

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS**

May 16, 2022

Middlesex, ss.

Docket No. MS-15-16

DEPARTMENT OF AGRICULTURAL RESOURCES, Petitioner

v.

BIG FLUFFY DOG RESCUE, Respondent

DECISION

Appearance for the Petitioner

Katherine A. Foote, Esq,
Legal Counsel
Dep't of Agricultural Resources
251 Causeway Street, Suite 500
Boston, MA 02114

Appearance for Respondent:

Jean Dyer Harrison, Esq.
Harrison Law Group, P.C.
615 Main St., Suite M10
Nashville, TN 37206

Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

Agricultural Resources – Summary Decision – Animal rescue organization– Failure to register with and obtain license from Massachusetts Department of Agricultural Resources as required by Department regulations– Placement of dogs originating out-of-state with new Massachusetts owners – Noncompliance with Emergency Order requiring re-isolation, re-inspection and re-certification of imported dogs in Massachusetts following out-of-state isolation, inspection and good health certification – Civil penalty – Statutory Basis – Regulatory requirements in effect – Emergency Order with expired emergency regulation status, and no force of law.

Appeal by Big Fluffy Dog Rescue (BFDR) from civil penalties totaling \$5,000 issued to it on November 15, 2015 by the Massachusetts Department of Agricultural Resources for (a) continuing to operate an animal rescue “operation” in Massachusetts without registering or obtaining a license from the Department; and (b) failing to re-isolate, in Massachusetts, three dogs it transferred to Massachusetts residents at a Connecticut isolation facility, and failing to have the dogs re-inspected and issued good health certificates by a licensed Massachusetts veterinarian, allegedly in violation of a 2005 Department Emergency Order (1-AHO-05) and a prior cease and desist order the Department had issued to BFDR in March 2014. On motions by both parties for summary decision:

(1) Partial summary decision for the Department sustains so much of the penalty (\$2,000 of the \$5,000) as was assessed against BFDR for operating a rescue organization in the Commonwealth without being registered with, and licensed as such, by the Department, and for transferring three rescued dogs to Massachusetts residents without this registration and licensing. This violated regulations having the force of law, a proper basis for a penalty assessed under M.G.L. c. 129, § 37. In contrast, the 2005 Emergency Order no longer had the force of law as an emergency regulation under M.G.L. c. 30A, § 2, seventh para., and its violation was not the proper basis for a civil penalty.

(2) Partial summary decision for BFDR vacates so much of the penalty (\$3,000 of \$5,000), as was assessed against it for failure to again isolate the three dogs upon entry into the Commonwealth, and then have them re-inspected and re-certified by a Massachusetts-licensed veterinarian. The regulations did not require these additional measures. The dogs’ prior isolation at a Connecticut-approved facility, and their inspection and good health certification by a licensed Connecticut veterinarian, satisfied applicable regulatory requirements. The additional measures required by the 2005 Emergency Order were without the force of law after late August 2005, when the Order’s status as an emergency regulation under M.G.L. c. 30A, § 2, seventh para. expired. Therefore, noncompliance with the additional measures did not violate the Department’s regulations, and was not the proper basis for assessing a penalty against BFDR under M.G.L. c. 129, § 37.

Background

Respondent Big Fluffy Dog Rescue (BFDR) is a Tennessee nonprofit corporation that rescues mostly “failed livestock dogs,” including Collies, Retrievers and German Shepherds, in the southern United States, and makes them available for adoption by suitable new owners¹ in other states, including Massachusetts. On November 15, 2015, petitioner Massachusetts Department of Agricultural Resources (the Department) issued BFDR a total of \$5,000 in civil administrative penalties, pursuant to M.G.L. c. 129, § 37, for:

(a) Continuing to operate an animal rescue “operation” that placed rescued dogs from out-of-state with new Massachusetts owners without having been registered with or licensed by the Department to do so, in violation of a cease and desist order the Department had issued to BFDR in 2013 (No. 463-CD-13) and Emergency Order 1-AHO-05, dated May 26, 2005 (“the 2005 Emergency Order”) requiring (among other things) the registration of all persons involved in transporting animals to or importing animals into Massachusetts; and

(b) Failing to have three dogs it placed out-of-state with new owners residing in Massachusetts isolated in Massachusetts, and inspected and issued good health certificates by a Massachusetts licensing veterinarian. Prior to their transfer to the new owners at a

¹/ As used here in the context of dog placement, “owner” is the equivalent of “adoptee,” “consignee,” “caretaker” or other word used to denote a person to whom a rescued dog is transferred.

Connecticut isolation facility, the dogs had each been isolated, and then inspected and issued Connecticut good health certificates, by a Connecticut-licensed veterinarian.

The penalty comprised the following elements:

(a) \$500 for continuing to conduct a rescue “operation” in Massachusetts without being registered with or licensed to do so by the Department, in violation of a prior Department cease and desist order (Order No. 463-CD-13, issued by the Department to BFDR on March 14, 2013), and the 2005 Emergency Order;

(b) \$1,500 (\$500 per animal) for transferring three dogs into the Commonwealth without being registered with and licensed by the Department as a rescue “operation,” in violation of the 2005 Emergency Order;

(c) \$1,500 (\$500 per animal) for failing to isolate the three dogs in Massachusetts “upon import” for 48 hours prior to transferring them to Massachusetts residents, in violation of the 2005 Emergency Order; and

(d) \$1,500 (\$500 per animal) for failing to have the three dogs examined by a Massachusetts licensed veterinarian following their isolation “upon import” into the Commonwealth before transferring them to Massachusetts residents, in violation of the 2005 Emergency Order.

BFDR timely appealed the penalty. It denied operating an unregistered animal rescue operation in the Commonwealth or transferring dogs into the Commonwealth; instead, it claimed to operate an adoption facility in Connecticut at which dogs were quarantined and examined by a licensed Connecticut veterinarian before being turned over to adopting owners or caretakers directly at that out-of-state facility. It argued that the Department was without authority to require that BFDR register its out-of-state dog adoption operation, or issue it a penalty for failing to register with the Department and comply in Massachusetts with the

animal quarantining and health certification requirements recited by the 2005 Enforcement Order. It also argued that in attempting to do so pursuant to the 2005 Emergency Order, the Department exceeded its regulatory authority under M.G.L. c. 129 and violated the Commerce Clause of the United States Constitution.

I held a prehearing conference on February 24, 2015. Both parties appeared by counsel. Because it appeared that the matter would be decided upon motions for summary decision if it was not resolved by agreement, I did not set a hearing date. The parties agreed upon, and I confirmed, a schedule for reporting the progress of their settlement efforts. (*See Order Following Prehearing Conference*, Feb. 25, 2015.)

The parties discussed, subsequently, the possibility of resolving this matter through an agreement that would also resolve BFDR's future placement of dogs in Massachusetts. Those efforts focused upon BFDR's isolation facility options. BFDR was using a facility in Connecticut that could provide isolation and veterinary services for up to 40-45 dogs prior to their placement with new owners in New England, New York and New Jersey. It was unclear whether any such facility was available in Massachusetts. It was also unclear whether use of the Connecticut facility would meet the Department's quarantine requirements for transferring dogs to Massachusetts residents, even if BFDR registered with the Department as an animal rescue organization. (*Id.* at 3-4.)

When settlement efforts proved unsuccessful, and with the parties' agreement, I

ordered a schedule for filing their respective proposed statements of undisputed fact and summary decision motions.

Both parties filed proposed undisputed facts. The Department moved for a summary decision sustaining the penalty it issued against BFDR, with a supporting memorandum. It filed no affidavit in support of its motion. BFDR moved for summary decision, subsequently, on the grounds it had asserted for appealing the penalty. Its motion (combined with a memorandum) was supported by the affidavit of BFDR's founder, Tennessee registered agent and attorney in this appeal, Jean Dyer Harrison, Esq., sworn-to August 19, 2016.

For the reasons stated below, I grant a partial summary decision in favor of each of the parties, as a result of which the civil penalties issued by the Department to BFDR are sustained in part and vacated in part.

Material Facts Not Genuinely Disputed

I find that the following material facts are not genuinely disputed, based upon a review of the entire record, including the parties' proposed statements of undisputed facts and summary decision motions:²

1. The Massachusetts Department of Agricultural Resources ("the Department")

²/ The documents I have reviewed in deciding the summary decision motions are listed in the attached Appendix. (See below at 58.)

is responsible for “keeping the Massachusetts’ food supply safe and secure, and for working to keep Massachusetts agriculture economically and environmentally sound.” *See* <https://www.mass.gov/orgs/massachusetts-department-of-agricultural-resources>. Its specific statutory responsibilities include maintaining the health of Massachusetts animal populations, and preventing and controlling the spread of contagious diseases among them. *See* M.G.L. c. 129.

(a) The Department has promulgated regulations pursuant to its authority under M.G.L. c. 129 and other statutes. Among them are regulations related to the importation of animals, including dogs, into the Commonwealth, including registration and licensing requirements for rescue organizations that place rescued dogs with new owners who reside in Massachusetts; and requirements related to the isolation, inspection and good health certification of such dogs. *See* 330 C.M.R. § 3.00 et seq. (entitled “Shipment of Dogs into the Commonwealth”) and 330 C.M.R. § 30.00 et seq. (entitled “Animal Rescue and Shelter Organization Regulations”).

(b) In 2005, the Department issued an Emergency Order to address the unregistered and unlicensed importation into the Commonwealth of out-of-state dogs with unknown isolation, inspection and health conditions. *See* Emergency Order 1-AHO-05, dated May 26, 2005 (“the 2005 Emergency Order”). The 2005 Emergency Order was issued “[t]o all persons involved in the transfer of animals in the

Commonwealth.” The 2005 Emergency Order directed those persons to register with and obtain a license from the Department. It also required that any animal transported into the Commonwealth be isolated in Massachusetts and then inspected and issued good health certificates by a Massachusetts-licensed veterinarian.

2. BFDR is a nonprofit corporation registered in the state of Tennessee that specializes in the rescue of mostly large dogs who have failed as livestock guardian dogs, or who were or abandoned and/or rescued from shelters with high euthanasia rates, including mixed breed Collies, German Shepherds and Retrievers. It finds new owners for these dogs in other states, and arranges for these dogs to be quarantined, inspected, issued good health certificates, and then transferred to the new owners.

(a) “Failed livestock dogs” are dogs that were used previously to protect livestock, but that may have killed or injured chickens, goats or lambs or simply wandered away from their tasks.

(b) On account of their prior training as livestock dogs, many of the dogs BFRD rescues and places with new owners need space to run, and are not well-suited to containment systems, including underground electric fences.

