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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0902-06T1

LIBERTY HUMANE SOCIETY, INC.,

Plaintiff-Appellant,

v.

FRED L. JACOBS, Commissioner,
N.J. Department of Health and
Senior Services, in his official
capacity, N.J. DEPARTMENT OF
HEALTH AND SENIOR SERVICES, FAYE
SORHAGE, Director, Office of
Infectious and Zoonotic Disease,
in her official capacity,
COLIN CAMPBELL, Assistant Director,
Office of Infectious and Zoonotic
Disease, in his official capacity,
JANET DEGRAF, Director, Office of
Communicable Disease, in her
official capacity, JOSEPH AIELLO,
Office of Animal Welfare,
in his official capacity,
OFFICE OF ANIMAL WELFARE,
OFFICE OF INFECTIOUS AND ZOOBOTIC
DISEASE, OFFICE OF COMMUNICABLE
DISEASE, DIVISION OF EPIDEMIOLOGY,
ENVIRONMENTAL AND OCCUPATIONAL
HEALTH, and RUTH CHARBONNEAU,
Director of Legal and Regulatory
Affairs for the Department of
Health and Senior Services, in her
official capacity,

Defendants-Respondents.

Submitted December 3, 2007 – Decided June 24, 2008

Before Judges Collester and C.S. Fisher.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, L-2270-06, and from the Final Agency Decision filed September 22, 2006, by the Director, Office of Legal and Regulatory Affairs, Department of Health and Senior Services.

Marshall, Dennehey, Warner, Coleman & Goggin, attorneys for appellant (Howard Z. Myerowitz, of counsel and on the brief).

Anne Milgram, Attorney General, attorney for respondents, (Patrick DeAlmeida, Assistant Attorney General, and Susan J. Dougherty, Deputy Attorney General, on the brief).

PER CURIAM

Liberty Humane Society (LHS), a non-profit corporation, was organized to protect the welfare of domestic companion animals, and manages and operates the municipal animal control facility for the City of Jersey City (the City). See N.J.S.A. 40:48-5.1. As such, LHS fulfills the City's statutory obligation to provide shelter for stray animals pursuant to N.J.S.A. 4:19-15.16 as well as other obligations pursuant to N.J.A.C. 8:23A-1 to 1.13. As of February 2006, the City Animal Control Office is under the supervision of the New Jersey Office of Infectious and Zoonotic Disease, which in turn is overseen by the New Jersey Division of Epidemiology, Environmental and Occupational Health, Office of Communicable Disease. At all relevant times in this matter, the

Department of Health and Senior Services (the Department) was the supervising authority.

On August 29, 2006, LHS filed an order to show cause and complaint in lieu of prerogative writs seeking to compel the Department to revoke the certification of Chief Certified Animal Control Officer Joseph Frank as well as Animal Control Officer Emanuel Machado. The Law Division motion judge denied the order to show cause and dismissed the complaint for lack of jurisdiction pursuant to R. 2:2-3(a)(2) and R. 2:2-4. On September 20, 2006, the Department of Health issued a denial letter in response to LHS's request for revocation of Frank's certification. LHS appeals from both the September 14, 2006 order dismissing the complaint and the Department's September 22, 2006 decision.

LHS's complaint was based on the following factual allegations of actions by Frank and Machado with respect to a dog owned by Vivian Lopez. On December 20, 2005, Jackie Rivera, the owner of a house at 23 Winfield Avenue in the City, called the animal control office and reported that Lopez's dog was running loose in her basement, making it impossible for her to do her laundry or read the utility meters. Rivera rented a closed-off area of the basement to Lopez, who lived there with her two children and her pit bull named Spanky. The apartment

had a separate entrance door. Rivera requested that the animal control officer remove the dog. Frank ordered Machado and two other officers, Alex Perez and John Ross, to enter the house when Lopez was at work, remove the dog, take it to the LHS shelter, and report it as a stray. Under N.J.S.A. 4:19-15.16, a stray dog that is not claimed or adopted within seven days of arrival at the shelter must be euthanized.

