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*Counsel for the Department of Agriculture*

DAVID C. MCKENZIE III  
Assistant Counsel (Pa. I.D. 91768)  
Governor's Office of General Counsel  
Pennsylvania Department of Agriculture  
Office of Chief Counsel  
Bureau of Dog Law Enforcement  
2301 N. Cameron St., room 201  
Harrisburg, PA 17110  
(717) 787-8744

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*Appeal from the Final Order of the Secretary of Agriculture dated May 15, 2009*

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**BRIEF OF RESPONDENT COMMONWEALTH OF  
PENNSYLVANIA DEPARTMENT OF AGRICULTURE**

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Respondent.

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF AGRICULTURE,

v.

Petitioner,

DANIEL P. ESH,  
d/b/a SCARLET-MAPLE FARM

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No. 1064 CD 2009

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In The Commonwealth Court Of Pennsylvania

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STATEMENT OF JURISDICTION<sup>1</sup>

Because Petitioner has sought an appeal from an order from the Secretary of the Pennsylvania Department of Agriculture denying Petitioner a 2009 dog kennel license, the Commonwealth Court has jurisdiction pursuant to Section 763 of the Judicial Code, 42 Pa.C.S. § 763.

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<sup>1</sup> Although Respondent has included a statement of jurisdiction, Respondent does not acquiesce to Petitioner's omission of same. Pa.R.A.P. 2111 (a)(1); 2114.

**ORDER AND ADJUDICATION IN QUESTION<sup>2</sup>**

**BEFORE THE COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF AGRICULTURE**

**IN RE:**

**Daniel P. Bsh**

**(d/b/a Scarlet-Maple Farm)**

**:  
: Docket No. AG-2009-2  
: 2009 Kennel License Refusal  
:**

**FINAL ORDER AND ADJUDICATION**

**AND NOW**, this 15<sup>th</sup> day of May, 2009, upon consideration that Daniel P. Bsh d/b/a Scarlet-Maple Farm was afforded a full administrative hearing on April 9, 2009, which comported with the provisions of the Administrative Agency Law and its regulations and upon consideration of the testimony and exhibits of record and further in accordance with the attached Adjudication, including the Findings of Fact and Conclusions of Law, the decision of the Bureau of Dog Law Enforcement to refuse the 2009 kennel license application of Daniel P. Bsh d/b/a Scarlet-Maple Farm is hereby **AFFIRMED**.

**THEREFORE**, in accordance with Section 207(e)(3) of the Dog Law, 3 P.S. § 459-

207(e)(3), Daniel P. Bsh d/b/a Scarlet-Maple Farm, shall continue to post the Notice of

Operating Under Suspension dated February 23, 2009 in a place conspicuous to persons authorized to enter the kennel and approved by the Department until such time as Daniel P. Bsh has ceased to operate the kennel.

**THEREFORE**, in furtherance of this Final Order and in accordance with the provisions of

Section 211(c) of the Dog Law, 3 P.S. § 459-211(c):

A. Daniel P. Bsh d/b/a Scarlet-Maple Farm shall immediately comply with all of the

following:

I. Cease and desist from operating a kennel, including boarding, buying, exchanging, selling, offering for sale, giving away or in any way transferring dogs.

**NOTE:** The immediately foregoing provision of this Order is, as stated, immediately enforceable with regard to the boarding of dogs. However, pursuant to a Stipulation approved and Order entered by the United States District Court for the Middle District of Pennsylvania in the case captioned *Professional Dog Breeders Advisory Council, et al. v. Wolff*, docket number 1:09-CV-258, the immediately foregoing provision of this Order, and only that provision, will not be enforced for the shorter of the following two periods of time: (1) until the

<sup>1</sup> All citations to the Dog Law in this Adjudication and Final Order refer to the Act of December 7, 1982, P.L. 784, No. 225, known as the "Dog Law" and include the applicable amendments established by Act of October 9, 2008, P.L. 1450, No. 119, as amended, 3 P.S. § 459-101 *et seq.*

<sup>2</sup> Although Respondent has included the Order in question, Respondent does not acquiesce to Petitioner's omission of same. Pa.R.A.P. 2111(a)(2): 2115.

exhaustion of the appeal period to the Pennsylvania Commonwealth Court from this Order (which is thirty (30) days from the date of this Order) or (2) while the aforementioned case is pending before the United States District Court for the Middle District of Pennsylvania.

II. Acquire no additional dogs nor increase the number of dogs in the kennel by any means, including breeding. (This subparagraph does not apply to an acquisition or increase by birth of puppies from a mother which, at the time of refusal was on the property, pregnant, and owned by the kennel or the kennel owner.)

III. Notify the Pennsylvania Department of Agriculture (PDA) prior to the euthanization of any dog. No dog may be euthanized unless it is determined by a veterinarian that the euthanasia will prevent the dog from suffering caused by a medical condition. If a veterinarian determines a dog should be euthanized, a copy of the veterinarian's findings, signed by the veterinarian, must be provided to the PDA. The provisions of this subparagraph do not apply to an emergency situation if it is deemed by the veterinarian that immediate euthanasia is necessary to relieve the suffering of the dog. Following euthanasia in an emergency situation, a copy of the veterinarian's findings must be signed by the veterinarian and provided to the PDA.

IV. Permit State dog wardens to inspect the kennel without a warrant in order to determine compliance with this Final Order and any provision of the Dog Law or its regulations.