(c) A major element of BFDR’s work is finding a suitable new owner for each of the rescued dogs it handles, one with “reasonable expectations” as to rescued dogs. Another major element of BFDR’s work is finding a new permanent, safe and caring

home for abandoned, poorly cared for, possibly abused, and possibly sick but treatable dogs in other states, including Massachusetts. Before transferring dogs to Massachusetts residents, BFDR isolates the dogs in an approved facility outside, but relatively close to, Massachusetts, and then has the dogs inspected and issued good health certificates by a veterinarian licensed in the state where the quarantine and inspection facility is located.

(Dep't Proposed Facts and Exhibits dated Apr. 1, 2015: Proposed Fact 19; Exh. 1: "Business Entity Detail" for Big Fluffy Dog Rescue, printed out from the website of the Tennessee Secretary of State on Feb. 2, 2015; Exh. 4: BFDR Adoption Application at 1, 6; Exh. 8: printout dated Mar, 27, 2015 from State of Connecticut licensing lookup website showing Big Fluffy Dog Rescue listed as an animal importer with an active license between February 11, 2015 and December 31, 2015.)

3. Through 2015, BFDR maintained a dog quarantine facility in Connecticut that was approved as such by the Connecticut Department of Agriculture.

(a) Dogs that BFDR rescued were transported to this facility for isolation and inspection by a Connecticut licensed veterinarian.

(b) If an isolated dog was found to be in good health, the Connecticut veterinarian issued a certificate of good health for the dog, which included the dog's vaccination status.

(c) Persons in New England who wished to adopt one or more of these dogs traveled to BFDR's Connecticut facility to do so.

(d) BFDR used no other site in Connecticut for transferring dogs to Massachusetts residents.

(Dep't Proposed Facts at 19; Exh. 8.)

4. During this time period, BFDR maintained no such facility in Massachusetts. Nor did it directly transport or deliver dogs into Massachusetts. (Undisputed based upon a review of the entire record.)

5. Between 2008 and 2015, BFDR did not register as an animal rescue organization in the Commonwealth with the Massachusetts Department of Agriculture. (Undisputed based upon a review of the entire record.)

6. On several occasions between July 2008 and December 2009, the Department ordered BFDR to cease bringing dogs into Massachusetts for adoption without registering its animal transfer "operations" with the Department and complying with the quarantining, veterinarian examination, record-keeping and other requirements of the 2005 Emergency Order.

(a) On July 22, 2008, the Department issued an Order to "Big Fluffy Dog Rescue of New England" (Order No. 132-CD-08) directing it to cease operating an unregistered dog adoption/rescue "operation" in Massachusetts. (Department's

Request to Schedule Hearing with attached Exhibits (Jan 14, 2015): Notice of Assessment of Penalty (Nov. 13, 2014) at 2, Finding 3.)³

(b) On December 21, 2009, the Department issued an Order to BFDR (Order No. AHO-CD-212-09) directing it to cease operating an unregistered dog adoption/rescue “operation” in Massachusetts in violation of the 2005 Emergency Order, and to register as that order required if it was going to engage in an animal adoption and/or rescue “operation” in the future in Massachusetts.

(Dep't Facts and Exhibits: Exh. 5: Order to Cease and Desist (Order No. 463-CD-13, dated Mar. 14, 2013) at 1-3.)⁴

7. On or about March 1, 2013, the Department's attention was drawn to a website (www.petfinder.com) at which 29 BFDR dogs were listed as available for adoption in Marblehead, Massachusetts. (Dep't Facts and exhibits: Exh. 5: Order to Cease and Desist (Order No. 463-CD-13, dated Mar. 14, 2013) at 2-3.)

8. Shortly afterward, on March 14, 2013, the Department noticed that at an apparently-related website (www.petfinderfoundation.com) BFDR stated that it had sent 60 “Thundershirt” shirts to BFRD in Hopkinton, Massachusetts, and that BFDR's president

³/ The July 22, 2008 order is not in the record, but the Department's 2015 penalty assessment notice describes the order, and this description is not disputed.

⁴/ The December 21, 2009 order is not in the record, but its description in the Department's 2013 cease and desist order is not disputed.

(Elizabeth Zaccaro) had written that “Thundershirt” had helped a particular one year old deaf Golden Retriever, who was “available for adoption” through BFDR. The website listings the Department noticed on March 1 and 14, 2013 convinced the Department that BFDR was “engaging in the business of transporting and adopting dogs into the Commonwealth, which requires a shelter/rescue registration” (*Id.*)

9. As of March 14, 2013, BFDR had not registered with the Department as an animal rescue organization in the Commonwealth of Massachusetts. (*Id.*)

10. On March 14, 2013, the Department issued to BFDR’s officers and directors an administrative order (No. 463-CD-13) requiring that it immediately cease its dog shelter and rescue “operations” in Massachusetts, and register with the Department as a shelter/rescue “operation” in the Commonwealth.

(a) The administrative order directed BFDR to register pursuant to the 2005 Emergency Order if it sought to engage in an animal adoption and/or rescue “operation” in the future in Massachusetts, and provided a link to the Department’s website for registering.

(b) The administrative order stated that it was issued pursuant to M.G.L. c. 129, § 2 and the 2005 Emergency Order.

11. BFDR did not appeal any of the Department’s cease and desist orders issued from July 22, 2008 through March 14, 2013.

12. In April 2014, BFDR transferred three dogs to Massachusetts residents at its Connecticut facility, and those residents brought the dogs they adopted into the Commonwealth.

(a) On or about April 12, 2014, Massachusetts resident Heidi Lyle traveled to the BFDR facility in Connecticut in order to adopt two dogs, named Flannery and Milo, and bring them into the Commonwealth. (Department's Statement of Facts and Proposed Exhibits (Apr. 7, 2015) at paras. 10-14, and Exh. 6: Connecticut Dep't of Agriculture Small Animal Health Certificates regarding dogs named Flannery and Milo for shipment to Ms. Lyle in Ipswich, Massachusetts, dated Apr. 23, 2014.)

(b) On or about April 12, 2014, Massachusetts resident Mike Williams traveled to Connecticut in order to adopt one dog, named Sarah, from BFDR's Connecticut facility and bring her into the Commonwealth. (*Id.* at paras. 15-16; and Exh 6: Connecticut Dep't of Agriculture Small Animal Health Certificate regarding a dog named Sarah for shipment to Mr. Williams of Brookfield, Massachusetts, dated Apr. 23, 2014.)

13. Each of these three dogs was provided with a State of Connecticut Department of Agriculture "Small Animal Health Certificate" signed by a Connecticut- licensed veterinarian" and dated April 23, 2014.

(a) Each certificate named the animal and specified its species, breed, color,

age and sex—thus, Flannery, a blond mix male (neutered) one-year-old Collie; Milo, a black and tan mix male (neutered) 15-week-old German Shepard; and Sarah, a 3-year-old female (spayed) blonde mix Retriever.

(b) Each certificate stated that the animal in question had been examined by an approved state veterinarian on April 12, 2014.

(c) Each certificate also showed the animal's rabies vaccination date (March 28, 2014 for Flannery, April 12, 2014 for Milo, and April 1, 2014 for Sarah). Additional vaccinations were shown for Flannery and Sarah.

(d) Each certificate also showed that the dog had been shipped from Elizabeth Zaccaro (BFDR's executive director at the time), making her the consignor of each of these three dogs, and the person to whom the dog was "shipped" (in this case, picked up and, in other words, the dog's consignee), and the consignee's address. Thus, Flannery and Milo were consigned to Heidi Lyle, and Sarah was consigned to Mike Williams, and the Connecticut certificates showed a Massachusetts address for the consignee.

(Dep't Facts and Exhibits (Apr. 7, 2015): Exh. 6 and Proposed Facts 10-16.)

14. Each of these three certificates stated that the veterinarian had examined the dog in question and found it to be free from contagious and infectious diseases; and that, to the best of the veterinarian's knowledge, the dog had not been exposed to rabies or other

communicable diseases and did not originate from within a rabies quarantined area. (*Id.*; Exh. 6.)

15. At that time, and at least into 2015, BFDR was registered, licensed, and remained in good standing in Connecticut as an Animal Importer. (Dep't Facts and Exhibits (Apr. 7, 2015): Proposed Fact 19; and Exh. 8: printout dated Mar, 27, 2015 from State of Connecticut licensing lookup website showing BFDR listed as an animal importer with an active license between February 11, 2015 and December 31, 2015.)

16. Between 2008 and 2014, BFDR maintained a website at which it posted documents that included its form dog adoption application and its terms of adoption. Neither of these two documents stated that BFDR offered dogs for adoption in Massachusetts, or that it imported dogs for adoption from other states into Massachusetts. The website remained online through at least February 17, 2015. (Dep't Facts and Exhibits (Apr. 7, 2015); Exh. 4: printouts from BFDR website downloaded in February 2015: Business Entity Detail for Big Fluffy Dog Rescue, printed out from the website of the Tennessee Secretary of State on Feb. 2, 2015.)

17. On November 13, 2014, the Department issued a notice assessing a total of \$5,000 in civil penalties against BFDR, pursuant to M.G.L. c. 129, § 37. The penalties were assessed as follows:

(a) \$500 for continuing to operate a shelter/rescue "operation" in Massachusetts without being registered with the Department as a shelter/rescue

“operation,” in violation of the prior Department cease and desist order (Order No. 463-CD-13, issued by the Department to BFDR on March 14, 2013) and the 2005 Emergency Order;

(b) \$1,500 (\$500 per animal) for transferring three dogs into the Commonwealth without being registered with or licensed by the Department as a rescue “operation,” in violation of the 2005 Emergency Order;

(c) \$1,500 (\$500 per animal) for failing to isolate the three dogs in Massachusetts “upon import” for 48 hours before transferring them to Massachusetts residents, in violation of the 2005 Emergency Order; and

(d) \$1,500 (\$500 per animal) for failing to have the three dogs examined by a licensed veterinarian following their isolation “upon import” into the Commonwealth before transferring them to Massachusetts residents, in violation of the 2005 Emergency Order.

(Dep't Facts and Exhibits (Apr. 7, 2015); Exh. 9: Notice of Assessment of Penalty pursuant to M.G.L. c. 129. § 27 against Big Fluffy Dog Rescue, dated Nov. 13, 2014.)

18. BFDR timely appealed the Department's penalty assessment on December 2, 2014.

19. On April 1, 2015, the Department transferred its penalty assessment, and BFDR's appeal challenging it, to the Division of Administrative Law Appeals (DALA) for adjudication.

Disputed Non-Material Fact

BFDR disputed that it was ever “served” with any penalty assessment notice by the Department, an assertion supported by the accompanying affidavit of BFDR director and

attorney Jean Dyer Harrison. The crux of this argument appears to be that the Department did not send the penalty assessment notice to BFDR's registered agent in Tennessee, and mailed copies of the notice, instead, to each of BFDR's directors. (BFDR Memorandum of Law, Aug. 19, 2016, at 3; Affidavit of Jean Dyer Harrison sworn-to Aug. 19, 2016, at para. 6.)

I note BFDR's receipt of the penalty as a disputed fact, but not as a material one. BFDR's alleged non-receipt of the penalty assessment does not raise a genuine or material issue precluding summary decision as to whether the Department had the authority under M.G.L. c. 129 to assess a civil penalty against it for the alleged violations of the 2005 Emergency Order. BFDR elected to proceed here with this legal challenge, which is appropriately decided upon the parties' respective summary decision motions.

Discussion

1. Summary Decision: The Ground Rules

Summary decision may be granted in adjudicatory appeals to DALA when there are no genuine or material facts to be adjudicated, and the outcome is compelled as a matter of law. *See* 801 C.M.R. § 1.01(7)(h); *Chamorro v. Fair Labor Div.*, Docket No. LB-19-0045, Decision at 17 (Mass. Div. of Admin, Law App., Mar. 1, 2021); *Bd. of Registration in Medicine v. Grusd*, Docket No. RM-18-0445, Recommended Decision at 24-25 (Mass. Div. of Admin. Law App., May 19, 2020); *Stanton v. Quincy Bd. of Retirement*, Docket No. CR-

18-0121, Decision at 8-9 (Mass. Div. of Admin. Law App., Jun. 28, 2019); *Lilly v. Fair Labor Div. (Kirby Distributorship Appeals)*, Docket Nos. LB-10-505 *et al.*, Decision and Order on Motion for Summary Decision at 13-14 (Mass. Div. of Admin. Law App., Nov. 26, 2013). The moving party must show both grounds for summary decision—the absence of genuine, material factual issues that need to be decided, and its entitlement to summary decision as a matter of law—with competent evidence. Its burden to make this showing is reduced substantially when both parties agree that the appeal raises only legal issues, or when each of them moves for a full summary decision in its favor. That said, the Administrative Magistrate is not bound, in either of these circumstances, to find the absence of a genuine, material factual issue precluding summary decision, and so it is prudent for the parties to show that the record presents no such issue. They have done so here.

A motion for summary decision must be based upon the record as it then exists; however, the Administrative Magistrate deciding the motion is not confined to what portions of the record the parties choose to file, or cite, in support of or in opposition to the motion. A summary decision motion prompts a search of the entire record for a genuine, material factual issue. *Chamorro*; Decision at 18; *Grusd*; Recommended Decision at 25; *Castellani v. Fair Labor Div.*, Docket No. LB-10-533, Partial Summary Decision at 12 (Mass. Div. of Admin. Law App., Aug. 12, 2013). If a record search suggests the existence of a genuine, material factual issue, but the evidence in the record is insufficient to decide that issue

strictly as a matter of law, DALA must hold an evidentiary hearing before deciding it. *See* 801 C.M.R. §1.01(7)(h), last sentence. Summary decision is granted appropriately as a matter of law, however, if a record search reveals no genuine, material factual issues as to the claims, allegations or defenses in question. *Sapozhnikov v. Fair Labor Div.*, Docket No. LB-19-0456, LB-19-0457, Decision at 22-23 (Mass. Div. of Admin. Law App., Mar. 24, 2021.) In that case, “summary decision may be granted in favor of the moving or opposing party, depending upon where the legal compass points, even if the opposing party did not cross-move for summary decision in its favor.” *Bd. of Registration in Medicine v. Robertson*, Docket No. M-19-0327, Recommended Partial Summary Decision at 32 (Mass. Div. of Admin. Law App., Jan. 13, 2022), *citing Castellani*; Partial Summary Decision at 12.

2. Regulation of Animal Rescue Organizations in, and the Placement of Dogs with New Owners Residing in, the Commonwealth

The issue to be decided summarily here, as a matter of law, is whether the Department had the legal authority to issue the civil penalty that BFDR challenges. The Department based its authority to do so upon its 2005 Emergency Order and BFDR’s alleged violations of that Order’s requirements, including its failure to register with and obtain a license from the Department as a rescue “operation,” transferring three rescued dogs that had been isolated, quarantined and examined by a licensed veterinarian at a Connecticut facility to Massachusetts residents, and failure to have these dogs, each of which had been quarantined,

inspected and issued good health certificates at a Connecticut facility by a licensed Connecticut veterinarian, re-quarantined, re-inspected and re-certificated as to good health by a Massachusetts-licensed veterinarian upon their entry into the Commonwealth.

BFDR denied operating as a rescue “operation” in Massachusetts or having imported or brought the three dogs in question into Massachusetts. With respect to the additional Massachusetts quarantine, inspection and good health certification requirements, BFDR challenged the 2005 Emergency Order as beyond the scope of the Department’s statutory authority under M.G.L. c. 129, § 2, as well as beyond the scope of its own regulations regarding bringing animals, including dogs, into Massachusetts generally. *See* 330 C.M.R. § 3.02, and “shipping dogs into Massachusetts” specifically, *see* 310 C.M.R. § 3.02 (1) and (2). For this reason, BFDR also asserted that the 2005 Emergency Order provided no legal basis for the civil penalties it appealed here. The Department countered that it issued the Emergency Order based upon its authority, under M.G.L. c. 129, to issue “reasonable orders” necessary to carry out its duty to protect the health of the Commonwealth’s animal populations, and to control animal diseases, under that statute.

Two types of alleged noncompliance are at issue here. One of them—failing to register with and obtain a license from the Department as a rescue organization, and operating as a rescue organization in Massachusetts by arranging for the placement of rescued dogs with new Massachusetts owners—is based upon registration and licensing

requirements recited not only by the 2005 Emergency Order but the Department's regulations as well. The violation of regulatory requirements is a basis for civil penalty assessment under M.G.L. c. 129. The other type of violation the Department asserts here is failure to re-quarantine, re-inspect and re-certificate the animals upon their entry into the Commonwealth, despite their almost immediately-prior quarantining, inspection and good health certification by a licensed veterinarian in Connecticut. These additional obligations were imposed by the 2005 Emergency Order, but not by the Department's regulations. Whether noncompliance with these additional requirements was the proper basis for the civil penalties BFDR appeals here depends upon whether the additional requirements, and, thus, the 2005 Emergency Order, had the force of law when the Department assessed the appealed civil penalties.

The operative facts appear to be free of any genuine, material dispute. These facts are identified below. To resolve the legal issue presented here by summary decision, I determine, first, the Department's relevant authority under M.G.L. c. 129, including its civil penalty assessment authority. I also determine what the Department's regulations require as to animal rescue organization registration and licensing, and as to the quarantining, inspection and good health certification of dogs placed for adoption with Massachusetts residents.

Next, I determine whether the 2005 Emergency Order had the force of law. This determines, in turn, whether BFRD can be penalized for failure to have the three dogs in question re-quarantined, re-inspected and re-certificated as to good health in the

Commonwealth as the 2005 Emergency Order required, even after the dogs had been quarantined, inspected and issued certificates of good health at a Connecticut facility by a Connecticut-licensed veterinarian.

Finally, I address BFDR's challenge to the 2005 Emergency Order and the Department's applicable regulations on constitutional grounds.

a. Department's Authority Under M.G.L. c. 129

The Department regulates, among other things, the health of domestic animals and the control of contagious disease spread among them. M.G.L. c. 129, § 2 specifies the Department's authority to promulgate regulations. It provides, in pertinent part, that the Department's director of animal health:

may make and enforce reasonable orders, rules and regulations relative to . . . the prevention, suppression and extirpation of contagious diseases of domestic animals . . . and the issuing of certificates in connection therewith; the inspection, examination, quarantine, care and treatment or destruction of domestic animals affected with or which have been exposed to contagious disease, the burial or other disposal of their carcasses, and the cleansing and disinfection of places where contagion exists or has existed. No rules or regulations shall take effect until approved by the governor and council.

M.G.L. c. 129, § 37 authorizes the Department to assess civil administrative penalties for violations of Chapter 129 not exceeding \$500 per violation, or \$10,000 in “[t]otal fines assessed in any given action under this section”

b. Applicable Department Regulations

The Department promulgated, pursuant to M.G.L. c. 129, § 2 and other statutes,⁵ two sets of regulations that apply here.

*i. License and Registration Requirements for
Rescue Organization Placing Animals in the Commonwealth*

One of them, 330 C.M.R. § 30.00 et seq., entitled “Animal Rescue and Shelter Organization Regulations,” addresses “the importation, handling, and care of Animals in connection with their Placement within the Commonwealth of Massachusetts by a Rescue Organization.” 330 C.M.R. § 30.01 (“Statement of Purpose”). This set of regulations includes a “definitions section.” 330 C.M.R. § 30.02. Several of these definitions are of particular importance here:

(a) “Import” to mean “[t]o transport into the Commonwealth for the purpose of Foster Care or Placement;”

(b) “License” means “[a] Revocable permission to operate an Organization in the Commonwealth to Place Animals in the Commonwealth.”

(c) “Organization or Rescue Organization” means “[a]n entity that is not

⁵/ M.G.L. c. 129, § 37 (granting the Department authority to issue civil penalties for violations of Chapter 129, not to exceed \$500 per offense); M.G.L. c. 129, § 39A (concerning pet shop licensing by the Department); and M.G.L. c. 140, § 139A (requiring that dogs or cats sold or given away by shelters be spayed or neutered, and giving the Department’s Commissioner authority to set fines and promulgate regulations to assure compliance with this section).

otherwise required to be licensed under M.G.L. c. 129, §§ 39, 39A, or 45, or under M.G.L. c. 94, § 152A, and whose primary activity is the placement of abandoned, displaced, unwanted, neglected or abused animals.” and

(d) “Place or Placement” means “[t]o sell, barter, exchange, give away, or otherwise find a permanent physical placement for an Animal that is abandoned, displaced, unwanted, neglected or abused.

330 C.M.R. § 30.03 provides that, “[n]o individual or entity shall, without first having obtained a License issued by the Department, operate a Rescue Organization, or Import or Place Animals, in the Commonwealth.” Per this proscription, a Department license is required to operate a rescue organization, or to import or place animals, in the Commonwealth.

Under the Department’s Regulations, BFDR is an animal rescue organization that was finding a permanent physical placement for dogs that were abandoned, displaced, unwanted, neglected or abused. Without question, BFDR played a major role in consigning dogs rescued, quarantined, inspected and issued good health certificates outside Massachusetts to permanent homes with new owners in Massachusetts.

BFDR’s role was far more extensive in the adoption process than that of a mere gatekeeper. (*See* statement of BFDR’s purpose on its website: Department’s Submission of Facts with Numbered Stipulation Exhibits, dated Apr. 1, 2015: Exh. 2: Printout dated Apr.

1, 2015 from Big Fluffy Dog Rescue website; introductory material); *see also* BFDR's form application to adopt a dog: *Id.*; Exh. 4: Printout dated Feb. 17, 2005 from Big Fluffy Dog Rescue website: Page entitled "Donate and Pay Fees to Big Fluffy Dogs;" and two documents, BFDR Adoption Application, and Big Fluffy Dog Rescue Adoption Contract).

With good reason that its website and dog adoption application make clear, BFDR played an active role in finding new homes for rescued dogs. A major element of this role as finding a suitable transferee for the rescued dogs it handled—basically, as BFDR's literature explained it, a person who was "prepared for the good and the bad of dog ownership," with reasonable expectations as to rescued dogs, and an understanding that a rescue dog was "not a Chia pet" and had "needs and issues just like humans do." (*Id.*, Exh. 4: BFDR Adoption Application at 1.) Another major element of this role was finding a new, permanent safe and caring home for abandoned, poorly cared for, possibly abused, and possibly sick but treatable, dogs in states including Massachusetts. BFDR assured that these dogs were ready for placement by isolating them in approved facilities outside but relatively close to Massachusetts, and then having these dogs inspected and issued good health certificates by a licensed veterinarian prior to their transfer to new owners. BFDR's role was critical, therefore, in assuring that the dogs it rescued would be placed with satisfactory owners in suitable new homes in different states.

This was how BFDR placed rescued dogs in the Commonwealth. Directly transporting

the dogs into the Commonwealth was not critical to the role BFDR played in placing these dogs with new Massachusetts owners. However, in view of the Department's responsibility to protect Massachusetts animal populations and to prevent, limit and trace contagious diseases that might accompany imported dogs into Massachusetts, it was critical for the Department to know from where each of these dogs originated, whether each of these dogs had been isolated before or upon entering the Commonwealth, who was consigning them to a new Massachusetts owner, and what each dog's health status was. Knowing this was (and remains) critical to the Department's statutory mandate to prevent, suppress and extirpate communicable animal diseases in the Commonwealth. *See* M.G.L. c. 129, § 2.

It is reasonable to read the requirements of the Department's regulations regarding the quarantining, inspection and good health certification of dogs rescued out-of-state that are placed with new Massachusetts residents as related to the Department's need to track the entry of animals into the Commonwealth from points outside and their condition. They relate, as well, to the Department's statutory purpose of preventing and controlling the spread of communicable animal diseases in the Commonwealth. More specifically, the regulations allow the Department to be able to identify and contact a rescue organization involved in placing out-of-state-rescued dogs in Massachusetts, and to trace these animals and order contagion control measures such as quarantines and inspections in the event of a contagious disease outbreak among them. The regulatory requirements for the registration and licensing

of rescue organizations involved in placing these dogs with new Massachusetts owners also relate directly to the succinct statement of purpose with which 330 C.M.R. 30.00 begins: “to provide standards relating to the importation, handling, and care of Animals in connection with their Placement within the Commonwealth of Massachusetts by a Rescue Organization.”

330 C.M.R. § 30.01.

Read in this manner, the Department’s regulatory registration and licensing requirements are soundly, and most efficiently, applied to any rescue organization involved in any meaningful way in the placement of rescued dogs in Massachusetts, whether it operates physically inside the Commonwealth or not, and whether it does or does not itself physically transport the dogs it helps place for adoption with Massachusetts residents.

During the time in question here, BFDR played a significant role in the placement of out-of-state dogs it rescued with Massachusetts residents. It confirmed which of its rescued dogs were entering Massachusetts and its existing animal populations, what their health condition was, and whether they had been quarantined and then inspected and certified as to good health by licensed veterinarians, all of which was done to prevent and control the spread of infectious and communicable animal diseases, as well as to maintain the reputation it intended to convey through its form adoption contact and terms, and the informational materials it posted at its website. In the context of the potentially hazardous animal importation circumstances to which the 2005 Emergency Order responded, BFDR was the

polar opposite of a fly-by-night dog broker delivering dogs of unknown etiology and condition to Massachusetts residents at a parking lot or public rest area somewhere in a nearby or neighboring state.

In this context, BFDR was, during the time in question here, a rescue organization that placed dogs rescued out-of-state in the Commonwealth. It did so by finding permanent physical placements for them with new Massachusetts owners. However this activity is characterized, including brokering dog placement, it resulted intentionally in the relocation of out-of-state dogs to new owners residing in Massachusetts, even if it did not directly operate in the Commonwealth or transport dogs physically into the Commonwealth. As a result, BFDR's operations affected the size and health of the Commonwealth's dog population. The Department relied upon BFDR's role in having these dogs properly quarantined, inspected and issued good health certificates, for the purpose of protecting the health of the Commonwealth's dog population, and, as well, for tracing infected dogs and their origin in the event of a communicable disease outbreak.

Reading the regulations in this context separates a rescue organization's rescued dog placement activities involving their transfer to new Massachusetts owners from the more specific action of physically importing or transporting the dogs into the Commonwealth. Per the definitions recited at 330 C.M.R. § 30.02 (*see* above at 23-24), BFDR was engaged in "the placement of abandoned, unwanted, neglected or abused animals," and was "otherwise"

engaged in “find[ing] a permanent physical placement” for such dogs in Massachusetts even through it did not itself “import” the dogs into the Commonwealth.

Accordingly, BFDR was a “rescue organization” that, per 330 C.M.R. § 30.03, was required to register with, and obtain a license from, the Department in order to operate as such in the Commonwealth.

ii. Requirements for “[t]ransporting” animals “in any way . . . into the Commonwealth . . . from any point outside”

The other set of Department regulations that apply here is 330 C.M.R. § 3.00 *et seq.*, entitled “Shipment of Dogs into the Commonwealth.” Although this set of regulations does not include a statement of purpose, the very first requirement it recites is that a health certificate is required to ship or transport any dog into the Commonwealth of Massachusetts. This requirement defines the primary purpose of 330 C.M.R. § 3.00 *et seq.*

330 C.M.R. § 3.02, entitled “Shipment In,” provides in its entirety as follows:

(1) Health Certificate Required. All dogs shipped or in any way transported into the Commonwealth of Massachusetts from any point outside thereof must be accompanied by a health certificate approved by the Livestock Official of the State of origin showing that they are free from all symptoms of infectious, contagious and communicable diseases; that they have not been exposed to rabies and if vaccinated the certificate shall include the date of vaccination.

(2) Rabies. Any dog which originated in an area where rabies has been known to exist within a period of six months prior to importation shall have been properly vaccinated with rabies vaccine within 12 months prior to date of importation and may, at the discretion of the Director, be subject to

quarantine at destination for a period of not less than 14 days following arrival within the Commonwealth.

(3) Exemptions. 330 CMR 3.02 shall not apply to any dogs passing through the Commonwealth nor to performing dogs kept under direct control during their stay in the Commonwealth.

Per its plain language, the health certificate required by 330 C.M.R. § 3.02 is from the state where the dog originated, not from a Massachusetts veterinarian. It allows a dog transported into Massachusetts to be quarantined if rabies is known to have existed in the state from which the dog was transported to Massachusetts within six months prior to importation; however, the regulation does not require that all dogs brought into the Commonwealth be re-quarantined or re-vaccinated, even if the dogs are not merely passing through the Commonwealth or are performing dogs kept under direct control while in the Commonwealth.

330 C.M.R. § 3.03, entitled "Violation," specifies the duty of a "transportation company" in Massachusetts receiving dogs not accompanied by a certificate of health to notify the appropriate animal health officer so that officer can quarantine such animals, and makes failure to do so a violation. It provides that:

Any transportation company, person, firm or corporation in Massachusetts receiving dogs which for any reason are not accompanied by a certificate of health as provided in 330 CMR 3.02, shall immediately notify either the local Inspector of Animals or the Bureau of Animal Health. The dogs so received must not be removed from the premises where received except by order of the Director, and in the case of a transportation company or its agent, or off the premises where they are unloaded except by permission obtained from the

Director or one of his or her agents.

If, for any cause, dogs are brought within the limits of the Commonwealth in violation of 330 CMR 3.02, it shall be the duty of the local Inspector of Animals of any city or town in which they arrive to quarantine them and to communicate with the office of the Bureau of Animal Health in regard to same.

330 C.M.R. § 30.00 *et seq.* is properly regarded as a set of general regulations regarding the requirements for bringing any animals, including dogs, into Massachusetts, and 330 C.M.. § 3.00 *et seq.* is properly read as a set of specific regulations applicable to “shipping dogs into Massachusetts” in particular.

c. The 2005 Emergency Order

Emergency Order 1-AHO-05, issued on May 26, 2005, is entitled “An Order requiring the registration of all persons involved in the transfer of animals and requiring all persons importing animals into the Commonwealth to institute sound management practices to avoid harm to the Commonwealth’s animal population as well as its citizenry.” The Emergency Order is addressed “[t]o all persons involved in the transfer of animals in the Commonwealth.”

From the two pages of “wherefore” clauses that follow, we learn that the Department issued the 2005 Emergency Order in response to a significant increase in the unsupervised and unregistered importation and release of unlicensed animals (including but not limited to dogs) into Massachusetts, particularly at parking lots, from out-of-state locations. This had

the potential of introducing into Massachusetts contagious or infectious diseases that pose a significant risk to human and animal populations. The Department had no information about these animals or from where they had been imported. Among other things, the Department did not know whether the animals had been isolated, examined by a veterinarian, and issued health certificates prior to being brought into the Commonwealth and placed with other animals or humans; or whether animals with contagious or infectious diseases, or with abnormalities affecting their health, and posing, as a result, a significant risk to the health and well-being of other animals and humans were being brought directly into the Commonwealth without being quarantined and having their health status assessed.

The 2005 Emergency Order does not identify the source of this information. However, the factual basis for the Emergency Order is not challenged here. I assume, for argument's sake, that the Department's concerns in 2005 about a potential contagious or infectious disease threat to the Commonwealth's animal populations was well-grounded in fact and a thoughtful consideration of alternatives available to limit this threat.

That the 2005 Emergency Order identifies no prior notice, public hearing or public comment period is of consequence, however, in resolving its legal status for enforcement purposes, including penalty issuance for noncompliance. The absence of an identified public notice, hearing or comment period suggests strongly that the prerequisites of the regulatory promulgation process prescribed by M.G.L. c. 30A, § 2 were not satisfied. As a result, the

requirements of the Emergency Order that BFDR allegedly violated lacked the force of law they would have had as regulations—unless these requirements were indeed regulations during the time in question, in which case the question becomes whether they lost regulation status afterward and, if so, when and why they did.