Two days later, on December 22, 2005, Machado, Perez, and Ross went to 23 Winfield Street to carry out the assignment given by Frank. When Perez and Ross saw that the basement area was an apartment and the dog was confined inside, they refused to enter and take the dog. They told Frank it was illegal for them to enter a private dwelling. However, Machado carried out Frank's orders. He went into the apartment, seized the dog, and took it to the LHS shelter where he signed an animal intake form indicating the dog was a stray. Furthermore, Machado left no written notice for Lopez advising that her dog had been seized by the Animal Control Office or giving information that the dog was taken to the LHS shelter where he could be reclaimed. Later that day, Lopez was told by a person who knew Perez that the dog has been taken to LHS and she reclaimed her pet. Machado issued three citations to Lopez: having a dog off leash in a common area; creating a public health nuisance; and failing to obtain a

dog license. On May 19, 2006, the citations were dismissed by the Fort Lee Municipal Court judge.

The statutory section governing the taking into custody or impoundment of stray dogs, provides as follows:

Any person appointed for the purpose by the governing body of the municipality shall take into custody and impound or cause to be taken into custody and impounded, and thereafter destroyed or offered for adoption as provided in this section:

(a) Any dog off the premises of the owner or of the person keeping or harboring said dog which said official or his agent or agents have reason to believe is a stray dog;

(b) Any dog off premises of the owner or of the person keeping or harboring said dog without a current registration tag on his collar;

(c) Any female dog in season off the premises of the owner or of the person keeping or harboring said dog;

(d) Any dog or other animal which is suspected to be rabid;

(e) Any dog or other animal off the premises of the owner reported to, or observed by, a certified animal control officer to be ill, injured or creating a threat to public health, safety or welfare, or otherwise interfering with the enjoyment of property.

If any animal so seized wears a collar or harness having inscribed thereon or attached thereto the name and address of any person or a registration tag, or the owner or the person keeping or harboring said animal is

known, any person authorized by the governing body shall forthwith serve on the person whose address is given on the collar, or on the owner or the person keeping or harboring said animal, if known, a notice in writing stating that the animal has been seized and will be liable to be offered for adoption or destroyed if not claimed within seven days after the service of the notice.

A notice under this section may be served either by delivering it to the person on whom it is to be served, or by leaving it at the person's usual or last known place of abode, or at the address given on the collar, or by forwarding it by post in a prepaid letter addressed to that person at his usual or last known place of abode, or to the address given on the collar.

Any person authorized by the governing body may cause an animal to be destroyed in a manner causing as little pain as possible and consistent with the provisions of R.S.4:22-19 or to be offered for adoption seven days after seizure; provided that:

(1) Notice is given as set forth above and the animal remains unclaimed; or,

(2) The owner or person keeping or harboring the animal has not claimed the animal and paid all expenses incurred by reason of its detention, including maintenance costs not exceeding \$4.00 per day; or,

(3) The owner or person keeping or harboring a dog which was unlicensed at the time of seizure does not produce a license and registration tag for the dog.

[N.J.S.A. 4:19-15.16 (emphasis added).]

Since Lopez's dog had been falsely represented by Machado to be a stray on the order of Frank and, in any case, the actions were in violation of N.J.S.A. 4:19-15.16, LHS reportedly was concerned about the consequences to it if the dog had been euthanized as required after seven days in the absence of being reclaimed or adopted. LHS hired an investigative agency to look into the matter and submit a report. Sworn statements were taken from Lopez, Perez, Ross, and others; both Frank and Machado declined to be interviewed. The report concluded that Frank decided to do a favor for a friend of his wife, who also worked for the City Animal Control Office, and directed Machado to act as alleged by LHS. LHS notified the Department of the infractions and requested that action be taken for revocation of the certifications of Frank and Machado. When no action was taken by the Department after several months of prodding by LHS, the action in lieu of prerogative writs was filed.

