

ROXANNE M. ROBERTS,) C.A. No. CPU5-09-001799
)
 Appellant,)
)
 v.)
)
 KENT COUNTY SPCA, INC.)
 DELAWARE ANIMAL CARE & CONTROL,)
)
 Appellees.)

Reigle, J.

In this appeal from a decision of the Dog Control Panel (“the Panel”) to euthanize a dog owned by Roxanne Roberts (“Ms. Roberts”), this Court affirms the decision of the Panel that the dog is dangerous and reverses the decision of the Panel that the dog must be euthanized. The matter is remanded to the Panel for an entry of judgment consistent with this opinion.

Procedure on Appeal

On July 2, 2009, the Panel held a hearing following the seizure of Ms. Roberts’ dog by Delaware Animal Care & Control (“Animal Control”). Afterwards, it was the decision of the Panel that the dog met the statutory definition of dangerous and the Panel directed that the dog be euthanized. Ms. Roberts appealed to this Court.

On October 30, 2009, this Court vacated and remanded the Panel’s decision on the grounds that the Panel had not sufficiently explained its decision to euthanize the dog.

On November 5, 2009, the Panel issued a new decision that set forth its reasons for ordering euthanasia of the dog following its July 2, 2009 hearing.

Ms. Roberts appealed the second decision of the Panel to this Court. Letters were submitted by both sides in lieu of briefs. Additional documents and correspondence were submitted, at the request of the Court. On March 24, 2010, a meeting was held in chambers in lieu of oral argument.

On appeal, Ms. Roberts argues the decision should be reversed because her character was incorrectly maligned and proper administrative procedures were not followed by the Panel. The Panel argues, through counsel, that its decision should be affirmed because its decision now meets the requirements under the appropriate standard of review and any procedural problems are curable.

Underlying Facts

On May 20, 2008, Zoe, a female American Pit Bull Terrier, bolted from Ms. Roberts' house when her granddaughter inadvertently opened a door. Immediately the dog, Zoe, began to fight with a leashed dog that was walking in the street. When the owner of the leashed dog tried to break up the fight, she was bitten and required medical attention. An incident report was filed by Animal Control but no action was taken against Zoe.

On June 14, 2009, Ms. Roberts was visiting her daughter in Lewes, Delaware with Zoe. While the family was in their unfenced backyard, Ms. Roberts unleashed her dog so that she could play freely with her daughter's puppy. Almost immediately, Zoe ran into the adjoining neighbor's yard and severely attacked the neighbor's seven year-old Toy Poodle, Chloe, that was tethered in the neighbor's yard. The poodle was treated but later died. In response, Animal Control seized Zoe because it had reason to believe that Zoe had killed another dog, pursuant to Del.Code Ann. tit. 7 § 1732(a). Ms. Roberts requested a hearing to secure release of her dog pursuant to Del.Code Ann. tit. 7 § 1732(c).

Hearing before Panel on July 2nd

On July 2, 2009, a hearing was held.¹ Ms. Roberts and several other witnesses testified, including an Animal Control Officer. After the hearing, the Panel found Zoe to be dangerous and ordered her to be euthanized. Ms. Roberts appealed to this Court pursuant to Del.Code Ann. tit. 7 § 1734(c).

Decision on First Appeal

On October 30, 2009, this Court issued an order vacating and remanding the matter to the Panel. *Roberts v. Kent County SPCA, Inc.*, 2009 WL 4827361 (Del. Com. Pl. 2009). In the

¹ Certain exhibits were reviewed by the Panel, however, they were not formally admitted into evidence nor were they included in the transcript of the hearing. They were subsequently provided as part of this appeal.

decision, this Court identified the two step process used by the Panel to make its decision. First, the Panel considered whether the dog was “dangerous” or “potentially dangerous” as defined by statute. Del.Code Ann. tit. 7 §§ 1735 and 1736. The Panel found the dog to be “dangerous.” On review, this Court found this finding to be incontrovertible. Ms. Roberts’ dog killed another dog. Ms. Roberts did not contest this fact. By definition, the dog was dangerous. Second, after finding the dog to be “dangerous,” the Panel chose a remedy for the dog. It ordered euthanasia under, Del.Code Ann. tit. 7 § 1734(c). It could have directed that the dog’s owner abide by certain conditions to keep a dangerous dog under Del.Code Ann. tit. § 1735(b) and (c). On review, this Court found the order for euthanasia to be discretionary for the Panel. This was the part of the decision that Ms. Roberts contested, arguing that she could manage her dangerous dog properly if it was returned to her. This Court held that the Panel’s decision to euthanize the dog was not reviewable because the Panel’s reasons for choosing euthanasia were not set forth in its decision and remanded the case for the Panel to articulate the reasons for its decision.

