

COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals
14 Summer Street, 4th Floor
Malden, MA 02148
www.mass.gov/dala**

Department of Agricultural Resources,
Petitioner

v.

Docket No. MS-23-0319

Jason Whitmore,
Respondent

Appearance for Petitioner:

Katherine A. Foote, Esq.
Massachusetts Department of Agricultural Resources
30 Riverside Dr., Suite 202
Lakeville, MA 02347

Appearance for Respondent:

Jason Whitmore
35 Daniel Shays Highway
Orange, MA 01364

Administrative Magistrate:

Kenneth Bresler

SUMMARY OF DECISION

Department of Agricultural Resources fined respondent for selling dogs without pet shop license and for importing livestock animals into Massachusetts without complying with various requirements. Sellers of dogs must generally have a pet shop license. An exception is if person sells the offspring of dogs that the person owns personally. Because respondent co-owned dogs with other people as an investment and business arrangement, he did not personally own the dogs. He was not entitled to the exception for the offspring of personally owned dogs, and he was required to have a pet shop license, which he did not have. Department did not prove that livestock animals had been imported into Massachusetts. Department's maximum fine of \$10,000 for one enforcement action is affirmed.

DECISION

The respondent, Jason Whitmore, requested a hearing on the order and notice against him, including fines, for selling dogs without a pet shop license and for importing livestock animals into Massachusetts without complying with various requirements, issued by the Department of Agricultural Resources (which this decision calls “the Department”).

I held a hearing on December 5, 2023 by Webex, which I recorded. Mr. Whitmore represented himself and testified. The Department called one witness: Michael Cahill, Director of Animal Health for the Department. I admitted nine exhibits at the hearing and a tenth exhibit, Mr. Whitmore’s request for a hearing, after the hearing.

Both parties submitted post-hearing briefs in January 2024. Much of Mr. Whitmore’s brief alleges facts that are not in evidence and I have not considered those facts.

Findings of Fact

Legal context

1. The definition of “pet shop” is

every place or premise where birds, mammals or reptiles are kept for the purpose of sale at either wholesale or retail, import, export, barter, exchange or gift.

G.L. c. 129, §1; 330 CMR 12.01.

2. Under the statutory definition, a pet shop does not need to be a brick-and-mortar retail outlet. G.L. c. 129, §1.

3. Everyone who operates a pet shop must have a license from the Department. G.L. c. 129, §39A; 330 CMR 12.02(1).

4. G.L. c. 129, §39A contains exemptions, including “persons selling, exchanging or otherwise transferring the offspring of their personally owned animals.” That is, a person selling the offspring of their personally owned dogs does not need a pet shop license.

5. The statute does not define “personally owned animals.” The Department’s longtime interpretation of the statute is that a person personally owns a dog if the dog lives in the person’s home, is licensed by the municipality where the person lives, and is a personal pet. *See* G.L. 140, §137 (municipal licensing scheme). (Cahill testimony)

6. The Department’s interpretation of the statute is just that: an interpretation. It is not a written policy. The Department does not consider it an unwritten policy. (Cahill testimony)

7. The Department does not consider a co-owner of dog, such as on a registration certificate from the American Kennel Club, which allows up to eight co-owners of a dog, to be a personal owner of the dog. (Cahill testimony)

8. If a person has invested in a dog to breed it, the Department considers the investment to be a business arrangement, and does not consider the person to personally own the dog. (Cahill testimony)

Jason Whitmore

9. Mr. Whitmore lives at 35 Daniel Shays Highway, Orange, which is 0.34 acres. (*E.g.*, Ex. 1, WM0001, 0005) His home has various out buildings. (Whitmore testimony)

10. Mr. Whitmore does not have and has not had a pet shop license. (Cahill testimony)

2008 order

11. On June 5, 2008, the Department issued an Order to Cease and Desist to Mr. Whitmore, designated Order 119-CD-08. (Ex. 2) (This order is not directly the subject of this appeal.)

12. The 2008 order stated that the Department had determined that Mr. Whitmore was “unlawfully engaged in the operation of an unlicensed pet shop.” (Ex. 2, WM0011)

13. The 2008 order ordered “Whitmore, his agents, servants, employees, contractors and

representatives and all persons owning, having an interest in, or in charge of the Premises” (35 Daniel Shays Highway, Orange),

to immediately cease and desist the operation of a pet shop. This Order applies to the sale, barter, exchange and/or gift of any animals, without a pet shop license being duly issued by the Department.

(Ex. 2, WM0011)

14. The 2008 order noted that any violation of it “may result in further legal action by the Department, including but not limited to, administrative fines and injunctions.”

