DEPARTMENT OF STATE
OFFICE OF THE SECRETARY OF STATE
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In the Matter of

DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,

Appellant,

DECISION AND ORDER

-against-

36 DOS APP 12

JODI KAUFMAN,
d/b/a RANDEE ELAINE SALON

Respondent.
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The New York State Department of State, Division of Licensing Services (Appellant), appeals from a March 29, 2011 decision (179 DOS 11) by the Department of State's Office of Administrative Hearings (Ziedah F. Giovanni, ALJ), which held, as relevant here, that Respondent, a licensed operator of an appearance enhancement business, did not engage in the unauthorized practice of medicine by advertising laser treatments other than treatments for hair removal.

After an inspection of Respondent's business revealed several potential violations of applicable laws and rules, Appellant issued an administrative complaint alleging, among other things, that 1) Respondent offered various non-invasive cosmetic procedures involving the use of lasers to treat spider veins, wrinkles, age spots and the like, thereby engaging in the unauthorized practice of medicine; and 2) these acts demonstrate untrustworthiness and incompetency. Following a hearing, the ALJ determined, as relevant here, that Respondent had not engaged in the unauthorized practice of medicine merely by offering laser procedures other than for hair

removal. The ALJ reasoned that the regulation at issue bars the practice of medicine, not the advertising or offering of services that constitute the practice of medicine, and did not reach the question as to whether the specific treatments at issue fall within the practice of medicine. The ALJ did, however, find that Respondent used an intense pulse light ("IPL") device, rather than a laser, to perform the "laser" procedures it advertised and held that Respondent demonstrated untrustworthiness by advertising the availability of "laser" procedures using language that did not accurately reflect those services.[1]

On appeal, Appellant argues, essentially, that the ALJ erred by failing to find that Respondent offered and performed services that constitute the unlawful practice of medicine. Appellant requests a finding that laser/IPL/thermage treatments[2] other than for hair removal constitute the practice of medicine and may not be offered, advertised and/or provided by licensed appearance enhancement business owners.

ISSUES PRESENTED

The following issue is presented on this appeal:

Does the advertising, offering or provision of laser or laser-like treatments for various conditions unrelated to hair removal violate Appellant's regulations prohibiting the unlawful practice of medicine by licensed appearance enhancement professionals?

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[1] The ALJ also found that respondent had demonstrated untrustworthiness and violated 19 NYCRR 160.10[a], 160.14[c] and 160.25[d]. Respondent has not appealed the ALJ's determination on these points and has submitted proof that the fine imposed has been satisfied.

[2] The ALJ found that the use of an IPL device is distinct from the use of a laser, and relied upon this distinction in holding that Respondent had not performed unauthorized laser treatments. However, this distinction is not material to the instant question, namely, whether the use of lasers or other electronic technologies to perform non-invasive cosmetic procedures violates the Department's regulation

FINDINGS OF FACT

The Secretary adopts the ALJ's findings of fact as they are relevant to this appeal with the following addition:

1. The employees of Respondent's appearance enhance business have used IPL and/or other related technologies to provide a variety of cosmetic treatments for more than ten years (hearing transcript at 111-125).

OPINION

The Department of State ("Department") is statutorily charged with administrative oversight of several related appearance enhancement occupations (*see generally* General Business Law art 27). Under the regulatory scheme governing these occupations, individual appearance enhancement licensees are not "authorized to diagnose or treat diseases, including diseases of the skin, hair and nails," because doing so would be the practice of medicine (19 NYCRR 160.27[c]). Appearance enhancement business owners are similarly barred from allowing the unlicensed practice of medicine at their business locations (*see id.*). The Department's regulations do not define the practice of medicine or otherwise prescribe the scope of this prohibition.

The threshold question in this matter is whether the Department has the expertise to independently determine whether particular conduct constitutes the practice of medicine such that the unauthorized performance of those acts by appearance enhancement licensees violates

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prohibiting the unauthorized practice of medicine.

the Department's regulations. Although "[t]he determination of an agency, acting pursuant to its authority and within the orbit of its expertise, is entitled to deference" (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. and Community Renewal*, 46 AD3d 425, 428 [2007], *affd* 11 NY3d 859 [2008]), the Department does not have any authority or expertise regarding the proper scope of the practice of medicine. Since it is not positioned to independently determine whether specific acts constitute the practice of medicine, the Department cannot rely upon its own expertise and must instead rely upon outside authority as it seeks to enforce its regulatory prohibition on the practice of medicine by appearance enhancement licensees.

The statutes and regulations governing the medical profession do little to clarify whether any particular act constitutes the practice of medicine. The statutory definition of the practice of medicine – "diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition" (Education Law § 6521) – is quite general and, if strictly construed, would encompass an extremely broad range of conduct. It is generally recognized and popularly understood that certain acts – invasive surgeries, the setting of broken bones, the prescribing of medications, etc. – clearly fall within the "practice of medicine." At the same time, many actions commonly performed by lay people, such as providing aspirin for a headache, bandaging a small cut, or removing a splinter, would fall within a strict reading of the statutory definition.

The Appellate Division long ago cautioned against reading the statutory prohibition against treating any "physical condition" overly broadly:

> A physical condition is, I take it, any condition that is perceptible by the senses. Therefore, a physical condition is anything or any condition about the body which

> is the subject of observation. It could very forcibly be argued that the growth of a finger nail, or premature baldness, or a visible birthmark, or any growth upon the body is a physical condition, but the legislature, I am sure, did not intend that such an interpretation should be put upon these words. It is quite as logical to say that a manicure or a barber is guilty of practicing medicine without a license in removing parts of the finger nail or the hairs on a man's face, as this plaintiff is in removing hair from a woman's face.