Meeting of Panel on November 5th

On November 5, 2009, the Panel met and issued a new decision that set forth its rationale for its decision that the dog should be euthanized. A new hearing was not held. No witnesses testified and Ms. Roberts was not invited to attend. There was no transcript of the proceeding. The Panel’s decision was based, in part, upon the Panel’s concerns about Ms. Robert’s ability and willingness to comply with the statutory conditions that would be put in place if the dog was returned to her, rather than euthanized.

The November 5th decision was issued in letter form. Eight “attachments” were identified at the bottom of the letter. Several of the attachments were already in the possession of the Court. These included the transcript of the July 2nd hearing, the Panel’s initial one page

decision following that hearing and two items constituting the October 30th decision by this Court vacating and remanding the Panel's decision.

Upon the Court's request the additional attachments were provided by the Panel, through counsel. They included the incident reports filed by the Animal Control Officers for the May 2008 and June 2009 incidents. (The incident reports were reviewed by the Panel at the July 2nd hearing although they were not marked as exhibits and made part of the record.). Additionally, two groups of documents were provided entitled, "Letters of recommendation" and "Communication with Connie Cook." These last two attachments were of great interest to this Court as they appear to have been the basis for much of the Panel's reasoning that Ms. Roberts was not a responsible dog owner who could be relied upon to abide by the conditions for a dangerous dog.

The letters of recommendation were discussed in the Panel's decision. Specifically, the Panel referred to mistakes in the letters regarding the dog's breed as evidence that the writers were unfamiliar with Ms. Roberts' dog, Zoe, or that Ms. Roberts had not bothered to proof-read the letters. In her response, Ms. Roberts asserts that she submitted different letters to the Panel. Indeed the letters put forth by the Panel and the letters put forth by Ms. Roberts to this Court do not match. They are authored by different people. This Court is unable to reconcile these documents. However, Ms. Roberts should not have submitted any letters, after the July 2nd hearing and the Panel should not have reviewed any letters, after the July 2nd hearing.

It is problematic that Ms. Roberts was not given an opportunity to respond to the Panel's reaction to the letters. The Panel found that they detracted from Ms. Roberts' position rather than supported it. It is clear from its decision that the Panel referred to the letters and relied upon them in its decision.

The attachment referred to as "Communication with Connie Cook" is even more troubling. It is a series of copies of electronic mail printouts ("e-mails"). Prior to the July 2nd hearing, Ms. Cook of the Caroline County Humane Society in Maryland communicated with Ms. Peterson, the chairperson of the Panel. Apparently, Ms. Peterson is a professional dog trainer that uses the trade name, Positive Pups & Ponies. Ms. Cook communicated to Ms. Peterson by e-mail between June 15th and 16th regarding an unnamed dog that was behaving aggressively. She was looking for a trainer to assist the owner of the dog. Ms. Peterson expressed a willingness to help.

After the July 2nd hearing, in subsequent emails on July 3rd, Ms. Cook revealed to Ms. Peterson that Ms. Peterson had sat on the panel that decided to euthanize Zoe and that Zoe was the dog to which she had referred in her previous e-mails. It was not apparent to Ms. Peterson at the July 2nd hearing that the emails from Ms. Cook were regarding Zoe. The communications between Ms. Peterson and Ms. Cook became contentious. As a result, Ms. Peterson sent an e-mail to members of the SPCA identifying Ms. Cook and accusing her of libel. There were also e-mails from Lisa Trippett that accused Ms. Roberts of misrepresentation of her dog's behavior.

The e-mails were provided to the Panel at its November 5, 2009 meeting and their context was explained by Ms. Peterson. She subsequently made hand-written notes on the emails. This information was verified by Ms. Peterson and counsel.

The emails contained hearsay regarding Ms. Roberts's response to the SPCA's seizure of Zoe which included possibly returning her to her original owner which was a violation of her quarantine. In addition, there was some question if Ms. Roberts had provided all of the facts regarding Zoe, including that she had killed another dog, to Ms. Cook. All of these alleged facts were viewed in a negative light by Ms. Peterson.