V. Divest of all dogs over 25, in the manner set forth in subsections B and C of this Final Order, within ten (10) days after the exhaustion of the appeal period to the Pennsylvania Commonwealth Court from this Order (which is thirty (30) days from the date of this Order). If there are more dogs on the premises than permitted in the Final Order after the expiration of this time period, the kennel may select the dogs to be retained, up to the number allowed in this Final Order, and any dogs not so selected shall be forfeited to any entity approved by PDA, without compensation to the owner.

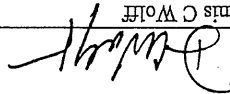
B. Pursuant to this Final Order, Daniel P. Esh d/b/a Scarlet-Maple Farm must first contact Bureau of Dog Law Enforcement Region 6 Supervisor, Diane Buhl, or his/her designee, in order to obtain approval to transfer the dog(s) to reduce the number of dogs on the premises to fewer than 25.

C. A record of each dog transferred setting forth a detailed description of each dog and the name and address of the approved person(s) to whom the dog(s) was transferred shall be kept and a copy of the record immediately forwarded to Bureau of Dog Law Enforcement Region 6 Supervisor, Diane Buhl, or his/her designee.



D. Failure to take action or to meet the conditions imposed by the Dog Law and this Final Order constitutes a misdemeanor of the third degree and, in addition to any other penalties allowed under the Dog Law, may result in imposition by the PDA of an administrative penalty of not less than \$100 nor more than \$500 per day for each violation. Each dog in excess of the number of dogs permitted in the Secretary's Order shall count as one violation.

**BY THE COMMONWEALTH OF  
PENNSYLVANIA, DEPARTMENT OF  
AGRICULTURE:**



Dennis C. Wolf  
Secretary of Agriculture

STATEMENT OF SCOPE AND STANDARD OF REVIEW<sup>3</sup>

**1. SCOPE OF REVIEW**

The scope of review of this Court is limited to the record made before the governmental agency, or in the present matter the record made before the Pennsylvania Department of Agriculture. 2 Pa.C.S.A. § 704; Pa.R.A.P. 1551(a).

**2. STANDARD OF REVIEW**

The standard of review of the Pennsylvania Department of Agriculture's adjudication is limited to determining whether an error of law was committed, constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Kinaman Animal Shelter v. Department of Agric., 673 A.2d 36 (Pa. Commw. Ct. 1996) (citing Section 704 of the Administrative Agency Law, 2 Pa. C.S.A. § 704). In applying this standard of review to the findings of an administrative agency, it has been held by Commonwealth Court itself that an appellate court, in order to reverse, must conclude that the findings of the agency are totally without support in the record.

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<sup>3</sup> Although Respondent has included a statement of scope and standard of review, Respondent does not acquiesce to Petitioner's omission of same. Pa.R.A.P. 2111(a)(3).

COUNTERSTATEMENT OF QUESTIONS INVOLVED<sup>4</sup>

1. DID THE SAFEGUARDS OF PROCEDURAL DUE PROCESS REQUIRE THE DEPARTMENT OF AGRICULTURE TO PROVIDE PETITIONER NOTICE AND A HEARING UPON EACH NOTATION OF AN "UNSATISFACTORY" CONDITION IN HIS KENNEL WHERE SAID NOTATION IS NOT ADJUDICATORY IN NATURE?

Suggested Answer: No.

2. DID REGULATIONS 21.29(A) AND (21.29(C)) OF 7 PA CODE, CHAPTER 21, PROMULGATED UNDER THE DOG LAW (3 P.S. § 459-101—459-1201), AS APPLIED TO PETITIONER, CONTAIN REASONABLE STANDARDS TO GUIDE PETITIONER IN THE MAINTENANCE OF HIS KENNEL?

Suggested Answer: Yes.

3. DID PETITIONER WAIVE THE ISSUE OF WHETHER HE RECEIVED A HEARING BEFORE A FAIR AND IMPARTIAL TRIBUNAL DUE TO HIS FAILURE TO TIMELY RAISE SAID ISSUE?

Suggested Answer: Yes.

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<sup>4</sup> Although Petitioner has failed to meet the requirements of Pa.R.A.P. 2116(a) by omitting a statement of questions involved, Respondent has nevertheless included a "counterstatement" of questions involved in an attempt to glean and articulate those issues sought by Petitioner to be resolved by this Honorable Court.

COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On January 2, 2009, the Respondent Department of Agriculture, Bureau of Dog Law Enforcement received an application together with the appropriate fee from Petitioner Daniel P. Esh trading and doing business as Scarlet-Maple Farm for a commercial kennel license allowing for 501 or more dogs of any age during a calendar year. (R.1A). On February 5, 2009, Petitioner's 2009 kennel license application was refused by sending a Kennel License Refusal Order. (R.24A).

Jeffrey A. Conrad, Esquire, of the firm of Clymer & Musser, P.C., sent correspondence on February 16, 2009 to the Department of Agriculture's Office of Chief Counsel appealing the refusal order and requesting an administrative hearing. (R.33A). On February 23, 2009 Respondent sent Petitioner a Notice of Operating Under Suspension of Kennel License. (R.38A). Petitioner received said Notice the following day. (R.42A).

An administrative hearing was scheduled for March 24, 2009. (R.43A). After several continuance requests (R.45A, 47A, 48A, 51A, 53A, 55A), the hearing was set for April 9, 2009. (R.57A). On April 9, 2009, Respondent convened a hearing to receive testimony and evidence concerning the appeal of the Bureau's refusal of Petitioner's 2009 kennel license application. (R.64A). Petitioner received proper notice of the April 9, 2009 hearing. (R.57A). Petitioner was present and represented by counsel Jeffrey A. Conrad, Esquire. (R.76A).