(*People v Lehrman*, 251 AD 451, 453 [1937], quoting *Engel v Gerstenfeld*, 102 Misc 97 [App Term 2d Dept 1917] [Callaghan, dissenting], *revd* 184 AD 953 [1918]). This suggests that the statutory definition of the "practice of medicine" should not be read literally, but instead must be construed more narrowly to capture those acts that must be limited to medical practitioners and not be performed by lay people. The proper construction of this statute is clearly outside the Department's expertise.

The State Education Department ("SED"), as the state agency charged with granting licenses to practice medicine, may be best positioned to provide definitive guidance as to the proper scope of the practice of medicine. SED, aided by a State Board for Medicine, sets educational and other requirements for obtaining a medical license (Education Law §§ 6523-6524, 8 NYCRR part 60) and is also charged with investigating allegations of the unauthorized practice of medicine, a class E felony (Education Law § 6512). Nevertheless, allegations that, upon SED investigation, are substantiated must be referred to the Attorney General for prosecution and the final determination as to whether specific acts constitute the unauthorized practice of medicine rests with the courts (Education Law § 6514).

Appellant sought to rely upon SED's expertise in this area by introducing the transcribed testimony offered by Walter Ramos, the Secretary to SED's State Board for Medicine, at a 2009

administrative hearing on a similar matter.[3] In that hearing, Ramos testified that the use of laser or thermage devices to treat any physical conditions, including wrinkles, would be the practice of medicine (*see* Appellant's Memo of Appeal, Attachment "A"). Ramos did not, however, suggest that the State Board for Medicine has ever formally taken this position.

SED is also responsible for regulating and approving the curricula of schools that train appearance enhancement professionals. The record reflects that, in 2008, SED staff participated in ongoing discussions of the Department's Appearance Enhancement Advisory Committee ("Committee") regarding appropriate educational standards for appearance enhancement professionals who seek to provide laser services. The minutes of several of the Committee's meetings (Respondent's exhibit K) reflect that these SED employees believed the standard esthetics curriculum should be revised to include training in the use of these devices. In fact, according to the minutes of an August 2008 meeting of the Committee, an SED employee stated that SED "does not regulate the use of lasers" and so permitted licensed esthetics schools to provide training in the use of laser devices both to appearance enhancement licensees and to nurses (*id.* at 2).

This record of conflicting staff opinions suggests that SED does not have a definitive position as to whether the use of lasers or laser-like devices by non-medical professionals constitutes the practice of medicine. Unless and until SED takes a definitive position on this question, the Department cannot rely upon SED's expertise as the basis for its enforcement of the

[3] Ramos testified in *Matter of Div. of Licensing Servs. v Pandolfo* (100 DOS 10 [2010]), wherein the ALJ held that the use of laser devices to perform treatments other than for hair removal constitutes the practice of medicine. Although Appellant urges reliance on this precedent as a matter of *stare decisis*, that case, in which the respondent appeared *pro se*, was not appealed. The question on this appeal is, thus, an issue of first impression before the Secretary of State.

regulatory prohibition on the practice of medicine by its appearance enhancement licensees.

Appellant also introduced into evidence certified copies of a multiple-count felony indictment alleging, among other things, that a defendant repeatedly engaged in the unauthorized practice of medicine, in violation of Education Law § 6512, by offering to use a laser device and inject anesthesia to remove a skin lesion (State's exhibit 16). The record reflects that the defendant entered a guilty plea to one count of the indictment (*see id.*), but there is no corresponding fact-finding from which to glean whether the core conduct at issue was the use of a laser, the administration of anesthesia, or both. Inasmuch as the injection of anesthesia, an invasive procedure, is popularly understood to fall within the practice of medicine, the fact that an indictment was once handed down alleging that the injection of anesthesia and other conduct together constituted the unauthorized practice of medicine does not provide guidance upon which the Department can rely as to whether the other alleged conduct – offering to use a laser to remove a benign skin lesion – would, standing alone, constitute the unauthorized practice of medicine.

At the same time, it must be noted that the previously discussed Appellate Division case that examined the breadth of interpretation to be applied to the statutory definition of the practice of medicine held that electrolysis – the process of "inserting a needle charged with a small quantity of negative electricity into the follicle of the hair which is to be removed" – did not constitute the unlawful practice of medicine (*People v Lehrman*, 251 AD 451, 453 [1937]). The record in this matter further suggests that the use of laser or laser-like devices by appearance enhancement professionals to perform a variety of non-invasive treatments for cosmetic conditions is widespread in this State (*see, e.g.*, hearing transcript at 112; Respondent's exhibit

K). At the same time, there is no evidence in the record clearly demonstrating that the use of laser or laser-like procedures for the non-invasive cosmetic treatment of spider veins, wrinkles, age spots and the like constitute the practice of medicine.

On this record, there is insufficient evidence upon which the Department can rely to determine whether the use of laser or laser-like devices by appearance enhancement licensees to perform non-invasive cosmetic procedures constitutes the unauthorized practice of medicine. Accordingly, the allegation in Appellant's complaint that Respondent violated 19 NYCRR 160.27(c) cannot be sustained.

It is of note that the Department has, in aforementioned section 160.27, holds various practices "not applicable" to appearance enhancement licensure: the practice of applying permanent makeup, or micropigmentation and permanent dyeing, among others. Should the Department be of the opinion that the use of laser or laser-like devices to perform non-invasive cosmetic procedures is incompatible with the practice of appearance enhancement licensure, it should, by rule, hold those practices to be "not applicable" in this context.

DETERMINATION

Based on the foregoing, the Decision of the Administrative Law Judge, 179 DOS 11 (March 29, 2011), is hereby modified in accordance with this opinion and, as so modified, confirmed.

So ordered on October 25, 2012

Daniel E. Shapiro
First Deputy Secretary of State