We first consider the question as to whether LHS has standing to pursue this matter. LHS asserts that Frank's and Machado's misconduct exposed it to direct and severe harm since there was the distinct possibility that Lopez's dog would be euthanized after seven days as an unwanted stray. It argues that it must rely on the representations of animal control officers in carrying out its legal duties, and if records are

falsified, its entire operation is jeopardized. That is, if it had euthanized Lopez's dog, LHS would have been exposed to legal liability as well as negative publicity that would have adversely effected their ability to raise funds as a non-profit entirely devoted to the proper care of domestic animals.

We conclude that LHS has standing to pursue this matter as the organization designated to operate the shelter in the City. Non-compliance with statutory requirements respecting impoundment of animals by the animal control office could well cause public doubts as to whether LHS employees were properly carrying out their functions. LHS also represents the public's interest in knowing that animals are being handled in accordance with the law and that officers charged with the responsibility of enforcing the law are properly carrying out their duties. As stated by the Supreme Court in In re Camden County, 170 N.J. 439, 446 (2002),

It is clear that standing to seek judicial review of an administrative agency's final action or decision is available to the direct parties to that administrative action as well as anyone who is affected or aggrieved in fact by that decision.

We first address the dismissal of LHS's action in lieu of prerogative writs for lack of jurisdiction. We agree with the motion judge's decision. R. 2:2-3(a)(2) and R. 2:2-4 "contemplate [] that 'every proceeding to review the action or

inaction of a state administrative agency [shall] be by appeal to the Appellate Division.'" Hosp. Ctr. at Orange v. Guhl, 331 N.J. Super. 322, 329 (App. Div. 2000) (quoting Central R.R. Neeld, 6 N.J. 172, 185, cert. denied, 357 U.S. 928, 78 S. Ct. 1373, 2 L. Ed. 2d 566 (1976)); Pascucci v. Vagott, 71 N.J. 40 (1976). Therefore, this court has exclusive jurisdiction to consider the claim of state administrative inaction as well as action. Pascucci, supra, 71 N.J. at 52; Guhl, supra, 331 N.J. Super. at 329. As we stated in Matthews v. Finley, 46 N.J. Super. 175, 177 (App. Div.), certif. denied, 25 N.J. 283 (1957), "[t]he term 'action,' found in [R. 2:2-3(a)] includes inaction."

LHS relies upon a footnote in Guhl which discusses a possible exception to the general rule in cases of "ministerial" actions. Id. at 329 n.2. A ministerial duty has been defined as one that is "absolutely certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion." Case v. Daniel C. McGuire, Inc., 53 N.J. Super. 494, 498 (Ch. Div. 1959). LHS argues that since the Department is charged with the protection and safety of the community, it was a ministerial function for the Department to revoke the certification of the two officers. However, the

Department must use its discretion to determine whether an inquiry or investigation is appropriate as well as whether revocation of the certification of an animal control officer is warranted. N.J.S.A. 4:19-15.16(b) authorizes the Department to set standards and determination eligibility requirements for certification, and it follows that the Department would also be authorized to determine when such certifications should be revoked. Because that decision requires judgment and discretion, it is not a ministerial function. Similarly, the State Commissioner of Health (the Commissioner) necessarily must use discretion in determining what legal processes "may be necessary properly to enforce and give effect to any of his powers or duties. . . ." N.J.S.A. 26:1A-15(h). Accordingly, the argument by LHS is without merit.

Furthermore, in this case LHS's prerogative writs action is moot since the Department rendered a final agency decision within three weeks of the time the civil complaint was filed. See Guhl, supra, 331 N.J. Super. at 330 (once the final agency has issued the decision, the action for prerogative writs is moot). Therefore, we affirm the decision of the Law Division judge to dismiss the complaint in lieu of prerogative writs based on lack of jurisdiction.

We now consider the substantive argument of LHS that the final agency decision of the Department should be reversed because the Department arbitrarily and capriciously refused to exercise its power to investigate the allegations and revoke the certifications of Frank and Machado. In its decision, the Department contends that the 2003 amendment of N.J.S.A. 4:19-15.16a(b)(2) requiring mandatory revocation of certifications of animal control officers convicted of or found civilly liable for animal cruelty is the only basis for revocation of the certifications of the officers, and that therefore there was no duty to investigate the factual allegations made by LHS.