Warden Dommoyer went to Petitioner's kennel for a routine inspection on November 2, 2007. (R.84A). The inspection of Petitioner's kennel on November 2, 2007 resulted in unsatisfactory ratings for 7 Pa. Code, Chapter 21 regulatory sections

Inspection of November 2, 2007

Kristen Dommoyer [hereinafter "Warden Dommoyer"] testified on behalf of the Department at Petitioner's administrative hearing that was held on April 9, 2009. (R.78A). Warden Dommoyer was a Pennsylvania State dog warden, employed by the Department for approximately two (2) years. (R.78A). She had over 300 hours of training in areas of "Humane Officer" (parts 1 and 2), pathology of dogs, handling dogs, sanitation, biosecurity, and cruelty while possessing two degrees in criminal justice. (R.79A-83A; Exhibits T1-T10, R.364A-373A).

**B. RELEVANT FACTS**

Subsequent to the administrative hearing, by way of an Order dated April 9, 2009, Secretary Dennis C. Wolff (hereinafter "the Secretary") ordered Hearing Examiner Mountz to certify the record. (R.63A). On April 16, 2009, Hearing Examiner Mountz certified the record. (R.564A). Both parties submitted timely briefs and the matter was properly before the Secretary for final disposition.

On May 15, 2009 the Secretary issued a Final Order and Adjudication affirming the Department's refusal of Daniel Esh's 2009 kennel license application (R.566A), which was received by Petitioner's counsel on or about May 18, 2009 (R.589A). It is this Final Order and Adjudication that is the subject of this appeal.

Based upon her training and experience as dog warden and due to Petitioner's admissions, the feces observed under the prefabricated kennels was identified by Warden Dommoyer as being in excess of one day's worth. (R.107A-109A, 160A-161A, 182A-183A; Exhibits C16-C19, R. 390A-393A). Moreover, there were whelping pens that

were completely soiled with feces. (R.106A).

Warden Dommoyer also viewed metal strand flooring in Petitioner's kennel that did not have the required vinyl coating; some of the metal flooring was rusted. (R.97A-99A; Exhibits C4-C7, R.378A-381A). Meanwhile in the kennel, there were self-feeders possessing food contaminated with old feces, caked feed, and mold. (R.100A-105A; Exhibits C8-C15, R. 332A-389A). Carpet pieces within the whelping boxes in the kennel

with regulation 7 Pa.Code 21.23(b). (R.94A).

During Warden Dommoyer's inspection she discovered that many dogs in Petitioner's kennel were in pens with scratched/exposed wood that was not water resistant and could not be readily sanitized. (R.93A; Exhibits C2-C3, R.376A-377A). Three pens did not meet the minimum size requirements inasmuch as six dogs located in the first pen were shorted 12.02 square feet of floor space, five dogs in the second pen were shorted 13.45 square feet of floor space, and four dogs in the third pen were shorted 3.44 square feet of floor space. (R.94A-96A). Warden Dommoyer measured the dogs in accordance

(related to records kept). (R.86A-115A; Exhibit C1, R.374A).

21.21(b) (related to water resistance), 21.23(b) (related to run dimensions), 21.24(d) (related to rest area), 21.28(a) (related to food), 21.28(c) (related to food/water receptacles), 21.28(d) (related to bedding cleanliness), 21.29(a) (related to excreta), 21.29(b) (related to sanitation), 21.29(c) (related to housekeeping/pests), and 21.41(a)

contained old feces, hair and debris smashed down into the cracks of the wood while one pen in particular had insects throughout it. (R.109A-111A; Exhibits C20-C22, R.394A-396A). The presence of large amounts of insects on November 2, 2007 indicated to Warden Dommoyer that Petitioner did not have an effective program at his kennel to control insects. There were numerous dead flies, "tons" of flies flying around the kennel, and full fly traps. (R.111A-113A, 188A-190A; Exhibits C22-C24, R.396A-398A). The kennel also contained a large accumulation of hair in one of the dog runs. (R.113A; Exhibit C25, R.399A).

Despite possessing 131 puppies at the kennel, Petitioner had no records of same. (R.114A). In addition, the records Petitioner had listed more dogs than actually present at the kennel. (R.115A).

Inspection of November 28, 2007

Warden Dommoyer's inspection of Petitioners kennel on November 28, 2007 resulted in unsatisfactory ratings for regulatory sections 21.21(b) (related to water resistance), 21.23(b) (related to run dimensions),<sup>5</sup> 21.24(d) (related to rest area), 21.28(a) (related to food), 21.28(c) (related to food/water receptacles), 21.29(c) (related to housekeeping/pests), and 21.41(a) (related to records kept). (R. 117A-137A; Exhibit C26, R. 400A).

Warden Dommoyer found exposed unsealed wood throughout a dog box which could not be readily sanitized. (R. 118A-119A; Exhibit C27, R. 401A). Cages were in use that were not adequate in size in that they did not allow the dogs within them to turn

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<sup>5</sup> Warden Dommoyer testified that the correct violation should have been 21.23(a) instead of 21.23(b). (R.120A-121A).

Petitioner's kennel still possessed whelping boxes that had exposed, scratched, and chewed wood that needed to be sealed. Some of these boxes were those noted in the prior inspection while others were boxes that showed the condition for the first time. (R.