(Ex. 2, WM0011)

2022 notice

15. On June 13, 2022, the Department issued a Notice of Assessment of Penalty to Mr. Whitmore. (Ex. 2, WM0014) (This notice is not directly the subject of this appeal.)

16. The 2022 notice charged Mr. Whitmore with acts, including importing 21 puppies into Massachusetts and selling them, in violation of various statutory and regulatory provisions. (Ex. 2, WM0018)

17. The 2022 notice fined Mr. Whitmore \$10,000. (Ex. 2, WM0018)

2023 inspection and related facts

18. In 2022, Mr. Whitmore sold approximately 70 dogs. (Whitmore testimony)

19. At the time of the hearing, Mr. Whitmore co-owned over 20 dogs. (Whitmore testimony)

20. Mr. Whitmore co-owned and co-owns dogs with breeders and other people involved in the selling of dogs. (Whitmore testimony; Ex. 7)

21. Mr. Whitmore owns dogs primarily to sell them. (Whitmore testimony)

22. At any time, Mr. Whitmore has four adult dogs on his premises. (Whitmore

testimony)

23. The adult dogs usually stay with Mr. Whitmore for four weeks and then return to other states. (Whitmore testimony)

24. On March 27, 2023, Department inspectors inspected 35 Daniel Shays Highway. (Ex. 1, WM0004)

25. At that time, the four adult dogs on Mr. Whitmore's premises were not licensed by the Town of Orange. (Whitmore testimony)

26. Mr. Whitmore testified that the reason that the four adult dogs were not licensed is that he kept the dogs for only a few weeks and the Town of Orange did not know how to license them. (Whitmore testimony)

27. At the time of the hearing, three of the four adult dogs on his premises had licenses from the Town of Orange. He was in the process of obtaining a license for the fourth adult dog. (Whitmore testimony)

28. The Department's concern is not that the dogs that Mr. Whitmore co-owns live in a barn or outbuildings, rather than in Mr. Whitmore's home. Its concern is that the dogs primarily live outside Massachusetts and not with Mr. Whitmore. (Cahill testimony)

Livestock

29. Mr. Whitmore testified as follows: Livestock animals live on his premises. He takes the animals to fairs to show them and uses them in petting zoos. He has had donkeys for 20 years. He bought the other animals in 2021 and 2022 in Massachusetts. He bought some from cattle dealers, some from a person named Christy Miller, and some through Craigslist and Facebook. Some animals were born to animals he owned. He has records about some animals, including where he bought them, which he has sent to the Department. (Whitmore testimony)

30. On October 6, 2023, Mr. Whitmore emailed the Department as part of this case, writing in part, “I can tell you where most [of the animals] came from.” He listed people and farms in Massachusetts. (Ex. 8, WM0064) (The Department had already issued its order and notice, discussed below.)

2023 order and notice

31. On May 8, 2023, the Department issued an Order to Cease and Desist and Notice of Assessment of Penalty to Jason Whitmore. (Ex. 1) (This decision calls it the order and notice.)

32. The Department invoked the following sources of authority for the order and notice: G.L. c. 129, §§14E, 39A, and 44; 330 CMR 4.00, 11.00, and 12.00 *et seq.*; Order 119-CD-08, which DAR issued against Mr. Whitmore in 2008; 9 C.F.R. §§ 79.3, 86.1, and 86.5; a Memorandum of Understanding between the Commonwealth of Massachusetts and the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Veterinary Services. (Ex. 1)

The order and notice regarding dogs

33. Regarding dogs, the notice and order stated:

20. During the March 2023 inspection, Mr. Whitmore provided copies of the interstate health certificates mentioned below. Mr. Whitmore stated that he had 26 dogs on the Premises, which included 5 adult dogs and 21 puppies. Mr. Whitmore also claimed to be a co-owner of multiple dogs throughout Pennsylvania and Ohio, and that he brings the puppies born in those states to his home in Massachusetts to sell them to the public. He admitted that he has been offering puppies for sale from the Premises on a consistent basis and that he will import puppies from the breeders noted on the OCVIs [Official Certificate of Veterinary Inspection] into the Commonwealth one to two times per month with the intention of selling them. He stated that he routinely transports puppies using a passenger van owned by his parents.

21. On or about January 20, 2023, Jason Whitmore imported into Massachusetts nine 6-week-old Golden Retriever puppies and one 1-year-old female Golden Retriever from Ohio. The owner of the dogs listed on the interstate health

certificate was Andy Troyer, [REDACTED], Millersburg, OH.¹

22. On or about February 6, 2023, Jason Whitmore imported into Massachusetts eleven 5.5-week-old Golden Retriever puppies and one 3-year-old female Golden Retriever from Ohio. The owner of the dogs listed on the interstate health certificate was Marie Burkholder, [REDACTED], Holmesville, OH.²

23. On or about March 6, 2023, Jason Whitmore imported into Massachusetts six 11-week-old Welsh Corgi puppies from two separate litters from Ohio. The owner of the dogs listed on the interstate health certificate was Norman Burkholder, [REDACTED], Dundee, OH.³

24. On or about March 7, 2023, Jason Whitmore imported into Massachusetts five 14-week-old Cavapoo mix puppies from Ohio. The owner of the dogs listed on the interstate health certificate was Ivan Miller, [REDACTED], Millersburg, OH.⁴

25. On or about March 7, 2023, Jason Whitmore imported into Massachusetts one 4-year-old and one 3-year-old female Bernese Mountain Dog from Ohio. The owner of the dogs listed on the interstate health certificate was Joseph Troyer, [REDACTED], Millersburg, OH.⁵

26. On or about March 10, 2023, Jason Whitmore imported into Massachusetts six 9-week-old Golden Retriever puppies from Ohio. The owner of the dogs listed on the interstate health certificate was Andy Troyer, [REDACTED], Millersburg, OH.⁶

27. On or about March 21, 2023, Jason Whitmore imported seven 9-week-old Bernese Mountain Dog puppies from Ohio. The owner of the dogs listed on the interstate health certificate was Joseph Troyer, [REDACTED], Millersburg, OH.⁷

28. Department Inspectors reviewed the OCVIs for the above-mentioned animals. Mr. Whitmore is identified as the “Consignee” on all of the OCVIs. He did not produce any documentation or any other evidence of ownership of any of the parent dogs observed during the inspection. Rather, all of the dogs’ owners are identified on the OCVIs as outlined herein. Mr. Whitmore is not identified as an owner of any of the dogs on any of the OCVIs.

¹ This allegation is confirmed by Ex. 2, WM0032.

² This allegation is confirmed by Ex. 2, WM0033; Ex. 4, WM0048.

³ This allegation is confirmed by Ex. 2, WM0034; Ex. 4, WM0046.

⁴ This allegation is confirmed by Ex. 2, WM0035; Ex. 4, WM0047.

⁵ This allegation is confirmed by Ex. 2, WM0036-00037.

⁶ This allegation is confirmed by Ex. 2, WM0038.

⁷ This allegation is confirmed by Ex. 2, WM0039.

....

32. Jason Whitmore has imported at least 44 puppies into Massachusetts for the purpose of resale without a license from the Department, and has indicated that he intends to continue such unlicensed importation and sale, in violation of M.G.L. c. 129, §39A, 330 CMR 12.02(1), and Order 119-CD-08.⁸

(Ex. 1, WM0004-0005)

34. The order and notice contained these provisions about fines related to the dogs:

Five-hundred dollars (\$500.00) for continuing to operate an unlicensed pet shop, in violation of Order 119-CD-08;

Five-hundred dollars (\$500.00) each, for offering 44 puppies for sale that were not the offspring of his personally owned animals, in violation of M.G.L. c. 129, § 39A and 330 CMR 12.02(1)

(Ex. 1, WM0006)

The order and notice regarding livestock

35. Regarding livestock, the notice and order stated:

30. During the March 2023 inspection, Department Inspectors also observed on the Premises the following animals: 42 goats, 14 sheep, 5 potbelly pigs, 4 alpacas, 2 miniature donkeys, 1 miniature horse, and 1 bull calf. Mr. Whitmore could not produce any paperwork regarding the origin of any of these species. Inspectors photographed several eartags affixed to some of the sheep and goats. The eartags affixed to the sheep and goats indicate that they had been imported from Pennsylvania and Indiana.⁹ Interstate shipment of these various species requires specific disease testing, and all animals must be accompanied by an Interstate Certificate of Veterinary Inspection (ICVI) when crossing state lines.

31. Department Inspectors counted sixty-nine (69) livestock animals on the Premises....Mr. Whitmore possessed no OCVI's [Official Certificates of Veterinary Inspection], receipts, or any identifying documentation for any of the livestock identified herein.

....

⁸ These allegations are accurate.

⁹ The photographs were not introduced into evidence. The record does not indicate how many of the sheep's and goats' eartags indicated that they had been imported from Pennsylvania and Indiana.

33. Jason Whitmore imported 5 potbelly pigs into Massachusetts without an ICVI and without a negative test for pseudorabies within 30 days prior to entry, in violation of M.G.L. c. 129, § 14E, and without an import permit or negative test for brucellosis within 30 days prior to entry, in violation of 330 CMR 11.04 and 9 C.F.R. §§ 86.1.

34. Jason Whitmore imported 1 bull calf into Massachusetts without an ICVI, in violation of 330 CMR 4.04 and 9 C.F.R. §§ 86.1.

35. Jason Whitmore imported 2 miniature donkeys into Massachusetts without a negative test for Equine Infectious Anemia having been conducted within the prior 12 months, in violation of M.G.L. c. [129], § 44, and without an ICVI, in violation of 9 C.F.R. §§ 86.1 and 86.5.

36. Jason Whitmore imported 42 goats and 14 sheep into Massachusetts without an ICVI, in violation of 9 C.F.R. §§ 79.3(a) and 86.1.

(Ex. 1, MW0005-0006)

36. The order and notice contained no paragraph, similar to paragraphs 33 through 36, related to the five alpacas. That is, the order and notice does not allege which, if any, statute or regulation Mr. Whitmore violated related to alpacas and how he violated it. (Ex. 1, MW0006)

37. The order and notice contained this provision about fines related to the livestock:

One-hundred dollars (\$100.00) each, for importing 69 animals - 42 goats, 14 sheep, 5 potbelly pigs, 2 miniature donkeys, and 1 bull calf - into Massachusetts without Interstate Certificates of Veterinary Inspection, in violation of M.G.L. c. 129, § 14E, 330 CMR 4.04, 330 CMR 11.04, and 9 C.F.R. §§ 79.3(a) and 86.5.

(Ex. 1, MW0006)¹⁰

38. Between the time that the Department issued the notice and order and the hearing, Mr. Whitmore provided the Department with paperwork that led it to conclude that 21 livestock

¹⁰ The sum of 42 goats, 14 sheep, 5 potbelly pigs, 2 miniature donkeys, and 1 bull calf is not 69 animals; it is 64 animals. The original count of 69 animals included five alpacas. Ultimately, this apparent discrepancy, which went unremarked on during the appeal, is not significant.

animals could potentially be identified as coming from within Massachusetts: 5 cattle,¹¹ 6 goats, 2 alpacas,¹² and 8 sheep. (Department Br. 3; Cahill testimony)

Fines

39. When the Department fines a person, it considers various factors, including the egregiousness of the violations and whether the person has committed violations in the past. (Cahill testimony)

40. When the Department fines a person, it normally engages in progressive enforcement, such as issuing a cease-and-desist order first; then issuing a nominal fine; and then issuing a higher fine. (Cahill)

41. The Department engaged in progressive enforcement against Mr. Whitmore and considered his previous violations when it set the maximum fine of \$500 per puppy. (Cahill testimony)

42. \$500 per puppy for 44 puppies would be a fine of \$22,000.

[H]owever, because the total fines assessed in any given action under M.G.L. c. 129, § 37 cannot exceed \$10,000.00, the total administrative penalty assessed upon Mr. Whitmore is \$10,000.00.

(Ex. 1, WM0006)

¹¹ It is unclear which animals are counted as cattle. The notice and order mentions one bull calf, which seems to qualify as cattle. I see no definition of “cattle” in G.L. c. 129, §1 or 330 CMR. The Code of Massachusetts Regulations distinguishes among cattle, swine, and horses. *See* 330 CMR, 4.00, 11.00, 16.00. The order and notice distinguishes among cattle on one hand and goats, sheep, and pigs on the other hand. Ultimately, this possible discrepancy – the Department mentioned one animal that seems to qualify as cattle in the order and notice, and the Department dismissed charges related to five cattle – is not significant.

¹² This mention of alpacas in the Department’s brief may indicate that the omission of alpacas from the order and notice was inadvertent. Again, ultimately, this possible omission is not significant.

Request for a hearing

43. On May 19, 2023, Mr. Whitmore requested a hearing. (Ex. 10)

Discussion

Burden of proof and standard of proof

General Laws chapter 129 and 330 CMR do not specify the burden or standard of proof in administrative proceedings involving the Department. General Laws chapter 30A and 801 CMR 1.01, which govern administrative proceedings in general, do not specify a default burden or standard of proof.

Nonetheless, the Department is the petitioner in this appeal. It brought the order and notice, and seeks to fine Mr. Whitmore. Therefore, it has the burden of proof. *See* Massachusetts Administrative Law and Practice §3.03[3][b][iii][C] at 3-39 (Lexis/Nexis 2014) (“When the agency is bringing an enforcement or similar action, it is the petitioner and has the burden of proof”).

As for the standard of proof,

In the absence of a statutory provision to the contrary...[p]roof by a preponderance of the evidence is the standard generally applicable to administrative proceedings.

Medical Malpractice Joint Underwriting Association of Massachusetts v. Commissioner of Insurance, 395 Mass. 43, 46 (1985) (citation and internal quotation marks omitted).

Livestock

In its order and notice, the Department cited:

- G.L. c. 129, §14E, which imposes requirements on “breeding swine imported into the commonwealth.”

- G.L. c. 129, §44, which imposes requirements on a person who “shall import into the commonwealth any equine animal.”

- 330 CMR 4.04, which imposes requirements on “anyone bringing cattle into the Commonwealth of Massachusetts.”

- 330 CMR 11.04, which imposes requirements on “anyone bringing Swine into the Commonwealth of Massachusetts.”

- 9 C.F.R. § 79.3(a), which provides that certain sheep and goats may not be moved or commingled with other sheep and goats “in interstate commerce” unless they are accompanied by an Interstate Certificate of Veterinary Inspection.

- 9 C.F.R. 86.5, which imposes requirements on “persons responsible for animals leaving a premises for interstate movement.”

To prevail on the charges in the order and notice related to livestock, a key and common element that the Department must prove by a preponderance of the evidence is that the livestock were imported into Massachusetts or were otherwise transported interstate. The Department did not so prove.

The order and notice states:

Inspectors photographed several eartags affixed to some of the sheep and goats. The eartags affixed to the sheep and goats indicate that they had been imported from Pennsylvania and Indiana.

(Ex. 1, WM0005) However:

- Photographs of the eartags were not introduced into evidence;
- the two inspectors did not testify;
- Mr. Cahill did not testify about the eartags; and

- it is unclear whether any of the animals that had eartags were among the 21 animals that the Department has, in effect, dismissed from the order and notice.

A draft report from the inspection of March 27, 2023 states, “Several scrapies¹³ tags and ear tags were photographed and recorded.” (Ex. 2, WM0023). However:

- The report is clearly watermarked “DRAFT” on every page;
- the draft report does not contain photographs of the eartags, although it contains eight other photographs;
- the draft report does not mention that the eartags indicate that some sheep or goats had been imported from Pennsylvania and Indiana; and
- the inspectors did not testify.

In contrast, Mr. Whitmore testified that all of the livestock animals were bought or born in Massachusetts. Because the Department did not prove that any of the livestock animals were imported into Massachusetts, the Department did not prove the part of the order and notice regarding livestock animals, and Mr. Whitmore does not owe fines regarding them.

Dogs

The Department has proved by a preponderance of the evidence, through documents from Mr. Whitmore and his testimony, that he offered 44 puppies for sale that were not the offspring of his personally owned dogs. Mr. Whitmore does not dispute that he offered 44 puppies for sale. He does dispute the Department’s interpretation of “personally owned animals” in G.L. c. 129, §39A, the statute requiring people to have licenses to run a pet shop.

¹³ A disease. *See* G.L. c. 129, §13A.

The Department may engage in rulemaking by adjudication. *Town of Brookline v. Commissioner of Department of Environmental Quality Engineering*, 387 Mass. 372, 379 (1982). The Department's rule is, in effect, as follows:

A person personally owns an animal if it lives in the person's home, is licensed by the municipality where the person lives (if a licensing scheme exists for that kind of animal), and is a personal pet.

A co-owner of an animal in a business arrangement does not personally own the animal. If a person has invested in an animal for the purpose of profiting from it, the person does not personally own the animal.

That the parent or parents of puppies live on Mr. Whitmore's premises for four weeks or so does not make them his personally owned animals. That Mr. Whitmore is able to secure dog licenses from Orange for dogs who live on his premises for four weeks or so also does not make them his personally owned animals. The parent or parents of puppies are not Mr. Whitmore's pets; he co-owns them as a business arrangement.

Therefore:

- the exemption for "personally owned animals" in G.L. c. 129, §39A does not apply to Mr. Whitmore;
- he must have a license to operate a pet shop;
- he has been operating a pet shop without a license; and
- the Department's fines for operating a pet shop without a license are affirmed.

Conclusion and Order

Mr. Whitmore must pay the fine of \$10,000 that the Department of Agricultural Resources has imposed. That is the maximum fine for one enforcement action by the Department. G.L. c. 129, § 37.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth Bresler

Kenneth Bresler
Administrative Magistrate

Dated: June 12, 2024