It appears from the attachments, the decision of the Panel and the inferences that can be drawn between the two, that Ms. Peterson conducted her own investigation into Ms. Roberts' conduct regarding Zoe, provided documentation of her investigation to the other members of the Panel, made comments to other members of the Panel that contained opinion regarding Ms. Roberts' character and may have influenced the Panel's decision to euthanize Ms. Robert's dog without Ms. Roberts having any knowledge of such and being given the opportunity to respond.

Standard of Review

An appeal from the Dog Control Panel is conducted according to the provisions governing judicial review of case decisions under the Administrative Procedures Act. Del.Code Ann. tit. 7 § 1734(d). Under the rules of the Administrative Procedures Act, appeals are *on the record* without a *trial de novo*. Del.Code Ann. tit. 29 § 10142(c) (emphasis added).

The standard of review as set forth in the Administrative Procedures Act states, "The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency." Del.Code Ann. tit. 29 § 10142(d). *See also Downs v. Emory*, 2007 WL 3231611 at *2 (Del. Com. Pl.) *citing Mooney v. Benson Mgmt. Co.*, 451 A.2d 839, 840 (Del. Super. 1982).

In addition, "[t]he reviewing Court must also determine whether the findings of the Panel are free from legal error and the product of an orderly and logical deductive process." *Downs* at *2 *citing In re Surcharge Classification 0133 ex rel. Del. Comp. Rating Bureau*, 655 A.2d 295, 299 (Del. Super. 1994).

This Court does not find that the Panel's second decision on November 5th was free from legal error and the product of an orderly and logical deductive process. The Panel committed plain error when it considered facts outside of the record of the July 2nd hearing.

Introduction of Evidence Outside of the Hearing

Once the July 2nd hearing was concluded, the record was closed on the matter. This means that no further evidence or facts should have been admitted for consideration by the Panel. Although this Court remanded the matter to the Panel, the remand was solely to afford the Panel an opportunity to give its reasoning in a sufficiently articulated way so that this Court could review the Panel's decision.

It was improper for the Panel to consider the letters submitted by Ms. Roberts after the July 2nd hearing. It was also improper for the Panel, through its chairperson, to hear additional evidence regarding Ms. Roberts's actions, whenever they occurred, which were not presented at the July 2nd hearing.

In Delaware, "[i]t is a general rule of law that it is improper for an administrative agency to base a decision, or finding in support thereof, on evidence or information outside the record. *Trader v. Caulk*, 1992 WL 148094 (Del. Super.) citing *Delaware Alcoholic Bev. v. Alfred I. du Pont Sch.*, 385 A.2d. 1123, 1127 (Del. 1978). "Generally, the use of such information or evidence constitutes a due process violation." *Trader* at *2 citing *Wilmington Vitamin & Cosmetics v. Tigue*, 183 A.2d. 731, 736-37 n. 6 (Del. Super. 1962).

It is true that the Rules of Evidence do not apply in Dog Control Panel hearings. 7 Del.Code. Ann. tit § 1734(a). "However, that precept is not a license to introduce irrelevant evidence." *Geshner v. Delaware Real Estate Commission*, 1994 WL 680090 (Del. Super. 1994). "While compliance with strict evidentiary standards is not required in administrative hearings, it

is clearly improper for an administrative agency to base a decision of an adjudicatory nature upon evidence or information outside the record. An administrative body must base its conclusion upon competent evidence.” 2 Am.Jur. 2nd *Administrative Law* § 344.²

“Administrative agencies operate less formally than courts of law . . . [however] [i]t is improper for an administrative agency to base a decision on information outside of the record without notice to the parties. *Turbitt v. Blue Hen Lines*, 711 A.2d. 1214 (Del. 1998) (citations omitted). See also *Administrative Decision or Finding Based on Evidence Secured Outside of Hearing, and Without Presence of Interested Party or Counsel*, 18 A.L.R. 2d. 552 (1951).

