STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE HUMANE SOCIETY OF THE UNITED STATES, SHARON AND RICHARD CHAMBERS, MIRIAM BARKLEY, SHEREE THOMAS, AND CONNIE CREWS,	)	
Petitioners,	)	
vs.	)	Case No. 07-1503RU
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,	)	
Respondent.	)	

FINAL ORDER

A formal hearing was not held before J. D. Parrish, Administrative Law Judge, in this case. Instead, the parties agreed that the matter would be decided based upon the Parties' Joint Stipulated Facts. At all times the parties have been represented by counsel as follows:

APPEARANCES

For Petitioner: Marcy I. LaHart, Esquire
Marcy I. LaHart, P.A.
711 Talladega Street
West Palm Beach, Florida 33405-1443

For Respondent: James R. Kelly, Esquire
Florida Department of Agriculture
and Consumer Services
Mayo Building, Suite 520
407 South Calhoun Street
Tallahassee, Florida 32399-0800

STATEMENT OF THE ISSUE

Whether statements issued by the Respondent's employees constitute unpromulgated rules in violation of Section 120.54(1)(a), Florida Statutes (2007).

Whether Florida Administrative Code Proposed Rule 5C-27.001, incorporating a form is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

The Petitioners, The Humane Society of the United States, Sharon and Richard Chambers, Miriam Barkley, Sheree Thomas, and Connie Crews (Petitioners), filed a Request for Administrative Hearing (hereinafter Petition) for the purpose of challenging agency statements as an unpromulgated rule. The agency [Respondent, Department of Agriculture and Consumer Services (Respondent or Department)], by and through its Division Director had issued a written memorandum dated July 6, 2006 (the memorandum), intended for all veterinarians in the State of Florida, but transmitted by the Florida Veterinary Medical Association. The Petitioners assert that the memorandum constituted an unpromulgated rule. Additionally, the Respondent created a form known in this record as the Official Certificate of Veterinary Inspection (OCVI) form that it requires in connection with the sale of pets. The Petition also alleged the OCVI form is relied upon by the Department in violation of

Section 120.54(1)(a), Florida Statutes (2007). The case was filed with the Division of Administrative Hearings on April 2, 2007.

A Notice of Hearing was issued on April 9, 2007, that set the formal hearing in this matter for April 30, 2007. A Motion to Continue Final Hearing and Stay Proceedings was filed by the Respondent on April 18, 2007. That motion represented that the Department had initiated rule-making and that a rule development workshop had been scheduled for May 15, 2007. In accordance with Section 120.56(4)(e)2. Florida Statutes (2007), the request to stay was granted pending the outcome of rulemaking and any proceedings involving challenges to the proposed rules that might be generated from the rule making process.

On July 2, 2007, the Department filed a Second Notice to Hearing Officer that represented on June 27, 2007, the Respondent transmitted to the Florida Administrative Weekly for publication on July 6, 2007, Notices of Proposed Rules for the following rules: 5C-24.001; 5C-24.002; 5C-24.003; 5C-27.001 (includes adoption of form DACS-09085-the OCVI form); and 5C-28.001. At that time the Respondent did not know if anyone would challenge the proposed rules.

Also on July 2, 2007, the Petitioners filed a Status Update that represented the Department had only sought to adopt one of the statements challenged as an unpromulgated rule and that the

intention to adopt only one of the statements still left the Petitioners' unresolved issues. Moreover, the Petitioners expressed concern about another statement made by a Department employee during the rule-making process. This second statement (known in the record as the "Fuchs statement") created additional concerns for the Petitioners. As such, Petitioners represented their intent to challenge the proposed rule (incorporating the OCVI form) and to add the Fuchs statement to the Petition as a second unpromulgated statement of the Department.

A telephone conference call was conducted with the parties on July 13, 2007, to verify the status of the case and to schedule a hearing. A second conference call on August 3, 2007, was conducted to further address the outstanding issues. During that call the Petitioners' First Amended Request for Administrative Hearing was allowed. This amended claim seeks to invalidate the proposed rule and the unpromulated statements of the Department (both the July 6, 2006 memorandum and the Fuchs statement). As no other person had sought to challenge the proposed rule(s), in an economy of effort, the two challenges proceeded: the Section 120.56(4) challenge as to the memorandum and the Fuchs statement, and the Section 120.56(2) challenge as to the OCVI form incorporated by reference into the newly proposed rule.

