inability was based on the actions of the Medical Society of Delaware "by and through its wholly-owned subsidiary Medical Society of Delaware Insurance Services, in partnership with Willis." Based on these contentions, Ms. Webster asked that all members of the Board of Medical Licensure and Discipline who are also members of the Medical Society recuse themselves from this matter.

The Board deliberated on the hearing officer's recommendation and Ms. Webster's exceptions thereto on April 2, 2013. In this case, the hearing officer found that Ms. Webster provided unlicensed medical care to patients "Jennifer" and "Hadassah." The hearing officer found that a business entity owned and operated by Ms. Webster, known as WomanWise, has a website which lists the following midwifery services: homebirth, comprehensive prenatal care, postpartum care for mother and baby, placenta encapsulation, fertility awareness and preconception counseling and referrals to holistic providers. In addition, WomanWise performs breast exams, pelvic exams, pap smears, blood work and menstrual and menopausal counseling.

The hearing officer further found that on May 17, 2011, Ms. Webster and Jennifer signed

an "Informed Consent" regarding Ms. Webster's agreement to provide midwife services for Jennifer and her baby. The consent agreement lists a number of high risk situations and potential complications and discloses that Ms. Webster brings the following to a home birth: oxygen, IV therapy equipment, fetoscope, suturing supplies, DeLee catheter, bag and mask for neonatal resuscitation, anti-hemorrhagic medication, urinary catheters and ointment. In addition, a Division of Professional Regulation investigator secured medical records regarding Jennifer and her baby, including antepartum notes and LabCorp results which list Ms. Webster's address as the "account address."

The hearing officer further found that Ms. Webster admitted that "management of pregnancy and parturition" was something which she did in the performance of her duties as a midwife and advertised such services on the internet. Moreover, the hearing officer found that Ms. Webster is not a licensee of the Board of Nursing and thus not authorized to practice midwifery as a nurse-midwife, and she has not secured the requisite permit from the Division of Public Health in order to lawfully practice as a non-nurse midwife.

As a result of these findings of fact and after consideration of Ms. Webster's legal motions, the hearing officer concluded that the Board had jurisdiction to hear this case and order Ms. Webster cease and desist from practicing medicine without a license. The hearing officer incorporated by reference his decision on this matter set forth prior to the hearing. To that end, the hearing officer concluded that Ms. Webster engaged in the unauthorized practice of medicine, as that term is defined in 24 *Del. C.* §1702(9)(a) and (c), and that such unauthorized practice is a violation of 24 *Del. C.* § 1720(a)(1). More specifically, the hearing officer concluded that Ms. Webster violated 24 *Del. C.* §1702(9)(c) by engaging in the "practice of medicine" by partaking in the "management or pregnancy and parturition." In addition, she has

not been issued a license to engage in medical practice by the Board of Medical Licensure and Discipline; she is not a licensee of the Board of Nursing, and thus is not authorized to practice midwifery as a nurse-midwife; and she has not secured the requisite permit from the Division of Public Health in order to lawfully practice as a non-nurse midwife. The hearing officer found that Ms. Webster also violated §1702(9)a of the Medical Practice Act which defines the "practice of medicine" as "advertising, holding out to the public, or representing in any manner that one is authorized to practice medicine in this State" based upon extensive evidence of postings on the WomanWise website.

As a result of these findings of fact, the hearing officer found that Ms. Webster violated 24 *Del. C.* §1720(a)(1). The hearing officer recommended discipline in the form of a cease and desist letter, ordering Ms. Webster to refrain from performing any and all acts which constitute the practice of medicine and that she cease and desist from advertising herself or holding herself out to the public as authorized to manage pregnancy and parturition in Delaware.

After due consideration, the Board voted to accept the recommended sanctions proposed by the hearing officer.

ORDER

NOW THEREFORE, by the vote of the members of the Board of Medical Licensure and Discipline, the Board enters the following Order:

1. A Cease & Desist order shall be issued to Ms. Karen Webster directing that she refrain from any and all acts which constitute the practice of medicine in Delaware as that term is defined in the Medical Practice Act, including any and all acts which constitute the management of pregnancy and parturition, and that such Cease & Desist order remain in effect until such time as Ms. Webster becomes certified as a non-nurse midwife by satisfying all statutes and regulations pertaining to non-nurse midwife certification;

2. Ms. Karen Webster forthwith shall cease & desist and refrain from holding herself out to the public, or representing in any manner that she is authorized to engage in the

practice of medicine in Delaware, to include the management of pregnancy and parturition, including any and all advertising, public or private, electronic, print or via other media, which represents or gives rise to the reasonable inference that Ms. Webster is authorized to engage in the practice of medicine, including the management of pregnancy and parturition;

3. Ms. Webster shall forthwith amend, take down or otherwise alter the language of any website owned or controlled by her or by WomanWise which represents or gives rise to the reasonable inference that Ms. Webster is authorized to engage in the practice of medicine in Delaware, including the management of pregnancy and parturition.

4. Any violation of the Cease & Desist order may result in financial penalties assessed against Ms. Webster after due notice and hearing, and may further result in criminal prosecution.

5. Pursuant to 24 *Del. C.* § 1735 a copy of this Order shall be served personally or by certified mail, return receipt requested, upon Karen Webster. A copy of the Hearing Officer's Recommendation shall be attached hereto and is incorporated herein.

IT IS SO ORDERED this 7th day of May, 2013.

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Mary Ryan, Public Member

Date Mailed: 5/08/13

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KAREN S. WEBSTER	)	
	)	
Petitioner Below,	)	
Appellant,	)	C.A. No. 593, 2014
	)	
v.	)	
	)	Court Below: The Superior
DELAWARE BOARD OF MEDICAL	)	Court of the State of Delaware,
LICENSURE AND DISCIPLINE,	)	C.A. No.: N13A-05-011 FSS
	)	
Defendants Below,	)	
Appellee.	)	

CERTIFICATE OF SERVICE

I, Jeremy D. Eicher, Esquire, hereby certify on this 5th day of December, 2014, that I caused true and correct copy of Appellant's Opening Brief and Appendix to be served electronically via File and ServeXpress upon the following:

Katisha D. Fortune, Esq.
Deputy Attorney General
Carvel State Office Building
820 N. French Street, 6th Floor
Wilmington, DE 19801

COOCH AND TAYLOR, P.A.

/s/ Jeremy D. Eicher
JEREMY D. EICHER (#5093)
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Wilmington, DE 19801
(302) 984-3800
Attorney for Appellant, Karen S. Webster

Dated: December 5, 2014