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From: Brownfield, Jill [jbrownfiel@state.pa.us] on behalf of AG, CHBcomments [CHBComments@state.pa.us]
Sent: Monday, October 26, 2009 1:02 PM
To: dhain@pahouse.net; IRRC; kebersole@pasen.gov; Kennedy, David C. (AG); Kerry Golden; MULLER, JENNIFER; Smith, Jessie L; Thall, Gregory (GC); wgevans@pasenate.com
Subject: FW: Comments on Proposed Regulation, Canine Health Board Standards for Commercial Kennels, 7 Pa. Code Ch. 28a [Regulation #2-170 (#2785)]
Attachments: Public Comments Canine Health Board.doc

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REGULATION
IRRC/AG/ENR

From: Verne R Smith [mailto:vrsmith@widener.edu]
Sent: Friday, October 23, 2009 5:02 PM
To: AG, CHBcomments
Subject: Comments on Proposed Regulation, Canine Health Board Standards for Commercial Kennels, 7 Pa. Code Ch. 28a [Regulation #2-170 (#2785)]

To: IRRC

From: Verne R. Smith, Esq.

Date: October 23, 2009

Subject: Comments on Proposed Regulation, Canine Health Board Standards for Commercial Kennels, 7 Pa. Code Ch. 28a [Regulation #2-170 (#2785)]

Attached please find the above-referenced comments, filed October 23, 2009.

To: IRRC

From: Verne R. Smith, Esq.

Date: October 22, 2009

Subject: Comments on Proposed Regulation, Canine Health Board Standards for Commercial Kennels, 7 Pa. Code Ch. 28a [Regulation #2-170 (#2785)]

After careful review of the Canine Health Board's Proposed Regulation ("the Regulation") and the recently revised Dog Law ("the Statute"), I make the following comments. In my considered opinion, viewed through my many years of experience as a law Professor teaching Animal Law and Commercial Business Transactions, I conclude that the Regulation faithfully and fairly fulfills the General Assembly's mandate to the Canine Health Board ("the Board") to articulate, define, and determine appropriate ventilation, humidity, ammonia, and lighting ranges and standards for commercial (Class C) dog kennels. I therefore recommend the issuance of this Regulation in its final form.

A fundamental principle of statutory interpretation is to look first to the plain meaning of the subject statute. If the plain meaning of the statute is clear, no further construction of the statute is necessary. In this case, the plain meaning of the Statute is indeed clear. The Pennsylvania General Assembly unambiguously charged the Board with "*determining* auxiliary ventilation to be provided *if the ambient air temperature is 85 degrees or higher.*" It summarized the Board's mandate in clear, unambiguous language, as follows: "The appropriate ventilation, humidity and ammonia ranges *shall be determined* by the Canine Health Board." Finally, it specifically defined the "Purpose" of the Board in broad, general terms by instructing it to "*determine the standards* based on animal husbandry practices to provide for the welfare of dogs..." (Italics added).

Two observations immediately emerge from the cited statutory language. First, the multiple uses of the word "determine" in the Statute is significant and dispositive. The word "determine" has the following meanings: "to fix conclusively or authoritatively; to settle a question or controversy; to settle or decide by choice of alternatives or possibilities" (Webster's Third New International Dictionary of the English Language). The use of this term in multiple contexts throughout the Statute to delineate the Board's authority plainly illustrates that the Board *is and shall be* the duly constituted and appropriate body to articulate and prescribe (i.e. "to settle or decide by choice of alternatives or possibilities") all requisite standards and ranges to ensure that the temperature, ventilation, humidity, and ammonia categories specifically enumerated in the Statute are measurable, quantifiable, and enforceable. The Regulation does precisely this. Indeed, had the Board done anything less than prescribe the specific standards and ranges it did in the Regulation, it arguably would *not* have fulfilled its statutory mandate, and could have been subject to challenge for that. Thus, it is my opinion that the Regulation precisely conforms to the statutory mandate of "determining" the appropriate standards and ranges for ventilation, humidity, and ammonia in commercial dog kennels, and therefore should be issued as written in its final form.

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Verne R. Smith, Esq.**

Second, the General Assembly clearly recognized the overlapping nature of ventilation and ambient air temperature in the dog kennels regulated by the Statute by specifically linking the two concepts in its twin directives to the Board to ensure that the kennels remain “sufficiently ventilated at all times when dogs are present” and to “determine auxiliary ventilation to be provided” if the air temperature reaches or exceeds 85 degrees. This in fact is precisely what the Board did in its Regulation. First, the Board *determined* that only a functional, mechanical ventilation system with specific characteristics to reduce air temperature would meet the statutory requirement of ensuring that the kennels remained “sufficiently ventilated”; and second, it *determined* that if the temperature in the kennels meets or exceeds 85 degrees, specific auxiliary ventilation standards would need to be provided if the kennel operator chooses to permit the dogs to remain in the kennel facility. Thus, the Regulation clearly, plainly, and faithfully tracks the language set forth by the General Assembly in the Statute. Nothing in the plain language or intent of the Statute contravenes the Board’s determinations. Rather, everything in the Statute supports the Board’s determinations as articulated in the Regulation.

The same conclusion holds true for the Board’s standards pertaining to ammonia, particulates, and lighting levels. Regarding lighting, the Statute gives very specific and unambiguous authority to the Board: “The appropriate lighting ranges *shall be determined* by the Canine Health Board” (italics added). Again, the Board’s Regulation fully, fairly, and faithfully discharges this mandate by determining and articulating specific foot-candle ranges and the appropriate mix of natural and artificial light standards. Regarding ammonia levels, the Statute clearly recognizes the close interrelationship between ammonia levels and ventilation in section 207(7). The ventilation standards prescribed in the Regulation ensure that the dogs are not harmed by the “ammonia levels” specifically referenced in the Statute, and thus discharge the Board’s statutory mandate to provide for the welfare of the dogs by determining and articulating appropriate measures to address ammonia levels in Class C kennels. Likewise, the Board’s regulation of particulates clearly falls within the ambit of its statutory authority to determine adequate and sufficient ventilation.

In conclusion, I see no legal impediment to the issuance of the Regulation in its final form, as written. All available evidence supports the conclusion that the Board acted entirely within the ambit of its statutory mandate and scope of authority to “determine” the appropriate standards and ranges of the statutorily mandated elements of the kennel environment. The Regulation furthermore provides the regulated community with clear and specific standards to guide it as it complies and remains in compliance with the Statute.

Issuance of the Regulation in its final form is therefore recommended.

Respectfully submitted,
Verne R. Smith, Esq.