We afford substantial deference to an agency's interpretation of the statute it is charged with enforcing, R & R Mktg., L.L.C. v. Brown-Forman Corp., 158 N.J. 170, 175 (1999), and we will reverse the final decision of an administrative agency only when it is arbitrary, capricious or unreasonable, or not supported by substantial credible evidence in the record as a whole, Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). However, we are not bound by an agency's interpretation of a statute or its determination of a strictly legal issue. In re Taylor, 158 N.J. 644, 658 (1999).

Under N.J.S.A. 26:1A-15(h), the Commissioner has a general responsibility to use legal process to enforce the statutes

under his authority. "Where the Legislature's intent is remedial, a court should construe a statute liberally." Young v. Schering Corp., 141 N.J. 16, 25 (1995). The Legislature gave the Department broad remedial powers to protect the safety of the community. We find that the argument that the statute does not require an investigation into the alleged unlawful activities by animal control officers is not in keeping with the remedial purpose of the governing statute.

The Department notes that both N.J.S.A. 4:19-15.16c, governing the responsibilities of animal control officers, and N.J.S.A. 4:19-15.16a, providing for the certification of animal control officers by the Department, are silent as to investigation of alleged misconduct or revocation of certifications of animal control officers, with the exception of N.J.S.A. 4:19-15.16a(b)(2) requiring automatic revocation for animal cruelty. The Department contends that it has no statutory duty to investigate allegations of misconduct, and suggests that either county societies for prevention of animal cruelty or the municipal authority may pursue such allegations.

Specifically, the Department points to N.J.S.A. 4:22-11.7, part of the Prevention of Cruelty to Animals Act, N.J.S.A. 4:22-1 to 56, which empowers the county societies for prevention of

animal cruelty to investigate and enforce all laws and ordinances enacted for the protection of animals.

But the Department is the only entity responsible for certifying animal control officers, and it alone may revoke the certification of an animal control officer. Moreover, it is alleged here that the officers violated provisions of a different statute, namely, N.J.S.A. 4:19-15.16, by taking a dog from a private home and surrendering it to LHS while falsifying records and failing to give requisite notice to the dog owner in clear violation of the statute. Because these violations are not governed by N.J.S.A. 4:22-1 to -56, the county societies have no authority to enforce them.

The Department's alternative argument is that under N.J.S.A. 4:19-15.16b, enforcement of N.J.S.A. 4:19-15.16 should be performed by the municipal governing body which employs the animal control officers. N.J.S.A. 4:19-15.16b provides:

The governing body of a municipality shall, within three years of the effective date of P.L. 1983, c. 525, appoint a certified animal control officer who shall be responsible for animal control within the jurisdiction of the municipality and who shall enforce and abide by the provisions of . . . (C. 4:19-15.16).

It is correct that since N.J.S.A. 4:19-15.16b requires the municipality to appoint an animal control officer who is certified and who shall impound animals according to the

requirements of N.J.S.A. 4:19-15.16, the municipality may discharge an animal control officer who does not comply with the statute. However, the statute does not give the municipality the authority to either confer or revoke certification of animal control officers. Only the Department possesses that authority. At issue here is not whether the officers may remain employees of the City in good standing, but whether they are fit to remain as certified animal control officers in any municipality in the state. The power to make that determination lies not with the municipality that employs them but with the state agency that certified the officers in the first place.

Statutes dealing with the same subject should be read in pari materia and construed so that, to the extent possible, each can be given its full effect. Saint Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 14-15 (2005); Walcott v. Allstate N.J. Ins. Co., 376 N.J. Super. 384, 391 (App. Div. 2005); see also Davis v. Heil, 132 N.J. Super. 283, 293 (App. Div.), aff'd, 68 N.J. 423 (1975) (statutory interpretations leading to "absurd or unreasonable results are to be avoided"). The statute which governs the activities of animal control officers and the statute which empowers the Department to certify animal control officers should be read in pari materia because they deal with the same subject. While the statute does not explicitly state that the

Department must investigate allegations of misconduct regarding certified animal control officers, in order to avoid an absurd result given that there is no other entity authorized to perform this function, the Department implicitly has a duty to investigate the allegations and take appropriate action by revoking certification if warranted.