The parties agreed to proceed to a resolution without a formal hearing. At that time the parties announced that they would file proposed final orders or motions to dismiss based upon a stipulated record. It is undisputed that the terms of the memorandum were not part of the proposed rules generated. Further, the Petitioners assert that the Fuchs statement contravenes Section 474.202(5), Florida Statutes (2007). As to the OCVI form that was addressed by the proposed rule, the Petitioners assert that the proposed definition of "healthy" as encompassed within the form is an invalid exercise of legislative authority in that it modifies or contravenes Section 828.29, Florida Statutes (2007), and is arbitrary and capricious.

On August 16, 2007, the parties filed a statement of Joint Stipulated Facts. Thereafter the parties were afforded another conference call. Subsequently, an Order was entered on August 28, 2007, that provided in pertinent part:

> . . . The parties have represented they will file motions based upon the stipulated record in this matter and that a formal evidentiary hearing will not be necessary. Presumably the parties will stipulate to all material facts upon which the undersigned is to rely in reaching a final decision. The parties have agreed to file any additional stipulations of fact and any additional legal argument on the merits of this case no later than 5:00 p.m., September 21, 2007. This order is entered to memorialize that agreement. Accordingly, it is

ORDERED:

1. The parties are to file any additional stipulations of fact and/or argument on the record in the form of a proposed order not later than 5:00 p.m., September 21, 2007.

2. If the parties are unable to agree on all facts needed to resolve the issues of this case, the parties are directed to file a stipulated statement of the time needed to try the matter, proposed dates for the scheduling of the hearing, and any other information pertinent to the timely resolution of this cause. The parties will not be afforded additional time to resolve the case or reach stipulations of fact.

3. The failure to timely respond to this Order will be deemed a waiver of the party's decision to file a proposed order. [Emphasis Added.]

Both parties timely filed Proposed Final Orders that have been fully considered in the preparation of this Final Order. This Final Order is entered based upon the stipulated record. Proposed Findings of Fact that may have been proffered that exceed the language of the parties' stipulation or are unsupported by the stipulation have been rejected.

FINDINGS OF FACT

The following are the stipulated facts (verbatim) as agreed by the parties:

1. In November and December 2005, Division of Animal Industry inspectors conducted inspections of various pet

facilities located throughout Florida and found 11 violations regarding OCVIs.

2. Dr. Thomas J. Holt, D.V.M., State Veterinarian and Director of Animal Industry, is signatory on a July 2006 Memorandum directed to "All Florida Veterinarians," which purports to provide "guidelines and reminders" to veterinarians regarding the issuance of OCVIs pursuant to Section 828.29, Florida Statutes. The memorandum is attached as Exhibit A.

3. Respondent does not license or regulate veterinarians in Florida.

4. Respondent does not maintain a database of veterinarians licensed or located in Florida.

5. The United States Department of Agriculture (USDA) maintains a database of USDA-accredited veterinarians.

6. The July 6, 2006, memorandum was provided by Respondent to the United States Department of Agriculture.

7. Respondent asked for the assistance of the United States Department of Agriculture to distribute the July 6, 2006, memorandum to all USDA-accredited veterinarians located in Florida.

8. The July 6, 2006 memorandum was challenged by Petitioners as an unpromulgated rule on April 2, 2007.

9. The Respondent agency published a Notice of Proposed Rule in the Florida Administrative Weekly on July 6, 2007, to

adopt the Official Certificate of Veterinary Inspection for Intrastate Sale of Dog or Cat (OCVI form) as a rule.

10. On May 15, 2007, the Department conducted a "Pet Certification Rules Workshop" regarding proposed changes to the OCVI.

11. Current form DACS-09085, Official Certificate of Veterinary Inspections for Sale of Dog or Cat, was adopted by Florida Administrative Code Rule 5C-24.003, in 1999. This rule is currently in effect.

12. A statement of Department Employee Diane Fuchs was recorded, and such statement is attached hereto as Exhibit B.

13. None of the Petitioners have filed complaints with Respondent concerning any of the allegations contained in Petitioners' Request for Administrative Hearing or Amended Request for Administrative Hearing.

The following facts are from the materials noted above:

14. The "Exhibit A" memorandum referenced above that was signed by the Department's State Veterinarian/Director of the Division of Animal Industry stated on its face, "This fax is being sent by the Florida Veterinary Medical Association at the request of the State Veterinarians Office." The memorandum provided, in pertinent part:

> TO: All Florida Veterinarians
>
> SUBJECT: OCVI for Sale of a Dog or Cat

Dear Florida Veterinarian:

Recent audits of Official Certificate of Veterinary Inspection's (OCVI) for Sale of a Dog or Cat by the Division of Animal Industry (DAI), Florida Department of Agriculture and Consumer Service (FDACS) shows an increasing number of violations related to the use and issuance of such certificates by veterinarians. Each violation compromises the integrity of the certificate. Previously violations were handled via personal communication and/or written correspondence with the veterinarian outlining the violation and recommended actions on how to correct them.