The Emergency Order states that the Department issued it pursuant to its responsibility and authority, under M.G.L. c. 129, § 2, to protect the Commonwealth's animal population and to issue reasonable orders, rules and regulations to prevent, suppress and extirpate contagious diseases of domestic animals. The Emergency Order states, as well, that the Department intended to assess fines of up to \$500 for each animal involved in a violation of the statute, and for each day the violation continued.

The 2005 Emergency Order requires the registration of all persons involved in the transfer of animals in the Commonwealth, including “individuals, organizations, businesses, non-profits and any other type or kind of entity.” Registration requires the use of a form the Department prescribed, and was to disclose sufficiently the details of any such animal transfer, including who was carrying it out, and what practices were utilized in doing so. The Emergency Order directs that any entity involved in the transfer of animals in the Commonwealth cease and desist from doing so until it files a registration and obtains a registration certificate from the Department. It requires that any entity not currently involved in the transfer of animals that wished to begin such activity file a registration with the

Department and obtain an acknowledgment from the Department before commencing such activity. It directs that any entity that did not secure a registration acknowledgment from the Department within 90 days of the Order's issuance date was to cease the importation of animals into the Commonwealth. It also states that any violation of the Emergency Order "will subject the entity to possible administrative penalties and/or criminal sanctions," and that "[t]he Department advises entities that it intends to enforce this Order aggressively." (2005 Emergency Order at 6., last para.)

The 2005 Emergency Order also requires that each animal entering the Commonwealth have a valid health certificate from a place of origin that meets or exceeds the Commonwealth's small animal interstate certificate of health examination. This requirement was not entirely new. Substantively, it reiterates existing regulatory requirements, in particular the requirements of 330 C.M.R. §§ 3.02 for transporting dogs into the Commonwealth from out-of-state, and of 330 C.M.R. § 30.03 as to a rescue organization's obligation to obtain a license from the Department before arranging a dog placement with a new Massachusetts owner.

The 2005 Emergency Order also imposes requirements not found in the plain language of the Department's regulations. The Emergency Order requires the isolation of *any* animal brought into the Commonwealth in an approved Massachusetts facility, and having a licensed Massachusetts veterinarian inspect the animal and issue it a good health certificate. This is

more than 330 C.M.R. § 3.02 requires. (*See* above at 29-30.)

The Emergency Order does not state specifically that these requirements apply even if an animal brought in from out-of-state was isolated, inspected and issued a certificate of good health out-of-state. However, the Department argued here that these requirements apply regardless of whether isolation, inspection and good health certification occurred out-of-state. The argument appears to be based on the Department's position, as shown by the Enforcement Order's "wherefore" clauses, that the extent to which undocumented transfers of untraceable and possibly sick animals into Massachusetts made reliance upon out-of-state isolation, inspection and good health certification unreliable in terms of preventing, containing or tracing the sources of contagious animal-borne diseases.

The Regulations, in contrast, make no such assertion and recite no such finding, at least not as to dogs imported into the Commonwealth from outside. Instead, they require, at 330 C.M.R. § 3.02(1), that imported dogs be accompanied by a valid certificate of health from the state of origin. Implicit in the regulatory requirement is the Department's acceptance of a valid out-of-state good health certificates for an imported dog as reliable, so long as it is made upon the form approved by that state's chief veterinarian and signed by a veterinarian licensed by that state are reliable. Implicitly, this means that the out-of-state quarantine and inspection performed at a facility approved by this other state that precedes the good health certificate issued for the dog by the out-of-state veterinarian are reliable as

well, the only exception being when the dog is known to have originated from an area of known rabies, in which case additional quarantining and inspection is not a rejection of the out-of-state quarantine, inspection and good health certificate as unreliable, but, instead, an additional precaution.

The 2005 Emergency Order does not reject out-of-state quarantines, inspections and good health certificates as unreliable. However, it makes mandatory, as the regulations do not, an additional layer of quarantine, inspection and good health certification by a Massachusetts-licensed veterinarian, regardless of whether or not an imported dog was transported into the Commonwealth from an area with a suspected rabies occurrence.

The Emergency Order states that all entities engaged in importing animals into the Commonwealth are required to comply with the following requirements:

(a) Each animal entering the Commonwealth needs a valid health certificate from a place of origin that meets or exceeds the Commonwealth's small animal interstate certificate of health examination;

(b) Each such animal must be placed in isolation for 48 hours upon arrival in the Commonwealth, in a facility approved by the Department and maintained in a manner the Department has approved, or for any longer minimum isolation period that the Department's regulations might require, citing 330 C.M.R. § 12.07(1);

(c) Upon completion of the required isolation period, each imported animal

must be examined, and issued a certificate of good health, by a Massachusetts licensed veterinarian, and any animal not examined or not issued such a certificate must be quarantined pending reexamination and remediation; and

(d) The entity transferring animals in the Commonwealth must maintain full, complete and detailed records of all animals it imported into the Commonwealth, including medication records.

(2005 Emergency Order at 4-5.)

As the Department applied the 2005 Emergency Order here, BFDR was required to comply with the Emergency Order's requirements whether or not a dog it placed with a new Massachusetts owner was previously isolated in an out-of-state quarantine facility, and then inspected and issued a good health certificate by an out-of-state licensed veterinarian. This is not congruent with what the Department's regulations require for an animal brought into Massachusetts that was previously isolated, inspected and issued a good health certificate at an approved out-of-state facility and by a veterinarian licensed by that state. With exceptions that do not apply here (including the importation of a dog from a known rabies area), the Department's regulations do not require this additional level of isolation in Massachusetts and inspection and good health certification by a Massachusetts licensed veterinarian, if the dog was previously isolated at an approved out-of-state facility and then inspected and issued a good health certificate by an out-of-state licensed veterinarian.

In contrast with what the 2005 Emergency Order requires, the Department's regulations addressing the shipment of dogs into the Commonwealth, 330 C.M.R. § 3.00 *et seq.*, allow a dog to be shipped or transported into the Commonwealth from another state if the dog is accompanied by a good health certificate approved by the other state. (*See* 330 C.M.R. § 3.02, discussed above.) The regulations also state that if dogs are brought into the Commonwealth in violation of 330 C.M.R. § 3.02, it is the duty of the local inspector of animals to quarantine them. However, in general 330 C.M.R. § 3.00 does not require that an animal already isolated in the other state, and examined and issued a good health certificate by a veterinarian licensed in that state, be re-isolated in Massachusetts or re-examined and issued another good health certificate by a Massachusetts licensed veterinarian.

An exception applies to dogs that "originated in an area where rabies has been known to exist within a period of six months prior to importation." Those dogs may be quarantined in Massachusetts at the discretion of the Department's Director of Animal Health. *See* 330 C.M.R. § 3.02(2). Even in that circumstance, however, the regulations do not require that these quarantined dogs be subsequently re-examined and issued a good health certificate by a Massachusetts licensed veterinarian, but it also does not preclude the Department's Director of Animal Health from requiring this.

The Department's regulations do not grant it, or its Director of Animal Health, the

discretion to require that a dog not originating in a rabies quarantined area, and already isolated and issued an out-of-state good health certificate, be isolated again upon entry into the Commonwealth and then be again inspected and issued a good health certificate, this time by a licensed Massachusetts veterinarian. Each of the three dogs that BFDR transferred to Massachusetts residents at its Connecticut facility was accompanied by a certificate stating that, to the best of the inspecting Connecticut veterinarians's knowledge, the dog had not been exposed to rabies or other communicable diseases and did not originate from within a rabies-quarantined area. (*See* Finding 14.)

Clearly, the 2005 Emergency Regulation was not promulgated as a new or amended regulation. The Emergency Order does not assert that it was promulgated as a regulation in accordance with the requirements of M.G.L. c. 30A. It does not state that it was issued following any public hearing on notice, or any opportunity for public comment. In addition, the Emergency Order recites no opportunity for appeal by anyone affected by it, including the persons involved in placing animals in Massachusetts to whom it was addressed.

The Emergency Order states that it was issued "pursuant to" M.G.L. c. 129. That is not the same as being promulgated pursuant to the Massachusetts Administrative Procedure Act. Promulgation means to be adopted, amended or repealed as M.G.L. c. 30A, § 2 requires, which includes holding a public hearing upon published notice. *See* M.G.L. c. 30A, § 2, first through sixth paras. The first paragraph of M.G.L. c. 30A, § 2 also provides that "[a] public

hearing is required prior to the adoption, amendment, or repeal of any regulation if: (a) violation of the regulation is punishable by fine or imprisonment; or, (b) a public hearing is required by the enabling legislation of the agency or by any other law; or, (c) a public hearing is required as a matter of constitutional right.”

Nonetheless, for a brief period, the 2005 Emergency Order was an emergency regulation, meaning that it had the legal force of a promulgated regulation. During that time, its requirement that animals brought into Massachusetts be quarantined in Massachusetts and inspected and certified as to good health by a Massachusetts licensed veterinarian applied to all such animals, imported dogs included.

M.G.L. c. 30A, § 2, seventh para. provides an “emergency” exception to the promulgation requirement if an agency “finds that immediate adoption, amendment or repeal of a regulation is necessary for the preservation of the public health, safety or general welfare.” However, the exception is a limited one. To qualify for this exception, whatever the agency issues to adopt, amend or repeal a regulation must be an “emergency regulation.” Even if it is an “emergency regulation” issued under M.G.L. c. 30A, § 2, seventh para., it remains in effect for a very limited time—three months—unless the agency holds a hearing following public notice.⁶

⁶/ M.G.L. c. 30A, § 2, seventh para., states in full that:

If the agency finds that immediate adoption, amendment or repeal of a regulation is necessary for the preservation of the public health, safety or general welfare,

M.G.L. c. 30A does not define “emergency regulation.” However, it defines “regulation” broadly to include several types of agency issuances, including “the whole or any part of every rule, regulation, standard *or other requirement of general application and future effect*, including the amendment or repeal thereof, adopted by an agency to implement or interpret the law enforced or administered by it.” M.G.L. c. 30A, § 1(5)(emphasis added.)

When it was issued on May 26, 2005, the 2005 Emergency Order was an emergency regulation issued pursuant to M.G.L. c. 30A, § 2, seventh para., even though it does not assert that it adopts, amends or repeals a Department regulation and is not entitled “emergency regulation.” Several factors support this conclusion.