(R.130A-136A; Exhibit C38, R.412A).

resulted in unsatisfactory ratings for regulatory sections 21.21(b) (related to water resistance), 21.23(b) (related to run dimensions), 21.24(d) (related to rest area), 21.29(a) (related to excreta), 21.29(b) (related to sanitation), and 21.41(a) (related to records kept).

Warden Dommoeyer's inspection of Petitioner's kennel on December 20, 2007

Inspection of December 20, 2007

C37, R.410A-411A).

discovered in the upper-barn section of Petitioner's kennel. (R.128A-129A; Exhibit C36-127A; Exhibits C34-C35, R.408A-409A). Warden Dommoeyer was even able to chip off buildup of oils, feed, and pieces of feces indicating a failure to clean regularly. (R.126A-127A; Exhibits C34-C35, R.408A-409A). A dying rodent and mouse droppings were discovered in the upper-barn section of Petitioner's kennel. (R.127A).

The inspection also revealed automatic, i.e. "self" feeders, that contained a

began working for the Department.

404A) was the most disgusting feeder that Warden Dommoeyer had ever seen since she Exhibits C30-C33, R. 404A-407A). One feeder at Petitioner's kennel (Exhibit C30; R. Again, the kennel had feeders that were contaminated with feces. (R.123A-124A; to pass through the metal openings. (R. 121A-123A; Exhibits C28-C29, R.402A-403A). 120A-121A). The kennel also contained metal strand flooring that allowed the dogs' feet about freely, stand erect, sit, or sit and lie down in a comfortable, normal position. (R.



131A). The kennel still had metal strand flooring with the vinyl coming off. (R.132A). Three cages in the prefabricated kennel section had an amount of excreta in them that was in excess of one day's buildup based upon the number of dogs in those cages. (R. 133A). Whelping boxes in the upstairs barn section of the kennel had a buildup of hair and debris while feces was smeared along the edges and cross members of the inside of the dog boxes. (R.134A). Once again too many dogs were listed on the records as compared to those actually present at the kennel on December 20, 2007 and Petitioner told Warden Domnoyer that he did not know how many dogs were on his property. (R. 134A-136A).

Inspection of January 14, 2008

Warden Domnoyer completed an inspection report for the January 14, 2008 inspection of Esh's kennel which showed unsatisfactory ratings for regulatory sections 21.24(d) (related to rest area) and 21.41(a) (related to records kept). (R.136A-137A; Exhibit C39, R.413A).

On January 14, 2008, the metal strand floor in Petitioner's kennel still had missing vinyl coating and Petitioner's records still listed more dogs than the number physically present at the kennel. (R.136A).

Inspection of February 29, 2008

Warden Domnoyer completed an inspection report for the February 29, 2008 inspection of Petitioner's kennel which showed only one unsatisfactory rating: for regulatory section 21.24(d) (related to rest area). (R. 0137; Exhibit C40, R. 0414). On

inspection of Esh's kennel which resulted in unsatisfactory ratings for regulatory sections  
Warden Dommoyer completed an inspection report for the May 19, 2008

Inspection of May 19, 2008

flooring that allowed puppies' feet to fall through its openings. (R.140A, 196A).

On April 21, 2008, metal strand flooring was missing vinyl coating and there was

0141A; Exhibit C42, R.416A).

in an unsatisfactory rating for regulatory section 21.24(d) (related to rest area). (R.140A-

Warden Dommoyer's inspection of Petitioner's kennel on April 21, 2008 resulted

Inspection of April 21, 2008

reflect the number of dogs on the kennel property. (R.139A-0140A).

hair, dirt, debris, and some feces. (R.139A) and the records once again did not accurately

as much as Petitioner had not found a way to prevent it. (R.138A). Pens had a buildup of

On April 7, 2008, vinyl coating remained missing from the metal strand flooring

21.41(a) (related to records kept). (R.137A-140A; Exhibit C41, R.415A).

sections 21.24(d) (related to rest area), 21.29(c) (related to housekeeping/pests), and

inspection of Petitioner's kennel which resulted in unsatisfactory ratings for regulatory

Warden Dommoyer completed an inspection report for the April 7, 2008

Inspection of April 7, 2008

(R.137A).

February 29, 2008, three pens had metal strand floor with missing vinyl coating.

21.24(d) (related to rest area), 21.28(a) (related to food), and 21.29(c) (related to housekeeping/pests). (R.141A-146A; Exhibit C43, R.417A).

On May 19, 2008, metal strand flooring was still missing vinyl coating. (R.142A). Additionally, dogs' food was contaminated with old feces. (R.79A-80A; Exhibits C44-C45, R.418A-419A). Warden Donmoyer watched Petitioner's son pull out the large pieces of feces from the food while leaving the small pieces of feces behind rather than dumping out the food in the feeders that was contaminated. (R.210A-212A). Petitioner's son admitted to same. (R.280A-281A). A buildup of feces and hair hanging underneath a pen was witnessed by Warden Donmoyer along with mouse droppings in the upstairs barn. A pull out tray beneath one of Petitioner's kennels was covered with rodent droppings. (R.144A-145A; Exhibit C46-C51, R.420A-425A).

The Secretary found the testimony of Donmoyer at the April 9, 2009 administrative hearing, that elicited the facts above, to be credible and supported by the weight of the evidence. (R.577A).