In *Trader v. Caulk*, the Court reviewed a decision by the Industrial Accident Board. The Board held a hearing regarding a claimant’s application for total disability. It heard evidence from doctors on both sides. The claimant’s doctor said that he was totally disabled and could not work. The insurance carrier’s doctor stated that he was able to work with restrictions. When the worker left after the conclusion of the hearing, members of the Board watched him walk to his motor vehicle, unbeknownst to him. The Board included its observations of his physical abilities in its findings and denial of total disability. Subsequently, the Board issued a decision that the worker was not totally disabled from working. The Court reversed the Board’s decision and remanded it to the Board for a new hearing. The Court found that the Board had improperly considered evidence outside of the record and had not given the claimant an opportunity to respond to the inferences that it had drawn from this consideration. *Trader at *2*.

When the Panel considered the letters and the emails and drew conclusions from this information, it was the same as if its members were watching Ms. Roberts walk to her car, when they should have limited their focus to the information provided to them inside the building and on the record before them from the July 2nd hearing.

² The case of *Trader v. Caulk* cited 2 Am.Jur. 2d *Administrative Law*.

Due Process and Remedy

Although rigid rules of evidence need not be followed in administrative hearings, courts have held that improper introduction of evidence can amount to reversible error. *See Dugan v. Delaware Harness Racing Comm.*, 752 A.2d 529 (Del. 2000).

Additionally, in *Geshner v. Delaware Real Estate Commission*, 1994 WL 680090 (Del. Super. 1994), the Court found the introduction of irrelevant evidence to be so pervasive and troubling to the Court that it was found to be a violation of fundamental due process.

In *Geshner*, a licensed real estate agent was working in Delaware when it came to the attention of the Real Estate Commission that he a criminal conviction. This was problematic because Mr. Geshner had represented on his sworn affidavit when he applied for a license that he did not have such a conviction. He was notified of the allegation and a hearing was held with Mr. Geshner in attendance. At the hearing, many additional allegations were made against Mr. Geshner. He was accused of sexual harassment, dishonesty, theft of services and generally being a bad person. Much of the evidence introduced at the hearing was through hearsay, innuendo and argument of counsel. At the hearing, Mr. Geshner was not allowed to introduce his own evidence to rebut the allegations and was not allowed to fully cross-examine the witnesses against him. He admitted that he had a misdemeanor conviction for resisting arrest in another State and that he had not reported it on his application. The Commission found that he had made misrepresentations on the application. The Commission revoked his license, rather than reprimand or suspend him.

In *Geshner*, the Real Estate Commission had to find first that the applicant had lied on his application and then to select an appropriate remedy. This is similar to the instant case where the

Panel had to first find that the dog was dangerous and then select the appropriate remedy. In both cases, the underlying facts were not contested, merely the discretionary choice of the most extreme remedy. Also, in both instances, the administrative agency allowed improper evidence to be admitted and used the improper evidence as a basis for its decision.

In *Geshner*, the Court struggled with the likelihood that Mr. Geshner's case could be remanded to the Commission and that he could receive a subsequent fair hearing in light of the extent of the denial of his due process at the first hearing. The Court was concerned that although Mr. Geshner had misreported his information on his application, his penalty may have been different if he had received a fair hearing that had focused on the matter at hand, rather than drifting to other allegations. Ultimately, the Court decided to remand the case because the attorneys were largely at fault for the introduction of the improper evidence.

In the instant case, the dog meets the definition of dangerous. The question is the appropriate remedy. The Panel chose euthanasia in large part because it did not believe that Ms. Roberts would ever abide by the statutory conditions and sufficiently control her dog. The expression of concern in the November 5th decision regarding Ms. Roberts' trustworthiness and abilities clearly stems from the introduction of evidence which was outside of the July 2nd hearing. It seems unlikely that there is a way to excise the Panel's firm and unfavorable opinion of Ms. Roberts, which was compounded by the use of evidence outside of the record at the November 5th meeting. Of particular concern to the Court is the dissemination of the emails to all of the members of the SPCA by Ms. Peterson which may taint any future Panels.

Discussion – Dangerous Dog

After a hearing, "[t]he Panel may declare a dog to be dangerous if it finds by a *preponderance of the evidence* that the dog killed or inflicted serious injury upon a domestic

animal, provided the domestic animal was on the property of its owner or under the immediate control of its owner.” Del.Code Ann. tit. 7 § 1735(2). (emphasis added). *See also Leech v. Caldwell*, 2000 WL 33653457 (Del. Com. Pl.) at *3.