First, the Emergency Order appears to fall within the scope of the seventh paragraph’s phrase “other requirement of general application.” It states that it applies “[t]o all persons involved in the transfer of animals in the Commonwealth.” Absent any assertion to the contrary, that group is sufficiently numerous to make the requirements imposed by the Emergency Order of “general application,” as opposed, for example, to an enforcement order

and that observance of the requirements of notice and a public hearing would be contrary to the public interest, the agency may dispense with such requirements and adopt, amend or repeal the regulation as an emergency regulation. The agency's finding and a brief statement of the reasons for its finding shall be incorporated in the emergency regulation as filed with the state secretary under section five. An emergency regulation shall not remain in effect for longer than three months unless during that time the agency gives notice and holds a public hearing as required in this section, and files notice of compliance with the state secretary.

issued to a particular alleged violator, such as the cease and desist order the Department issued to BFDR on March 14, 2013.

Second, the Emergency Order states that it was issued “pursuant to M.G.L. c. 129.” As a result, it appears to have been adopted by the Department, per the language of M.G.L. c 30A, “to implement or interpret the law enforced or administered by it.” “The law” to which this phrase refers is, in this case, M.G.L. c. 129, whose overriding directive to the Department is to protect the Commonwealth’s animal populations from contagious diseases through measures that include isolating, inspecting and issuing good health certificates for each animal transported onto the Commonwealth.

Third, the Emergency Order also identifies a specific health emergency—the danger of contagious diseases being spread among the Commonwealth’s animal populations posed by bringing animals into Massachusetts that lack the required health certificates certifying each imported animal’s good health, or the required isolation, inspection and good health certification of such animals. The Emergency Order recites findings to support the need for its issuance on an emergency basis, in the form of a succession of “whereas” clauses stating the Department’s perception of an animal health emergency, or a reasonable concern that one might occur, based upon the information it had at the time. That information included a lack of information about the identity of animal importers or the health status of the animals they imported into the Commonwealth.

The Emergency Order stated the Department's intention to supersede, by revised regulations, its requirement that animals entering the Commonwealth be isolated in Massachusetts and then inspected and issued good health certificates by a Massachusetts-licensed veterinarian.

Finally, the 2005 Emergency Order stated the Department's intention to enforce it vigorously against violators. Implicit in this pronouncement was the Department's awareness that the Emergency Order's requirements needed to be recited by a regulation to be a valid basis for enforcement, including civil penalty assessment, after the expiration of the Order's emergency regulation status under M.G.L. c. 30A, 2, seventh para.

As an emergency regulation issued pursuant to M.G.L. c. 30A, § 2, seventh para., the 2005 Emergency Order changed what the Department's regulations required for animals brought into the Commonwealth. Assuming the Department's position here was correct, a rescue organization such as BFDR would have been obligated to have a dog it helped place with a new Massachusetts owner isolated upon entry into the Commonwealth, and then inspected and issued a good health certificate by a Massachusetts licensed veterinarian, even if the dog had been isolated in a Connecticut-approved facility and inspected and issued a good health certificate by a Connecticut licensed veterinarian before it was transferred to the new owner. This obligation would have continued so long as the 2005 Emergency Order remained in effect as an emergency regulation.

It did not remain in effect as an emergency regulation for long. Per M.G.L. c. 30A, § 2, seventh para., the emergency regulation expired three months following its issuance. Also per M.G.L. c. 30A, § 2, the regulatory revisions that the 2005 Emergency Order effected as an emergency regulation expired at the end of the three-month period unless, during that time, the Department had completed the process of promulgating new or amended regulations incorporating these revisions.

Because the Emergency Order was issued on May 26, 2005, the Department needed to have completed the promulgation process by August 26, 2005 for any new requirements the 2005 Emergency Order imposed to remain in effect. The record is without evidence that the Department did so. There is also no evidence that the Department amended its regulations after that date to incorporate the 2005 Emergency Order's new requirements of re-isolation, re-inspection and re-certification of dogs brought into the Commonwealth, despite their prior isolation in an out-of-state facility, and their inspection and good health certification by an out-of-state licensed veterinarian.

As a result, the new requirements imposed by the 2005 Emergency Order lost their legal force as part of an emergency regulation after August 26, 2005.

d. Civil Penalty for Violating M.G.L.. c. 129

I turn next to whether BFDR's noncompliance with the 2005 Emergency Order's new requirements, as the Department sought to apply them here, was nonetheless a valid predicate

for the civil penalty it issued to BFDR. I conclude that it was not.

M.G.L. c. 129, § 37 provides in pertinent part that the Commissioner of the Department of Agriculture or his designee “may assess administrative fines, not to exceed \$500 per offense, for violations of this chapter,” meaning M.G.L. c. 129. Per section 37, a civil penalty issued for a violation of Chapter 129 may not exceed \$500 per violation, or \$10,000 in “[t]otal fines assessed in any given action.”

Unquestionably, a violation of a Department regulation would be sanctionable by civil penalty issued pursuant to M.G.L. c. 129, § 37. A regulation authorized by statute (here, M.G.L. c. 129, § 2), and promulgated as M.G.L. c. 30A, § 2 requires, has the same force of law as does a statute. *See Purity Supreme, Inc. v. Attorney General*, 380 Mass. 762, 775, 407 N.E.2d 297, 306 (1980).

That the Department promulgated the two sets of regulations that apply here, 330 C.M.R. § 3.00 *et seq.* and 330 C.M.R. § 30.00 *et seq.*, is not contested. Therefore, a violation of a specific requirement (or proscription) recited by these regulations is on par with a violation of the statute under which it was promulgated, M.G.L. c. 129, and may therefore be sanctioned by a civil penalty assessed pursuant to M.G.L. c. 129, § 37. So long as the 2005 Emergency Order had the force of an emergency regulation, noncompliance with its requirements would have also been on par with a violation of M.G.L. c. 129. That was no longer the case after August 26, 2005.

It is undisputed that the dogs Ms. Lyle picked up at BFDR's Connecticut facility on March 28, and April 12, 2014, and that Mr. Williams picked up at the same facility on April 12, 2014, had been isolated at the Connecticut facility and then inspected and issued good health certificates by a Connecticut licensed veterinarian, before either Massachusetts resident brought these dogs into the Commonwealth. It is also undisputed that none of these dogs was again isolated in the Commonwealth or re-inspected and re-certificated as to good health by a Massachusetts licensed veterinarian. While that contravened the requirements of the Emergency Order, it did not contravene the Department's regulations. The 2005 Emergency Order's forecast of a regulatory amendment that was expected to add these additional requirements proved to be purely aspirational. As of November 13, 2014, when the Department issued the civil penalty pursuant to M.G.L. c. 129, § 37 that BFDR appeals, the Department's regulations had still not been amended to add the new requirements the 2005 Emergency Regulation imposed and that (at least per the Department's position here) would have required the re-isolation, re-inspection and re-certification of the three dogs in question upon entering Massachusetts.

It is undisputed that BFDR did not comply with these additional requirements. However, those requirements lost their legal force when the Department did not promulgate new or amended regulations incorporating them by August 26, 2005 (or afterward), As a result, the 2005 Emergency Order lost its status as an emergency regulation under M.G.L.

c. 30A, § 2, seventh para., as of August 26, 2005. There is no evidence in the record that the requirements of the 2005 Emergency Order were incorporated into the Department's regulations that were in effect in 2013 or in 2015.

Under the Department's regulations, therefore, BFDR was not required, in 2013 or in 2015, to have had any of the dogs it helped place with new Massachusetts owners, following isolation. inspection and good health certification by a Connecticut licensed veterinarian, re-isolated in Massachusetts or re-inspected and re-certified as to good health by a Massachusetts licensed veterinarian.

The same conclusion applies with respect to the 2005 Emergency Order's registration and licensing requirements. However, those requirements mirrored what the Department's regulations required for an animal rescue organization. BFDR's failure to register as a rescue organization with the Department and obtain a license to do business as a rescue organization in the Commonwealth violated the regulations and, thus, M.G.L. c. 129. That violation, rather than a violation of the 2005 Emergency Order, provided the proper legal basis for so much of the penalty BFDR challenges here that was based upon its failure to register as a rescue organization with, and obtain a rescue organization license from, the Department.

e. Prior Decisions Addressing the 2005 Emergency Order

I consider next whether the conclusions I have reached thus far would conflict with any prior decision addressing the 2005 Emergency Order.

The parties identified no court decision interpreting or applying the 2005 Emergency Order. The Department identified a single DALA decision that did so. *Dept of Agricultural Resources v. Dogs 2nd Chance*, Docket No. FA-13-96, Recommended Decision (Mass. Div. of Admin. Law App., Mar. 27, 2014). *Dogs 2nd Chance* confirms the conclusion I reach here regarding BFRD's obligation to register as a rescue organization with the Department and obtain a rescue organization license. It also does not change my conclusion that BFDR was not required by any provision of the Department regulations to have the three dogs in question re-isolated, reinspected and recertificated as to their good health in Massachusetts.

Dogs 2nd Chance sustained, by summary decision, a \$1,500 civil penalty and cease and desist order the Department issued to an out-of-state nonprofit corporation that had adopted out a dog with a health certificate to a person with a Massachusetts address, who had picked up the dog at a visitor center in Maine. The Department had previously issued an order to Dogs 2nd Chance to cease and desist from operating all rescue/shelter "operations" in Massachusetts and comply with the Emergency Order by ceasing to offer animals for adoption by Massachusetts residents until it had registered with the Department and obtained approval to operate a rescue/shelter "operation" and followed the required animal isolation procedures. Subsequently, the Department assessed a \$1,500 civil penalty against Dogs 2nd Chance for failing to comply with the cease and desist order and with the 2005 Emergency Order, by arranging for the transport of at least one dog from Tennessee to a Massachusetts

resident who picked up the dog “near the Massachusetts border” (in Maine) by pre-arrangement. Dogs 2nd Chance appealed, claiming that it never transported or delivered a dog into Massachusetts, and therefore did not violate the 2005 Emergency Order or the cease and desist order.

Administrative Magistrate Bonney Cashin declined to read the Emergency Order narrowly so as to exclude from its requirements any activity that did not directly transfer dogs into Massachusetts. Magistrate Cashin noted that the overall purpose of the Enforcement Order was to furnish the Department with the information it needed about the transport of animals into Massachusetts, including the health status of the animals, in order to prevent the spread of contagious and infectious diseases that posed a risk to the Commonwealth’s animal and human populations. Magistrate Cashin also found that Dogs 2nd Chance had “sought to circumvent the Emergency Order by arranging for Massachusetts residents to pick up their dogs at public locations in nearby states and then bring the dogs into Massachusetts themselves,” which undermined the Emergency Order and placed both the new dog owners and people who came into contact with the dogs at risk. *Dogs 2nd Chance*; Recommended Decision at 8-9. Allowing Dogs 2nd Chance to continue its practice would “undermine the language of the Emergency Order as a whole “ and, as well, its “clear intent that animals which may threaten the health and well-being of animal and human populations should be registered and quarantined as a preventative measure.” *Id.* at 9. The Magistrate sustained the

civil penalty, therefore, noting that this result “also fulfills the objectives of G.L. c. 129, § 2” and “interprets the Emergency Order in harmony with common sense and sound reason.”

Id.

Dogs 2nd Chance is helpful here, but not dispositive. The penalty challenged in that appeal was based on the alleged violation of both the Department’s prior cease and desist order and the 2005 Emergency Order. Although the decision does not address the point, the violation of the prior cease and desist order alone may have sufficed to sustain the civil penalty assessed against Dogs 2nd Chance, particularly since the entity’s status as a rescue organization and its lack of a license were undisputed. I say “may” because it is not clear whether the prior cease and desist order was based upon an alleged violation of M.G.L. c. 129 or of a Department regulation, or whether it alleged only a violation of the 2005 Emergency Order. Quite possibly as well, the penalty assessment notice the Department issued to Dogs 2nd Chance asserted no violation of the Department’s regulations, and that the parties to that appeal did not address the violations in question in the regulatory context.

Dogs 2nd Chance focused entirely upon the 2005 Emergency Order and did not address the requirements of the Department’s regulations, including the proscription of unregistered and unlicensed rescue “operations” and dog placement in Massachusetts recited by 330 C.M.R. § 30.03. From the undisputed facts found by the Magistrate and the discussion that followed, it appears entirely possible that the violations for which the Department

assessed a civil penalty against Dogs 2nd Chance could have been issued as a violation of regulatory licensing requirements applicable to an animal rescue organization, and could have been based entirely upon the regulatory licensing requirements and a broad construction of the terms “place” or “placement,” and “rescue organization” as the Department’s regulations define them.

In fact, the licensing and registration requirements of the Emergency Order that *Dogs 2nd Chance* construed broadly in the context of the Department’s animal health protection responsibilities mirror the licensing and registration requirements that its regulations recite for the transfer of rescued animals into the Commonwealth. It is appropriate to read these regulatory requirements broadly in the context of the Department’s contagious disease prevention and control responsibilities.

Dogs 2nd Chance does not state whether the dog in question had been quarantined in Maine, where the dog was delivered to its new owner at a rest area, or in the other state from which the dog originated. That the dog’s transfer occurred in a public rest area, rather than at an isolation facility, provided good reason to suspect that the out-of-state transfer was intended to evade Massachusetts requirements regarding the shipment or transportation of properly isolated and inspected dogs into the Commonwealth, as well as the obligation of the rescue organization to register with and obtain a license from the Department.

Here, in contrast, it is undisputed that each of the three dogs in question was

transferred to a Massachusetts resident in Connecticut on April 12, 2014 at an isolation facility that BFDR used and Connecticut had approved. Each dog was accompanied by a Connecticut Department of Agriculture Small Animal Health Certificate, signed by a USDA-accredited, and Connecticut-licensed, veterinarian who had examined the dogs in question and found each of them to be free of contagious disease. Each certificate stated that, to the best of the veterinarian's knowledge, none of the dogs had been exposed to rabies or other communicable diseases and did not originate from within a rabies-quarantined area. (*See* Material Facts Not Genuinely Disputed 12-15.) These measures complied with what the Department's regulations required for out-of-state dogs brought into Massachusetts.

In this respect, the undisputed facts presented here differ materially from the circumstances presented in *Dogs 2nd Chance*.

3. Substantive Constitutional Challenge to 2005 Enforcement Order and Department Regulations

I turn, finally, to BFDR's challenge to the validity of the 2005 Enforcement Order, and to the Department's regulations, on Constitutional grounds including violation of the Commerce Clause of the United States Constitution, to the extent that the Enforcement Order or the regulations purport to regulate BFDR's activities outside the Commonwealth. There is no need to reach this claim in view of the outcome here, including my determination that the 2005 Emergency Order had lost its status as an emergency regulation and no longer had

the force of law when the Department issued the 2013 cease and desist order or the 2015 civil penalty to BFDR. In terms of the scope of the Department's regulatory authority, this decision goes no further than to find that Department regulations promulgated pursuant to the regulatory authority granted by M.G.L. c. 129, applied to actions by BFDR, as a rescue organization that placed out-of-state dogs into the Commonwealth, and therefore generated health impacts within Massachusetts. The regulatory requirements that apply to these activities include registration and licensing as a rescue organization placing out-of-state dogs with new Massachusetts owners, and the isolation, inspection and good health certification requirements applicable to those dogs. The purpose of these requirements is to protect the health of animal populations (and people) in the Commonwealth through the control of contagious diseases that could be spread by imported animals without isolation, inspection, good health certification, and paperwork identifying an imported dog's origins and health status. As a result, the violation of these regulatory requirements was a valid basis for the issuance of a civil penalty pursuant to M.G.L. c. 129, § 37.

The result reached here makes academic any assertion that the 2005 Emergency Order attempted to regulate BFDR's out-of-state activities. Because the 2005 Emergency Order lost its status as an emergency regulation after August 26, 2005, it lost the force of law after that date, as did any requirement it imposed that would have required the re-isolation, re-inspection, and re-certification of the three dogs BFDR transferred, with good health

certificates, to Massachusetts residents in 2014. The Department's regulations did not recite those requirements, and the Connecticut isolation, inspection and good health certification of those dogs complied with what the Department's regulations required. In addition, the regulatory registration and licensing requirements apply to BFDR on account of its involvement, as a rescue organization, in placing out-of-state dogs into Massachusetts with new Massachusetts owners, rather than to its out-of-state activities per se.

That said, DALA lacks authority to decide BFDR's challenge to the substantive validity of the Department's regulations, as opposed to a challenge to the regulations' application in the circumstances presented here, which this Decision resolves. BFDR's sole remedy on its substantive constitutional claim of regulatory invalidity is to proceed by way of an action for declaratory judgment pursuant to M.G.L. c. 30A, § 7 and M.G.L. c. 231A. *See Salisbury Nursing & Rehabilitation Center, Inc. v. Division of Administrative Law Appeals*, 446 Mass. 365, 374-75, 861 N.E.2d 429, 438 (2007).

4. Conclusion

For the reasons stated above, I conclude that, as a matter of law:

(1) Under the Department's regulations, BFDR was, during the years at issue here, a "rescue organization," *see* 330 C.M.R. § 30.02, whose "primary activity was the placement of abandoned, displaced, unwanted, neglected or abused animals," in particular rescued dogs,

and was involved in the placement of such dogs with new owners in Massachusetts. Per 330 C.M.R. § 30.03, BFDR was required to register with the Department as a rescue organization, and obtain a Department license, before arranging a dog placement with a new Massachusetts owner, regardless of where it physically transferred a dog and its accompanying out-of-state good health certification to the new owner. Its failure to do so violated the Department's regulations and, as a result, the statute pursuant to which the regulations were promulgated, M.G.L. c. 129. As a result, this noncompliance was the proper basis for the assessment of a civil penalty against BFDR by the Department pursuant to M.G.L. c. 129, § 37.

(2) Although the 2005 Emergency Order was an "emergency regulation" for three months after it was issued, it ceased having that legal status after three months, in late August 2005. *See* M.G.L. c. 30A, § 2, seventh para. The Department did not, by that date or afterward, promulgate new or amended regulations incorporating the Emergency Order's new requirements. Those new requirements included the re-isolation of dogs placed with Massachusetts owners in Massachusetts, and the dogs' re-inspection and good health re-certification by a Massachusetts licensed veterinarian, notwithstanding their prior isolation in the Connecticut isolation facility from which BFDR transferred the dogs to Massachusetts residents, and their prior inspection and good health certification by a Connecticut-licensed veterinarian. Those measures satisfied isolation, inspection and good health certification

requirements recited by the Department's regulations for dogs transported into Massachusetts from out-of-state. *See* 330 C.M.R. § 3.03. As a result, noncompliance with the additional requirements of the 2005 Emergency Order did not violate the regulations or, thus, M.G.L. c. 129, and was not a proper basis for assessing the civil penalty challenged here pursuant to M.G.L. c. 129, § 37.

Disposition

For the reasons stated above, I grant a partial summary decision in favor of each party, pursuant to 801 C.M.R. § 1.01(7)(h), as follows:

(1) A partial summary decision in the Department's favor sustains so much of the penalty (\$2,000 of the \$5,000) as was assessed against BFDR for operating an unregistered and unlicensed rescue organization that placed rescued dogs in the Commonwealth with new owners, as this violated the applicable requirements of the Department's regulations and, as a result, M.G.L. c. 129. This noncompliance was, therefore, the proper basis for a penalty assessment against BFDR pursuant to M.G.L. c. 129, § 37.

(2) A partial summary decision in favor of BFDR vacates so much of the penalty (\$3,000 of \$5,000) as was assessed against it for failure to again isolate the three dogs upon entry into the Commonwealth, and then have them re-inspected and re-certified as to their good health by a Massachusetts-licensed veterinarian, allegedly in violation of the 2005

Emergency Order and the 2013 cease and desist order the Department issued to BFDR. The regulations did not require these additional measures, and the dogs' prior isolation, inspection and good health certification by a Connecticut-licensed veterinarian satisfied applicable regulatory requirements. Even if the 2005 Emergency Order required the dogs' re-isolation, reinspection and re-certification in Massachusetts when it was issued, those requirements were without force of law after late August 2005, and noncompliance with them did not violate the Department's regulations or M.G.L. c. 129. As a result, this noncompliance was not the proper basis for assessing the appealed civil penalty against BFDR pursuant to M.G.L. c. 129, § 37.

SO ORDERED.

This is a final decision. The parties are hereby notified that any person aggrieved by this Decision may seek judicial review by filing, within 30 days of receiving notice of this Decision, an appeal with the Massachusetts Superior Court pursuant to M.G.L. c. 30A, § 14.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Mark L. Silverstein

Mark L. Silverstein
Administrative Magistrate

Dated: May 16, 2022

**APPENDIX TO THE DECISION:
DOCUMENTS CONSIDERED IN DECIDING THE
MOTIONS FOR SUMMARY DECISION**

(1) Notice of Assessment of Penalty pursuant to M.G.L. 129, § 37, dated Nov. 13, 2014, issued by Massachusetts Department of Agricultural Resources to Big Fluffy Dog Rescue (BFDR) for violation of Order 1-AHO-05 (Emergency Order dated May 26, 2005) and Order 463-CD-13 (Order to Cease and Desist issued by Department to the BFDR's Officers and Members of its Board of Directors), also for violation of Order 1-AHO-05, dated Mar. 14, 2013).

(2) Appeal (Request for Hearing) of Big Fluffy Dog Rescue, dated Nov. 26, 2014, from penalty assessment dated Nov, 13, 2014.

(3) Department's request to Division of Administrative Law Appeals, dated Jan. 14, 2015, to schedule a hearing in Big Fluffy Dog Rescue's penalty appeal.