#### Refusal of License

As the Director of the Bureau of Dog Law Enforcement, Susan West's responsibilities included oversight of the Bureau including dog licensing, damage claims, dangerous dogs, kennel licensing and inspection, as well as refusal and revocations of licenses for kennels. (R.225A). When a license is refused based on violations of the Dog Law or the regulations, there are six additional factors that need to be considered: the

gravity of the violation, the number of current or past violations<sup>6</sup>, the potential effect of the violation on the health or welfare of the dogs, whether the kennel has been warned previously, whether a violation resulted in a criminal conviction, and the length of time that elapsed between violations. (R.228A). The factors were evaluated by West and Special Deputy Secretary Jessie Smith. (R.238A).

The Department found the number of violations at Petitioner's kennel to be 35 from November 2, 2007 to May 19, 2008. (R.229A). All but four of these violations of the regulations could have had a potentially adverse effect on the health, welfare, and safety of the dogs. (R.232A). The Department determined that the kennel had been warned beginning with the November 2, 2007 kennel inspection and continuing through inspections into May 2008. (R.233A). Additionally, Petitioner pled guilty to three summary offenses stemming from Dog Law violations in November 2007. (R.234A; Exhibit C53, R.61A-63A; Defense Exhibits 72-75, R.558A-0561A). The Department also considered the length of time between the violations, that is, between the inspections of November 2, 2007 and May 19, 2008. (R. 0172). As a result, the Department considered the gravity of the violations to be severe and sufficient enough to warrant the refusal of the 2009 kennel license application. (R.235A-236A).

The Secretary found the testimony of West to be credible and supported by the weight of the evidence presented (R.578A).

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<sup>6</sup> The Dog Law does not place a time limit on how far back the Department can or should look when reviewing past violations; however, the Department's policy is to look back no further than 2 years. (R.227A).

**SUMMARY OF THE ARGUMENT**

Petitioner omitted from his brief several essential matters as required by the Pennsylvania Rules of Appellate Procedure, most importantly the Statement of the Questions Involved. As a result, Respondent is left to guess at the issues which Petitioner raises before this Honorable Court. Petitioner's failure to conform to the requirements of the rules of court, while unduly burdening Respondent, constitutes a waiver of those issues omitted from the statement of questions involved.

Procedural due process does not require notice and a hearing in every conceivable situation involving administrative action. Notice and a hearing are required only where administrative action is adjudicatory in nature and involves substantial property rights. Despite Petitioner's claims, a warden's notation of "unsatisfactory" on an kennel inspection sheet does not require the safeguards of procedural due process inasmuch as such a notation is neither an adjudication nor does it affect Petitioner's property rights.

Petitioner claims that regulations 21.29(a) and 21.29(c) of Chapter 21, 7 Pa. Code are vague as applied to Petitioner on December 20, 2007 and April 4, 2008, respectively. Publication in the Pennsylvania Code creates a rebuttable presumption concerning the propriety of the regulation's promulgation. Moreover, properly promulgated regulations can cure vagueness problems. As such, the regulations in the case *sub judice* are not vague. Furthermore, when measured against the common understanding and practices of the dog kennel industry, an industry Petitioner has been a part of for approximately 20 years, the promulgated regulations 21.29(a) and 21.29(c) of 7 Pa. Code, contain

reasonable standards to guide Petitioner in the maintenance of his kennel and, as such, are not vague.

In his brief, Petitioner raised for the first time an argument which he neither raised before the Department of Agriculture at the time of his appeal hearing nor in his Petition for Review. Specifically, Petitioner asserts that he "did not receive a hearing before a fair and impartial tribunal." In accordance with 2 Pa.C.S.A. 703, and Pa.R.A.P. 1513, as well as precedent established by this Court, Petitioner has failed to preserve the aforementioned issue.

ARGUMENT

INTRODUCTION

Respondent initially notes that Petitioner omitted from his brief several essential matters as required by the Pennsylvania Rules of Appellate Procedure, namely, statement of jurisdiction, order in question, statement of both the scope of and standard of review, and statement of the questions involved. Respondent finds Petitioner's omission of the statement of the questions involved most onerous inasmuch it thwarts this Honorable Court's ability to perform a meaningful review. Furthermore, Respondent, in an effort to fully advocate its position, must effectually develop and articulate Petitioner's otherwise inadequately presented argument, to Respondent's own detriment. The severity of the prejudicial effect on Respondent as a result of Petitioner's omission is magnified by Petitioner's argument of an issue neither raised at the administrative hearing nor in his Petition for Review<sup>7</sup>, allegedly supported with evidence outside of the record before this Court.<sup>8</sup>

The Pennsylvania Rules of Appellate Procedure are clear. "No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby." Pa.R.A.P. 2116. Petitioner's failure to conform to the requirements of the rules of court, while unduly burdening Respondent, constitutes a waiver of those issues omitted from the statement of questions involved. See Bell Atl. Mobile Sys. v. Commonwealth, 799 A.2d 902, 910 n.13 (Pa. Commw. Ct. 2002). Respondent respectfully requests this Court find accordingly.

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<sup>7</sup> Petitioner's Brief, Section III, at page 20, argues for the first time that Petitioner did not receive a hearing before a fair and impartial tribunal.  
<sup>8</sup> Petitioner's Brief, at page 22, references an alleged September 15, 2008 statement by the Secretary of Agriculture, identified as "(Ex. E)"; outside the record before this Court.

