

1320288

Final Order No. DOH-11-1451-^{DS}-MQA
FILED DATE - 6-21-11
Department of Health
By: [Signature]
Deputy Agency Clerk

STATE OF FLORIDA
BOARD OF MASSAGE THERAPY

IN RE: PETITION FOR DECLARATORY STATEMENT OF
DIANA RICHARDSON

FINAL ORDER

THIS MATTER came before the Board of Massage Therapy, pursuant to Section 120.565, Florida Statutes. At a duly-noticed public telephonic meeting held on June 13, 2011, the Board considered the Petition for Declaratory Statement submitted by Diana Richardson. The Petition was filed with the Department of Health on May 19, 2011. Petitioner is requesting that the Board issue a Declaratory Statement interpreting Chapter 477.013, Florida Statutes.

Petitioner was neither present nor represented by counsel. The Board was represented by Deborah Bartholow Loucks, Assistant Attorney General.

Having considered the Petition, the relevant statutes and rules, the Board issues the following:

FINDINGS OF FACT

1. The Petition was duly filed and noticed in the Florida Administrative Law Weekly; Volume 37, Number 22, published on June 3, 2011.
2. The Petition is attached hereto and incorporated herein by reference.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the issuance of declaratory statements pursuant to section 120.565, and Chapter 480, Florida Statutes.

2. Section 120.565, Florida Statutes, provides that: "Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances."

3. Rule 28-105.001, Florida Administrative Code, states:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

4. The Board of Massage Therapy does not have authority over Chapter 477, Florida Statutes, which is the Cosmetology Practice Act.

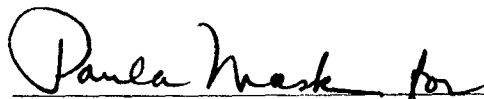
5. The Board voted to decline to answer on the grounds that it does not have authority to interpret the Cosmetology Practice Act.

6. The Board's response to the Petition is with regard only to the Petition presented and only applies to the facts set forth therein.

This Order shall become effective upon filing with the Clerk of the Department of Health.

DONE AND ORDERED, this 20th day of June, 2011.

BOARD OF MASSAGE THERAPY



Anthony R. Jusevitch, Executive Director
on behalf of Karen Ford, LMT, Chair

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Department of Health and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Florida Appellate District where the party resides. The Notice of Appeal must be filed within thirty (30) days of rendition of the order to be reviewed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to: **Diana Richardson, LMT**, 1179 Bayshore Drive North, Atlantic Beach, Florida 32233; and by interoffice mail to **Lee Ann Gustafson**, Senior Assistant Attorney General, PL-01 The Capitol, Tallahassee, Florida 32399-1050, and **Marcella Blocker**, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050, on June 21, 2011.

Angie Sanders

Deputy Agency Clerk

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**TO: Board of Massage Therapy Staff
4052 Bald Cypress Way Bin #C06
Tallahassee, FL 32399-3256**

**Division of Professions
Board of Cosmetology
1940 North Monroe Street
Tallahassee, FL 32399-0783**

**FROM: Diana Richardson, LMT
1179 Bayshore Drive North
Atlantic Beach, FL 32233**

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK Angel Sanders
DATE **MAY 19 2011**

DATE: 15 April, 2011

RE: Allowable massage services provided by Facial Specialists and facial services provided by Massage Therapists

I am writing to request clarification/interpretation and/or a declaratory statement regarding the extent to which a Facial Specialist may provide massage services (stated in the Cosmetology Act/ Chapter 477). In addition I am requesting clarification regarding exemptions as defined in Chapter 477 as it may or may not apply to a Massage Therapist.

In September of 2010 I called the number given on the website for the Florida Board of Cosmetology. I had questions about the laws and rules regarding Facial Specialties. I asked my questions and was told I would have to ask an attorney. So logically, at least to me, I looked up the contact information for the Boards' Attorney and sent her my questions. Most of what I asked her can be found below. Since she is the attorney of record for both boards it makes sense to me that she is best suited to answer my questions. I sent the email and then followed it up with a call. When I spoke with her she did let me know that she represented the board and not the individual but if the answer was blatantly obvious she would confirm it for me. She was able to verbally confirm my understanding of some of the query but was going to do a declaratory statement for the rest. She stated that she had all the information she required and that she would submit it to the Board and that the board would then need to publish it. I have monitored the minutes of the Board meetings since then and have seen nothing regarding this matter. I failed to ask how and where it gets published so I sent a follow up email asking her exactly where I should look for the results to be published but have not received an answer. Since I have an additional question that pertains to both Boards I am sending this query and a request for the results of the declaratory statement about which I spoke with Ms. Liang.

The following is a copy of my email query to Ms. Liang mailed on 30 September 2010.

16 PM 2:26
OSTRORAH 10:00:11

I am currently enrolled in a Facial Specialties class and am confused by what *my understanding* of what the law says we can do and what we are being taught we can do. Below you will find the highlighted areas of chapter 477 in question.

In my highlighting below I have used different colors to highlight the area in the laws and the same color to indicate my understanding of that particular area. My intentions are to make this as easy, and least time consuming, for you as possible. I hope I succeeded. Scroll down to definitions 6(c) and 13.

CHAPTER 477
COSMETOLOGY

477.013
Definitions.

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As used in this chapter:

(1)

“Board” means the Board of Cosmetology.

(2)

“Department” means the Department of Business and Professional Regulation.

(3)

“Cosmetologist” means a person who is licensed to engage in the practice of cosmetology in this state under the authority of this chapter.

(4)

“Cosmetology” means the mechanical or chemical treatment of the head, face, and scalp for aesthetic rather than medical purposes, including, but not limited to, hair shampooing, hair cutting, hair arranging, hair coloring, permanent waving, and hair relaxing for compensation. This term also includes performing hair removal, including wax treatments, manicures, pedicures, and skin care services.

(5)

“Specialist” means any person holding a specialty registration in one or more of the specialties registered under this chapter.

(6)

“Specialty” means the practice of one or more of the following:

(a)

Manicuring, or the cutting, polishing, tinting, coloring, cleansing, adding, or extending of the nails, and massaging of the hands. This term includes any procedure or process for the affixing of artificial nails, except those nails which may be applied solely by use of a simple adhesive.

(b)

Pedicuring, or the shaping, polishing, tinting, or cleansing of the nails of the feet, and massaging or beautifying of the feet.

(c)

Facials, or [REDACTED] with oils, creams, lotions, or other preparations, and [REDACTED]

[REDACTED]

[REDACTED]

(7)

“Shampooing” means the washing of the hair with soap and water or with a special preparation, or applying hair tonics.

(8)

“Specialty salon” means any place of business wherein the practice of one or all of the specialties as defined in subsection (6) are engaged in or carried on.

(9)

“Hair braiding” means the weaving or interweaving of natural human hair for compensation without cutting, coloring, permanent waving, relaxing, removing, or chemical treatment and does not include the use of hair extensions or wefts.

(10)

“Hair wrapping” means the wrapping of manufactured materials around a strand or strands of human hair, for compensation, without cutting, coloring, permanent waving, relaxing, removing, weaving, chemically treating, braiding, using hair extensions, or performing any other service defined as cosmetology.

(11)

“Photography studio salon” means an establishment where the hair-arranging services and the application of cosmetic products are performed solely for the purpose of preparing the model or client for the photographic session without shampooing, cutting, coloring, permanent waving, relaxing, or removing of hair or performing any other service defined as cosmetology.

(12)

“Body wrapping” means a treatment program that uses herbal wraps for the purposes of cleansing and beautifying the skin of the body, but does not include:

(a)

The application of oils, lotions, or other fluids to the body, except fluids contained in presoaked materials used in the wraps; or

(b)

Manipulation of the body’s superficial tissue, other than that arising from compression emanating from the wrap materials.

(13)

“Skin care services” [REDACTED]

[REDACTED]. Skin care services must be performed by a licensed cosmetologist or facial specialist within a licensed cosmetology or specialty salon, [REDACTED]

[REDACTED]



Rick Scott
Governor

H. Frank Farmer, Jr., M.D., Ph.D.
State Surgeon General

May 4, 2011

Diana Richardson, LMT
1179 Bayshore Drive North
Atlantic Beach, FL 32233

Re: Petition for Declaratory Statement

Dear Ms. Richardson:

I received your request for a Petition for Declaratory Statement dated April 15, 2011 which was mailed on April 29, 2011. The petition was regarding allowing massage services provided by facial specialists and facial services provided by massage therapists.

I am returning the original petition to you for signature. In order for it to be considered a valid petition it must have an original signature or the Board of Massage Therapy will be unable to act on your request. Additionally, the Board of Massage Therapy can only respond as to what activities are within the purview of the Massage Practice Act and not the Cosmetology Practice Act.

Please sign and return your original request to me along with this letter at the address listed below. Should you have any further questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Paula Mask".

Paula Mask
Program Operations Administrator
Board of Massage Therapy

/pm

Enclosure: Original Petition for a Declaratory Statement

OSTEO UNIT

TO: Cassandra G. Pasley, BSN, JD, Chief
Bureau of Health Care Practitioner Regulation

FROM: Anthony Jusevitch, Executive Director,
Florida Boards of Osteopathic Medicine, Massage Therapy,
Acupuncture, Speech Language Pathology & Audiology and
Council on Licensed Midwifery

DATE: Monday, June 20, 2011

RE: Delegation of Authority

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During my absence June 20 through June 24, 2011, Paula Mask, Program Operations Administrator, is delegated authority for the board office June 20th and 21st; Christy Robinson, Program Operations Administrator, is delegated authority June 22nd, 23rd, and 24th for the board office.

Thank you,

Anthony Jusevitch