In this case, the poodle that was attacked and died from its injuries was on the property of its owner and under the immediate control of its owner. There is no factual dispute. Ms. Roberts has never contested these facts. The dog met the definition of “dangerous,” as required by the statute. This portion of the Panel’s decision was previously acknowledged as without error in the Court’s prior decision dated October 30, 2009.

Discussion – Euthanasia

Once a dog is determined to be “dangerous” by the Panel, the Panel has two options under the law. First, the Panel can order euthanasia under Del.Code Ann. tit. 7 § 1734(c). Second, the Panel can order an owner to comply with certain conditions to keep the dog under Del.Code Ann. tit. 7 § 1735(b) and (c).

In enacting the statutes, the General Assembly clearly did not intend every dangerous dog to be euthanized or it would not have provided another option. The Panel must determine, after finding a dog dangerous, if it will order euthanasia or impose conditions. In its previous decision, after the July 2, 2009 hearing, this Court found that the Panel had not sufficiently articulated its reasoning for the order of euthanasia and its decision was remanded. In its November 5th decision, the Panel goes into great detail to articulate its reasoning and provides a reviewable decision to this Court that may have met the standard of review by this Court. However, legal errors that amount to due process violations of Ms. Robert’s rights were also candidly revealed in the Panel’s decision.

It seems very unlikely, under the facts of this case, that if this matter was remanded Ms. Roberts could go back in front of this Panel, even with new members, and receive a fair and unbiased hearing. For this reason, the decision must be reversed.

It should be noted that issues of evidence, procedure and due process rights of litigants are difficult concepts for attorneys and judges. Certainly the members of the Dog Control Panel are selected for their expertise in dog training and behavior and not in legal matters. The opinion of this Court is not intended to criticize the Panel, who perhaps could have benefited from counsel's presence at their hearing and meeting. Rather, this opinion is intended to address a specific case regarding Ms. Roberts and her dog and to educate the Panel on the legal standards regarding its use of evidence for future hearings and deliberations.

Ms. Roberts has a property interest in her dog. Dogs are personal property. Del.Code Ann. tit 7 § 1708(a). The seizure of her dog by Animal Control invokes her rights to due process under Delaware law. Animal Control cannot take her dog without giving her a hearing. She is entitled to a fair hearing free from legal error including violations of her rights of due process. A decision of the Panel with legal errors cannot result in a taking of Ms. Roberts's dog.

Decision

For the foregoing reasons, the decision of the Dog Control Panel that the dog is dangerous is affirmed. The order that the dog be euthanized is reversed and the Panel is directed to enter a judgment in compliance with the order of this Court.

Ms. Roberts's must abide by the conditions of Del.Code Ann. tit. 7 § 1737 regarding payment of the outstanding boarding fees from the date of her dog's seizure until the date of the Panel's final order of judgment in compliance with this decision. Under the statute, Ms. Roberts has five days from the date of the final judgment to make

the payment in full. Once such payment has been made, her dog, Zoe, shall be released to her and she will be directed to comply with further conditions under the statute. It shall be unlawful for her to keep or maintain Zoe unless:

- (1) The dog is spayed or neutered;³
- (2) The dog owner procures and maintains liability insurance in the amount of at least \$100,000, covering any damage or injury which may be caused by such dog;
- (3) The dog is confined by its owner within a proper enclosure, and whenever outside of the proper enclosure the dog is securely muzzled and restrained by a substantial chain or leash, not exceeding 6 feet, and under the control of a responsible adult, or caged;
- (4) The dog owner displays, in a conspicuous manner, a sign on his/her premises warning that a dangerous dog is on the premises. The sign shall be visible and legible from the public highway or 100 feet, whichever is less; and
- (5) The dog owner immediately notifies the animal control agency when the dog is loose, unconfined, has attacked a human being or another domestic animal, has been moved to another address or dies.

Del.Code Ann. tit 7 § 1735(b). Ms. Roberts also may not sell or give away the dog to any one other than animal control. Del.Code Ann. tit. § 1735(c).

It should be noted that Del.Code Ann. § 1739 provides substantial fines for violations of the above stated conditions imposed upon an owner of a dangerous dog. Also, there is a provision that a dangerous dog that attacks a person or another animal again will be euthanized. § 1739.

IT IS SO ORDERED this 4th day of June, 2010.


The Honorable Anne Hartnett Reagle

³ Ms. Roberts testified at the hearing on July 2, 2009 that Zoe was spayed. Transcript p. 23.