**1. A NOTATION OF AN "UNSATISFACTORY" CONDITION IS NOT ADJUDICATORY IN NATURE AND, THEREFORE, DOES NOT REQUIRE NOTICE AND A HEARING.**

The Dog Law mandates that all kennels shall be maintained in a sanitary and humane condition in accordance with standards and sanitary codes promulgated by the secretary through regulations. 3 P.S. § 459-207(b). Those regulations are found in the provisions of 7 Pa. Code, Chapter 21. It is a state dog warden's primary duty as an employee of the Department of Agriculture to enforce the Dog Law and the regulations pursuant thereto. 3 P.S. § 459-102. Upon inspection by a state dog warden, a kennel whose conditions do not meet the standards set by the Dog Law or its regulations will receive an "unsatisfactory" as to the particular standard violated. In other words, a kennel is not in compliance with those standards marked as "unsatisfactory."

The Dog Law succinctly states that a failure to comply with the Dog Law or with any regulation promulgated under the Dog Law by a person holding or applying for a license is adequate reason for the Department to revoke or refuse to issue a license. 3 P.S. § 459-211(a)(2) and (3). However, in determining whether to revoke a kennel license for a failure to comply with a provision of the act or regulations promulgated under it the Department must consider six (6) additional factors: gravity of violation, number of current or past violations, potential effect of the violation on the health or welfare of a dog, whether the kennel has been warned previously to correct the violation, whether the violation resulted in a criminal conviction, and the length of time that has elapsed between violations. 3 P.S. § 459-211(a.1). When the Department makes a determination to revoke a kennel license, the Dog Law provides that written notice of

<sup>9</sup> Petitioner understood the necessity that he be in compliance with the Dog Law and its regulations as evidenced by past unsatisfactory kennel inspections and resulting criminal charges to which he pled guilty. (R. 0532-0534; 0536-0541; 0543-0547; 0558-0561).



such an adjudication be provided to the person whose license is revoked, advising him of his right to request an administrative hearing. 3 P.S. § 459-211(b).

Petitioner suggests that the safeguards of procedural due process require he be given notice and a hearing upon each and every finding of noncompliance, i.e. "unsatisfactory", that results from an inspection of his kennel. While it is true that it is "fundamental that the right to notice and an opportunity to be heard" must be granted at a meaningful time and in a meaningful manner" (*Allegheny Ludlum Steel Corp. v. Pa. Public Util. Com.*, 501 Pa. 71, 83 (Pa. 1983) (Larsen, J. dissenting quoting *Fuentes v. Shevin*, 407 U.S. 67, at 80-82, (U.S. 1972)), the *majority* opinion of the case cited by Petitioner, and now by Respondent, clearly states that "procedural due process does not require notice and a hearing *in every conceivable situation* involving administrative action. *Allegheny Ludlum Steel Corp.*, 501 Pa. 71, 77 (Pa. 1983) (citing *Conestoga Natl Bank v. Patterson*, 442 Pa. 289, 295 (Pa. 1971) (*emphasis added*). The procedural safeguards of due process should accompany a situation where administrative action is adjudicatory in nature and involves substantial property rights. *Id.* "Actions are

personal or property rights." *Id.* (citing *Conestoga*, at 296).

The case of *Miller & Son Paving v. Pennsylvania Historical & Museum Comm'n*

is particularly enlightening to the case *sub judice* regarding actions that are "adjudicatory in character." *Miller*, 156 Pa. Commw. 523 (Pa. Commw. Ct. 1993). In *Miller*, petitioner landowner sought review of an action of respondent Pennsylvania Historical and Museum Commission, which certified the nomination of a historical district to the National Park Service for listing on the National Register of Historic Places. *Miller*

argued that the court had jurisdiction to determine whether the Commission denied him due process and fundamental fairness in not providing him notice or an opportunity to be heard on the matter of the Commission's nomination. Citing Allegheny Ludlum Steel Corp., the Commonwealth Court found that the due process issues raised by Miller were not ripe for adjudication because the decision to nominate lacked finality and did not substantially affect Miller's property interest.

Like the Commission's nomination in Miller, a finding of an "unsatisfactory" condition at Petitioner's kennel was not adjudicatory in nature and, thus, did not require the safeguards of procedural due process because such a finding, in and of itself, was neither a final determination, nor did it affect Petitioner's property rights. Kennel inspections, and their resulting findings, are advisory in nature for both the Department and the respective kennel owner. There is no property interest involved. When finding an "unsatisfactory", Warden Dommoyer, or any state dog warden for that matter, makes no determination, let alone a final one, as to a kennel owner's license. It is only upon the Department's revocation or refusal of a license that an action, adjudicatory in nature, occurs. This point is perhaps best illustrated by reviewing Defense Exhibits 45-54 (R. 0531-0540). For example, although Petitioner received multiple "unsatisfactory" throughout 2006, Petitioner's license was neither revoked in 2006, nor refused for 2007. In other words, the "unsatisfactory" did not culminate in a final determination affecting Petitioner's property rights. If numerous "unsatisfactory", with nothing more, do not result in the revocation or refusal of a kennel license, then an unsatisfactory necessarily cannot equate to an adjudication. Accordingly, an "unsatisfactory" is not an "adjudication." To have provided Petitioner with notice and a hearing upon each finding

of "unsatisfactory,"<sup>10</sup> where such finding was not an adjudication, would have been unnecessary and premature.