The legislative history of N.J.S.A. 4:19-15.16 and 15.16a supports this conclusion. In response to a concern that animal control officers were not adequately and uniformly trained, the New Jersey Legislature enacted N.J.S.A. 4:19-15.16a and 4:19-15.16b in 1983. L. 1983, c. 525, §§3-4. N.J.S.A. 4:19-15.16a directs the Department to establish training and educational requirements for the certification of animal control officers as well as issue certificates to those individuals who meet the requirements. The stated purpose of N.J.S.A. 4:19-15.16a was to provide more professionalism and uniformity in standards for animal control officers so that every municipality would carry out the task of animal control uniformly. It is the certification process that insures uniformity of training among certified animal control officers. Accordingly, the Department has promulgated rules in N.J.A.C. 8:23A-2.2 to 8:23A-2.5 which describe in detail the course requirements and knowledge necessary for certification as an animal control officer so that

when a municipality hires a certified animal control officer, it is with the knowledge that the individual has met the requirements of the state agency entrusted with educating and training people for this position.

It defies logic to argue that the Legislature intended for the Commissioner to establish standards for the training of animal control officers but did not create a mechanism to revoke the certification of those who violate their statutory obligations. Because the Department has unilateral discretion over certification, it follows that the Department would have the same discretion to determine when certification must be revoked. To take the Department's argument to an extreme, an animal control officer once certified could transgress any statutes regarding impoundment of animals and never lose his or her certification as long as the officer is not convicted of animal cruelty. Because the Department is the only entity with the authority to do so, it must investigate allegations of misconduct in order to determine whether a certification should be revoked.

Furthermore, as noted by LHS, in spite of its argument that it may revoke certifications only in the instance of animal cruelty, the Department has in fact revoked certifications in other instances. The cases admittedly involved officers who had

been convicted of crimes that directly impacted on their ability to continue as animal control officers. One pleaded guilty to falsifying documents regarding a rabid animal, and the other was convicted of theft by deception and misconduct in connection with his duties. Nonetheless, both letters of revocation contained the following language:

As the agency responsible for certification of animal control officers, it is this Department's obligation to ensure the health and safety of the public with whom you may come into contact. If there is any justifiable reason for this Department to believe that your continued certification as an animal control officer poses a threat to the public health and safety, it is the Department's obligation to initiate proceedings for the revocation of that certification.


Since the Department acknowledged that it is charged with revoking certifications of animal control officers when those officers pose "a threat to the health and safety" of the community, it should follow that allegations of officers willfully and illegally taking a dog from its owner and falsifying records to claim it a stray so as to expose it to adoption by another or euthanasia calls for the Department to take action. It is both arbitrary and capricious for the Department to ignore its duty to determine if revocation of certification is required. Compare Div. of the N.J. Real Estate Comm'n v. Ponsi, 39 N.J. Super. 526, 531 (App. Div. 1956) ("It

seems inconceivable that the Legislature intended to establish one standard for the issuance of a license and another for its renewal or revocation.").

As stated by our Supreme Court, "A statute often speaks as plainly by inference, and by means of the purpose which underlies it, as in any other manner. That which is clearly implied is as much a part of the law as that which is expressed." In re Heller, 73 N.J. 292, 302 (1977) (quoting Ward v. Scott, 11 N.J. 117, 123 (1952)). A license or certification granted by an agency can be revoked by that agency when the qualification for the license or certification no longer exists, and the agency has a duty to consider serious allegations against the officers it has certified to serve the public. See Id. at 303-04.

Therefore, we reverse the Department's determination that it lacked authority to investigate or revoke the certifications of the animal control officers and remand the case to the Department to review and consider the allegations as well as make findings of fact to create a record appropriate for appellate review.

Affirmed in part. Reversed in part.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION