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April 2, 2007

State Board of Veterinary Medicine
P.O. Box 2649
Harrisburg, PA 17105-2649
Attn: Robert Kline

Re: State Board of Veterinary Medicine
Proposed Regulation #16A-5721
Professional Conduct

Dear Mr. Kline:

As a practicing attorney concentrating in health and administrative law, and a former legal counsel to many of the professional licensing boards in the Bureau of Professional and Occupational Affairs, I am compelled to comment on the amendments proposed by the State Board of Veterinary Medicine to its professional conduct regulations which, in part, exceed the Board's statutory authority under the Veterinary Medicine Practice Act ("VMPA").

Specifically, the Board is proposing to rename Principle 3 at 49 Pa. Code §31.21 from "Professional behavior" to "Unprofessional conduct" and add language which both misconstrues the law and the Board's authority under the VMPA. The Board's proposed language follows:

A veterinarian who engages in unprofessional or immoral conduct is subject to disciplinary action under section 21(1) of the act (63 P.S. §485.21(1)) and may also be subject to discipline under section 21(11) or 21(20) of the act. Unprofessional or immoral conduct includes, but is not limited to: ...

- (5) Attempting to influence through coercion, undue pressure or intimidation, or attempting to induce

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an individual to file, not file or withdraw a complaint with the Board.

- (6) Abusing a client, former client, colleague, associate or employee, including verbal abuse, harassment or intimidation. ...

In point of fact, the VMPA does **not** authorize the Board to discipline a veterinary licensee for "unprofessional" or "immoral" conduct. *See Nelson v. State Board of Veterinary Medicine*, 863 A.2d 129 at 139 (2004), where the Court unequivocally said:

The Act does not allow the Board to suspend or revoke a veterinarian's license for lack of professionalism.

"Unprofessional conduct" is not the same as "professional incompetency," and we reject the Board's attempt to treat them as identical concepts.
(emphasis added)

Moreover, the Court in fn.20 further indicated:

Even if the Act expressly prohibited "unprofessional conduct" by veterinarians, due process would require the Act to enumerate specific instances of the prohibited conduct. (emphasis added)

Id. at 139.

The Board cannot do through regulation what the Act has not authorized it to do. It is axiomatic that "the power of an administrative agency to prescribe rules and regulations under a statute is not the power to make law, but only the power to adopt regulations to carry into effect the will of the Legislature as expressed by the statute." *McKinley v. State Board of Funeral Directors*, 313 A.2d 180 at 183 (1973) quoting *Commonwealth v. DiMeglio*, 385 Pa. 119, 124, 122 A.2d 77, 80 (1956).

In short, where, as here, the VMPA does not authorize the Board to discipline a veterinarian for unprofessional or immoral conduct, the Board has no authority to promulgate a regulation which would seek to do so. Indeed, the Board's pointing to §21(1) of the Act, which provides for discipline based on "willful or repeated violations of any provisions of this Act or any of the rules and regulations of the Board," cannot serve as a basis for unauthorized rule making. Moreover, the Board's suggestion that §21(11) or §21(20) of the Act would support such rule making was utterly and specifically rejected by the Commonwealth Court in *Nelson*, *supra*.

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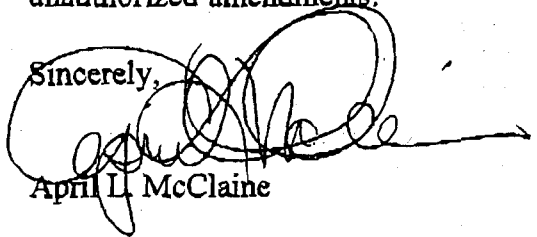
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The hallmark inquiry of regulatory review and approval is whether the agency has statutory authority in the first instance to promulgate the regulation. *See* the Regulatory Review Act at 71 P.S. § 745.5b(a). If such authority exists, the second inquiry is whether the regulation conforms to the intention of the General Assembly. *Id.* The Board's proposed regulatory amendments at 49 Pa. Code §31.21, Principle 3, subparagraphs (5) and (6) are neither authorized nor in conformance with the intent of the General Assembly in the VMFA and must be disapproved.

Moreover, the proposed amendments suffer from the same vagueness that rendered prior such regulatory conduct interpretations unconstitutional and therefore unenforceable. *See* Watkins v. State Board of Dentistry, 740 A.2d 760 (Pa. Cmwlth. 1999); Ciavarelli v. State Board of Funeral Directors, 564 A.2d 520 (Pa. Cmwlth. 1989); and Chaby v. State Board of Optometrical Examiners, 386 A.2d 1071 (Pa. Cmwlth. 1978)

I trust the Board will reconsider and withdraw its ill-advised and statutorily unauthorized amendments.

Sincerely,



April L. McClaine

ALM/kr

cc: Arthur Coccodrilli, Chairman
Pennsylvania Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, Pennsylvania 17101

The Honorable Robert M. Tomlinson
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