Rather, the safeguards of procedural due process were appropriately afforded Petitioner upon the Department's adjudication of February 5, 2009. Petitioner was advised by the February 5, 2009 Kennel License Refusal Order that his 2009 license application was denied (R. 0024). He was likewise advised of his right to an administrative appeal hearing to contest the refusal. (R. 0029-0030) Petitioner invoked said right (R. 0033) and he was afforded an administrative hearing in accordance with the Administrative Agency Law, 2 Pa. C.S. § 103(a) and Chapter 5(A) and 7(A); and the attendant regulations at Title 1 of the Pa. Code, Chapter 31, 33, and 35; and Title 7 of Pa. Code, Chapter 131. (R. 0064-0561). As such, the Department afforded Petitioner his procedural due process rights.

**2. REGULATIONS 21.29(A) AND 21.29(C) OF CHAPTER 21 OF 7 PA CODE, PROMULGATED UNDER THE DOG LAW (3 P.S. § 459-101—459-1201), AS APPLIED TO PETTIONER, CONTAIN REASONABLE STANDARDS TO GUIDE PETTIONER IN THE MAINTENANCE OF HIS KENNEL.**

Petitioner's argument that regulations 21.29(a) and 21.29(c) 7 Pa. Code, Chapter 21, promulgated by the Dog Law, are vague is, in and of itself, vague.<sup>11</sup> Respondent is again called upon to speculate as to Petitioner's argument and, in doing so, formulate Petitioner's argument. Petitioner takes exception to two (2) specific regulations;

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<sup>10</sup> "Unsatisfactory" conditions were noted on inspection dates November 2, 2007, November 28, 2007, December 20, 2007, January 14, 2008, February 29, 2008, April 7, 2008, April 21, 2008, and May 19, 2008.  
<sup>11</sup> Petitioner appears to additionally suggest a lack of substantial evidence supporting the Secretary's findings as to Petitioner's noncompliance with regulations 21.29(a) on December 20, 2007 and 21.29(c) on April 4, 2008 although he does not articulate same.

therefore, Respondent will address both. Petitioner's failure to challenge the other regulations indicates his acquiescence to those regulations.

It is fundamental to due process that a regulation must not be so vague as to require persons of ordinary intelligence to guess at its meaning or its possible application. However, the United States Constitution does not require impossible standards; all that is required is that the language convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice. Schmader v. Warren County Sch. Dist., 808 A.2d 596 (Pa. Commw. Ct. 2002). A regulation, meanwhile, is presumed valid if published in the Pennsylvania Code. Jeffers v. Commonwealth, DOT, Bureau of Driver Licensing, 144 Pa. Commw. 140, 143 (Pa. Commw. Ct. 1991).

Pursuant to section 905 of the Commonwealth Documents Law, 45 Pa.C.S. § 905, publication in the Pennsylvania Code creates a rebuttable presumption concerning the propriety of the regulation's promulgation. Furthermore, properly promulgated regulations can cure vagueness problems. Pennsylvania Medical Soc. v. Foster, 585 A.2d 595, 137 Pa. Commw. 192 (Pa. Commw. Ct. 1991).

The Dog Law regulations, and the amendments thereto, of 7 Pa. Code, Chapter 21, namely 21.29(a) and 21.29(c), were reviewed to make certain that the Department of Agriculture had the statutory authority to enact the regulations. The regulations were determined to be consistent with legislative intent. The economic impact, public health and safety, reasonableness, and clarity of the regulations were considered. Complaints, comments, and other input from the General Assembly and the public were reviewed. Moreover, the regulations were properly promulgated through the regulatory process and

were published in the Pennsylvania Code at Title 7, Chapter 21. The regulations are not vague.

In addition to the above, further review of the regulations subject to Petitioner's argument likewise reveals that they contain reasonable standards to guide petitioner in the maintenance of his kennel and, as such, are neither confusing nor vague. See Stephens v. Pennsylvania State Bd. of Nursing, 657 A.2d 71 (Pa. Commw. Ct. 1995). In addition, despite Petitioner's passing comments to the contrary, the violations of those regulations were indeed supported by substantial evidence. Substantial evidence is relevant evidence that a reasonable mind might accept to support a conclusion of law. Haas v. W. Shore Sch. Dist., 915 A.2d 1254, 1259 (Pa. Commw. Ct. 2007). It is irrelevant whether the record contains evidence to support findings other than those made by the fact finder; the critical inquiry is whether there is evidence to support the findings actually made. Id.

Section 21.29(a) of Title 7 of the Pa. Code states that "[e]xcreta shall be removed from the primary enclosure, including any floor area or ground surface beneath the primary enclosure, on a daily basis." The regulation informs Petitioner he must remove excreta from the primary dog enclosures on a daily basis. Respondent respectfully submits that the regulation is not vague.

Warden Dommoyer testified that on December 20, 2007 she viewed an extreme amount of feces under three cages in Petitioner's prefabricated kennel section. Based upon her training and experience as a state dog warden, and given the amount of feces she viewed under those pens as compared to the number of dogs in said pens, Warden Dommoyer found that the feces could not have been produced in one day. It follows, therefore, that Petitioner had not removed the aforementioned feces on a daily basis. The

Secretary found this as fact and the record reflects such a finding is supported by substantial evidence.

In regards to Petitioner's second contention, Section 21.29(c) of Title 7 of the Pa. Code states:

The buildings and grounds of kennels shall be maintained, kept clean and in good repair to protect the animal from injury and to facilitate practices required by this chapter. Kennels shall have an effective program that controls ingress by insects, ectoparasites and avian and mammalian pests. Evidence of insects, ectoparasites and avian and mammalian pests or conditions that would allow or encourage infestation in a kennel are indicative of an ineffective program and unsanitary environmental sanitation in the kennel.