Attached Exhibits:

Exh. 1: Big Fluffy Dog Rescue's hearing request (appeal) dated Nov. 13, 2014.

Exh. 2: Notice of Penalty Assessment issued by Department to Big Fluffy Dog Rescue, dated Nov, 13, 2014.

Exh. 3: State of Connecticut Department of Agriculture "Small Animal Health Certificates" signed by a Connecticut- licensed veterinarian" and dated April 23, 2014, for each of three dogs shipped by Big Fluffy Dog Rescue (by Elizabeth Zaccaro) as follows:

To Heidi Lyle of Ipswich, Massachusetts: certificates for two dogs: Flannery, a blond mix male (neutered) one-year-old Collie; and Milo, a black and tan mix male (neutered) 15-week-old German Shepard; and

To Mike Williams of Brookfield, MA: certificate for Sarah, a 3-year-old female (spayed) blonde mix Retriever.

Exh. 4: Email, Michael Cahill (Dep't of Agriculture) to Michael Demakakos (Dep't of Agriculture), dated Jan. 14, 2015, re "Whisker Walk" event on June 8, 2014 in which unregistered groups would be participating, with attached web site printouts from www.whiskerwalk.org.

Exh. 5: Order 463-CD-13, entitled "Order to Cease and Desist," dated Mar. 14, 2013, issued by Massachusetts Dep't of Agriculture to the officers and directors of Big Fluffy Dog Rescue, individually and in their capacity as officers or directors, pursuant to M.G.L. c. 129, § 2 and Order 1-AHO-05, regarding violations of Order 1-AHO-05, and requiring that BFDR register pursuant to Order 1-AHO-05 before engaging in an animal adoption and/or rescue operation in the future in Massachusetts.

(4) ACKNOWLEDGMENT OF FILING OF APPEAL BY DIVISION OF ADMINISTRATIVE LAW APPEALS (Jan. 21, 2015).

(5) Notice of Prehearing Conference, dated Jan. 26, 2015.

(6) Request to conduct prehearing conference by telephone (filed by BFDR counsel, Jean Dyer Harrison, Esq., Nashville, TN), dated Feb. 17, 2015.

(7) ORDER ALLOWING RESPONDENT TO ATTEND PREHEARING CONFERENCE BY TELEPHONE (Feb. 2, 2015).

(8) Appearance of Michael C. Demakakos, Esq. for Dep't of Agricultural Resources, dated Feb. 24, 2015.

(9) ORDER FOLLOWING PREHEARING CONFERENCE (Feb. 25, 2015).

(10) Department's motion for extension to file joint statement of stipulated facts and exhibits, dated Mar. 13, 2015.

(11) ORDER EXTENDING TIME TO FILE STIPULATED FACTS STATEMENT AND EXHIBITS (Mar. 13, 2015).

(12) Department's motion for additional extension to file joint statement of stipulated facts and exhibits, dated Mar. 27, 2015.

(13) ORDER re TIME TO FILE STIPULATED FACTS AND EXHIBITS, OR SEPARATE

PROPOSED UNDISPUTED FACTS IF PARTIES CANNOT AGREE UPON THEM (Mar. 30, 2015).

(14) ORDER FOLLOWING STATUS CONFERENCE (Apr. 2, 2015).

(15) Department of Agricultural Resources's Submission of Facts with Numbered Stipulation Exhibits, dated Apr. 1, 2015.

Contents:

Petitioner Department of Agriculture's Statement of Facts.

Department's Exhibits:

Exh. 1: Printout dated Feb., 2, 2015 from Tennessee Secretary of State website: Business Entity Detail for Big Fluffy Dog Rescue.

Exh. 2: Printout dated Apr. 1, 2015 from Big Fluffy Dog Rescue website; introductory material.

Exh. 3: Emergency Order 1-AHO-05 issued by Department of Agricultural Resources pursuant to M.G.L. c. 129. § 2 (May 26, 2005).

Exh. 4: Printout dated Feb. 17, 2005 from Big Fluffy Dog Rescue website: Page entitled "Donate and Pay Fees to Big Fluffy Dogs;" and two documents, BFDR Adoption Application, and Big Fluffy Dog Rescue Adoption Contract.

Exh. 5: Order to Cease and Desist (Order 463-CD-13), issued by Dep't of Agricultural Resources to officer and directors of Big Fluffy Dog Rescue, dated Mar. 14, 2013.

Exh. 6: State of Connecticut Department of Agriculture "Small Animal Health Certificates" signed by a Connecticut- licensed veterinarian" and dated April 23, 2014, for each of three dogs shipped by Big Fluffy Dog Rescue (by Elizabeth Zaccaro) as follows:

To Heidi Lyle of Ipswich, Massachusetts: certificates for two dogs: Flannery, a blond mix male (neutered) one-year-old Collie; and Milo,

a black and tan mix male (neutered) 15-week-old German Shepard; and

To Mike Williams of Brookfield, Massachusetts: certificate for Sarah, a 3-year-old female (spayed) blonde mix Retriever.

Exh. 7: Printout dated Jan. 14, 2015 from www.whiskerwalk.org for "Whiskerwalk" scheduled for June 8, 2014.

Exh. 8: Printout dated Mar. 27. 2015 from Connecticut license lookup site for Big Fluffy Dog Rescue showing active Animal Importer License.

Exh. 9: Notice of Assessment of Penalty pursuant to M.G.L. 129, § 37, dated Nov. 13, 2014, issued by Massachusetts Department of Agricultural Resources to Big Fluffy Dog Rescue (BFDR) for violation of Order 1-AHO-05 (Emergency Order dated May 26, 2005) and Order 463-CD-13 (Order to Cease and Desist issued by Department to the BFDR's Officers and Members of its Board of Directors), also for violation of Order 1-AHO-05, dated Mar. 14, 2013).

(16) Department's motion for extension of time to file status report, dated May 7, 2015.

(17) ORDER re TIME TO FILE STATUS REPORT (May 8, 2015).

(18) ORDER re TIME TO FILE STATUS REPORT (May 27, 2015).

(19) Big Fluffy Dog Rescue's Proposed Stipulation of Facts, dated Jun. 6, 2015.

(20) Department's motion for extension of time to file status report, dated June 30, 2015.

(21) ORDER re TIME TO FILE STATUS REPORT (July 3, 2015).

(22) Department's motion for extension of time to file status report, dated Aug. 25, 2015.

(23) ORDER EXTENDING TIME TO FILE STATUS REPORT (Aug. 28, 2015).

(24) Department's Status Report, dated Sept. 15, 2015.

(25) Big Fluffy Dog Rescue's Status Report, dated Sept. 15, 2015.

(26) Department's Status Report, dated Nov. 16, 2015.

(27) ORDER EXTENDING TIME TO FILE DISPOSITIVE MOTIONS and re STATUS REPORT (Nov, 16, 2015).

(28) Department's motion for additional time to submit status report, dated Jan. 6, 2016.

(29) ORDER re TIME TO FILE STATUS REPORT and DISPOSITIVE MOTIONS (Jan. 20, 2016).

(30) Joint motion to extend time for filing, dated Mar. 30, 2016.

(31) Department's Motion for Summary decision, dated Aug., 19, 2016.

Contents

Motion and Memorandum.

Exhibits:

Exh. 1: Printout dated Aug. 18, 2016: Tennessee Secretary of State corporate filing information fo Big Fluffy Dog Rescue.

Exh. 2: Printout dated Aug, 19, 2016: Big Fluffy Dog Rescue website page entitled "Southern Dog Connection."

Exh. 3: Printout dated Aug, 19, 2016: Big Fluffy Dog Rescue website page entitled "Welcome to Big Fluffy Dogs."

Exh. 4: Emergency Order 1-AHO-05 issued by Department of Agricultural Resources pursuant to M.G.L. c. 129. § 2 (May 26, 2005).

Exh. 5: M.G.L. c. 129, § 2 (from Commonwealth's masslegislature.gov website, retrieved Aug. 19, 2016).

Exh. 6: Printout dated Aug, 19, 2016: Big Fluffy Dog Rescue website page entitled "Apply Online to Adopt a Big Fluffy Dog," with Adoption Application.

Exh. 7: Order to Cease and Desist (Order 463-CD-13), issued by Dep't of Agricultural Resources to officer and directors of Big Fluffy Dog Rescue, dated Mar. 14, 2013.

Exh. 8: State of Connecticut Department of Agriculture "Small Animal Health Certificate" signed by a Connecticut- licensed veterinarian and dated April 23, 2014, for a dog shipped by Big Fluffy Dog Rescue (by Elizabeth Zaccaro) to Heidi Lyle of Ipswich, Massachusetts (Flannery, a blond mix male (neutered) one-year-old Collie).

Exh. 9: State of Connecticut Department of Agriculture "Small Animal Health Certificate" signed by a Connecticut- licensed veterinarian and dated April 23, 2014, for a dog shipped by Big Fluffy Dog Rescue (by Elizabeth Zaccaro) to Heidi Lyle of Ipswich, Massachusetts (Milo, a black and tan mix male (neutered) 15-week-old German Shepard).

Exh. 10: State of Connecticut Department of Agriculture "Small Animal Health Certificate" signed by a Connecticut- licensed veterinarian and dated April 23, 2014, for a dog shipped by Big Fluffy Dog Rescue (by Elizabeth Zaccaro) to Mike Williams of Brookfield, MA (Sarah, a 3-year-old female (spayed) blonde mix Retriever).

Exh. 11: Notice of Assessment of Penalty pursuant to M.G.L. 129, § 37, dated Nov. 13, 2014, issued by Massachusetts Department of Agricultural Resources to Big Fluffy Dog Rescue (BFDR) for violation of Order 1-AHO-05 (Emergency Order dated May 26, 2005) and Order 463-CD-13 (Order to Cease and Desist issued by Department to the BFDR's Officers and Members of its Board of Directors), also for violation of Order 1-AHO-05, dated Mar. 14, 2013).

Exh. 12: Appeal (Request for Hearing) of Big Fluffy Dog Rescue, dated Nov. 26, 2014, from penalty assessment dated Nov, 13, 2014.

(32) BFDR's Proposed Findings of Fact, dated Aug. 19, 2015.

(33) Big Fluffy Dog Rescue's Cross-Motion for Summary Decision, dated Aug. 19, 2016.

Contents

Memorandum of Law, dated Aug. 19, 2016.

Exhibits:

Exh. 1: Affidavit of Jean Dyer Harrison, sworn-to Aug. 10, 2016.

Exh. 2: *The Regulations Manual*, published by the Commonwealth of Massachusetts Secretary of State, rev. May 2016. Table of contents, and pages 1-5.

[End of list of documents considered in deciding the motion and cross-motion for summary decision]