The regulation requires Petitioner's kennel to be maintained, kept clean, and kept in good repair to protect the dogs within the kennel. Petitioner, therefore, is on notice that hair hanging underneath the pens of his upstairs kennel section that contained a buildup of dirt, debris, and feces along the edges and cross members of said pens, as testified to by Warden Donnoyer, would violate 7 Pa. Code § 21.29(c). The Secretary found that Petitioner violated regulation 21.29(c) which was adduced from Warden Donnoyer's testimony regarding same and, thus, supported by substantial evidence.

Promulgated regulations 21.29(a) and 21.29(c) of Chapter 21, 7 Pa. Code, as applied to Petitioner on December 20, 2007 and April 4, 2008, respectively, afforded Petitioner his due process inasmuch as they contain reasonable standards to guide Petitioner in the maintenance of his kennel.

**3. PETITIONER WAIVED THE ISSUE OF WHETHER HE RECEIVED A HEARING BEFORE A FAIR AND IMPARTIAL TRIBUNAL DUE TO HIS FAILURE TO TIMELY RAISE SAID ISSUE.**

Section 703 of 2 Pa.C.S.A., in relevant part, states that

A party who proceeded before a Commonwealth agency under the terms of a particular statute shall not be precluded from questioning the validity of the statute in the appeal, but such party may not raise upon appeal any other question not raised before the agency (notwithstanding the fact that the agency may not be competent to resolve such question) unless allowed by the court upon due cause shown.

In addition, the Pennsylvania Rule of Appellate Procedure 1513(d) states:

(d) Content of appellate jurisdiction petition for review. An appellate jurisdiction petition for review shall contain: (1) a statement of the basis for the jurisdiction of the court; (2) the name of the party or person seeking review; (3) the name of the government unit that made the order or other determination sought to be reviewed; (4) reference to the order or other determination sought to be reviewed, including the date the order or other determination was entered; (5) a general statement of the objections to the order or other determination; and (6) a short statement of the relief sought. A copy of the order or other determination to be reviewed shall be attached to the petition for review as an exhibit. The statement of objections will be deemed to include every subsidiary question fairly comprised therein. No notice to plead or verification is necessary.

The record made before the Agency, now present before this Court, is devoid of

any reference to the issue of whether Petitioner received a hearing before a fair and

impartial tribunal. "Where a Claimant fails to include an issue in his petition for review,

but addresses the issue in his brief, this Court has declined to consider the issue, since it

was not raised in the stated objections in the petition for review, nor "fairly comprised

therein" in accordance with Pa.R.A.P. 1513(a)." <sup>12</sup> See Tyler v. Unemployment

Compensation Bd. of Review, 139 Pa. Commw. 598, 605 (Pa. Commw. Ct. 1991) (citing

Pierce v. Pennsylvania Board of Probation and Parole, 46 Pa. Commonwealth Ct. 507,

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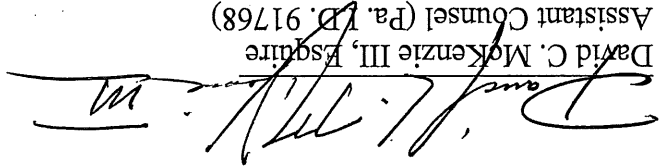
<sup>12</sup> Respondent respectfully notes that Pa.R.A.P. 1513(d) is the section of the rule that addresses the required content of an appellate jurisdiction petition for review.

509, n. 1, 406 A.2d 1186, 1187, n. 1 (1979). The issue of whether Petitioner received a hearing before a fair and impartial tribunal does not appear in the stated objections in the petition for review, nor can it be said that it is fairly comprised therein. Accordingly, Petitioner has waived said issue.

### CONCLUSION

For the foregoing reasons, the Pennsylvania Department of Agriculture respectfully request that this Honorable Court affirm the Secretary's May 15, 2008, Adjudication and Final Order in the above referenced matter.

Respectfully submitted,

  
David C. McKenzie III, Esquire  
Assistant Counsel (Pa. B.D. 91768)  
Governor's Office of General Counsel  
Pennsylvania Department of Agriculture  
Office of Chief Counsel  
2301 N. Cameron St., Room 201  
Harrisburg, PA 17110  
(717) 787-8744

*Counsel for PA Department of Agriculture*

Date: September 18, 2009



**PROOF OF SERVICE**

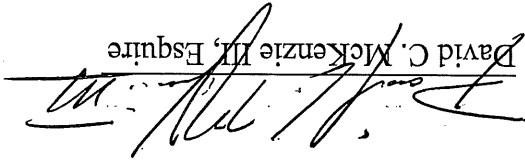
I hereby certify that I am this day serving two copies of the foregoing Brief of Respondent Department of Agriculture upon the person and in the manner indicated below, which service satisfies the require of the Pennsylvania Rules of Appellate Procedure (Pa.R.A.P 121):

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Commonwealth Court of Pennsylvania  
601 Commonwealth Avenue, Suite 2100  
P.O. Box 69185  
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Leonard G. Brown, Esquire  
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Clymer & Musser, P.C.  
408 West Chestnut Street  
Lancaster, PA 17603

  
David C. McKenzie III, Esquire

Date: September 18, 2009