Beginning July 1, 2006, the DAI will implement enforcement of such violations via Administrative Fine Procedure. For this reason, we are reminding veterinarians of the seriousness of this issue and are providing the following guidelines and reminders:

Veterinarians are responsible for the security and proposed use of all OCVI's and must take reasonable care to prevent misuse of them. Reasonable care means that the veterinarian must retain all copies of the OCVI until he or she has inspected the animal and fully completed and signed the document(s).

Incomplete, blank, or unsigned OCVI books or certificates cannot be sold to, or be in the possession of, a pet seller whether they are a breeder, broker, or retail pet store. Possession by a seller of incomplete or unsigned OCVI or of OCVI books compromises the integrity and security of the documents for which the veterinarian is responsible.

The issuing veterinarian's statement certifies that the vaccines, anthelmintics, and diagnostic tests were administered by or under the direction of the issuing

> veterinarian. The manufacturer, type, lot #, expiration date, and date of administration must be detailed in the appropriate blocks of all OCVI.
>
> Vaccinations and/or anthelmintics administered by anyone other than the issuing veterinarian must be confirmed and documented before listing them on the OCVI.
>
> "Vaccines given by breeder" is not an acceptable entry unless the vaccinations were administered by or under the direction of the issuing veterinarian who has personal knowledge that such vaccines were actually administered to the animal identified on the OCVI.
>
> OCVI should not be issued for a dog or cat that has been found to have internal or external parasites, excluding fleas and ticks. This includes, but is not limited to, coccidian and/or ear mites. The dispensing of medicine to be administered by the owner for treatment is not sufficient for the veterinarian to issue the OCVI. Such animals must be treated and be negative before the sale can occur.

15. The statement attributed to Diana Fuchs (noted as Exhibit B above) was:

> You're correct because the Veterinary Practice Act seeks supervision and it clearly defines supervision. The pet law does not state "supervision," it says "direction." It doesn't say whether it's direct supervision, it says "direction." As an employer, you can direct an employee to do something.

16. By and through the rule making process previously described the Respondent sought to promulgate a rule (5C-27.001)

that by reference adopts and incorporates form DACS-09085, the OCVI for Intrastate Sale of Dog or Cat Revised in July 2007.

17. The OCVI form provides, in part:

> ISSUING VETERINARIAN'S CERTIFICATION: I hereby certify that the described animal was examined by me on the date shown; that the vaccines, anthelmintics, and diagnostic tests indicated herein, were administered by me, or under my direction; said animal is found to be healthy in that to the best of my knowledge it exhibits no sign of contagious or infectious diseases and has no evidence of internal or external parasites, including coccidiosis and ear mites, but excluding fleas and ticks; and to the best of my knowledge the animal has not been exposed to rabies, nor did the animal originate from an area under a quarantine for rabies.

18. The Petitioner's First Amended Request for Administrative Hearing provided:

> 4. This petition is filed on behalf of The Humane Society of the United States ("The HSUS"). The HSUS is a nonprofit animal protection organization headquartered in Washington, (sic)DC. The HSUS Southeastern Regional Office is at 1624 Metropolitan Circle, Suite B Tallahassee, FL 32308.
> 5. The HSUS is the largest animal protection organization in the United States, representing over 9.5 million members and constituents, including more than 500,000 members and constituents residing in Florida. For decades the HSUS has been actively involved in educating the general public regarding the persistent health and behavioral problems that are common among puppies marketed by retail pet stores. This suit is bought [sic] on behalf of the HSUS and its Florida members. The HSUS investigates puppy mill and pet store

cruelty complaints and offers its members, constituents and the general public guidance and advice as to how to select healthy, well bred puppies. By ensuring that puppies sold in retail pet stores actually receive the statutorily mandated vaccines and antelmintics, the health and welfare of puppies will be improved. Further, by eliminating from sale puppies that harbor potentially dangerous zoonotic diseases, not only is the public health protected but breeding facilities where the puppies originate and the pet stores that market the puppies have incentive to improve the often overcrowded and unsanitary conditions to which causes the puppies to be infested with internal parasites.

6. A recent email survey revealed that more than 70 HSUS constituents have purchased puppies from Florida pet stores.

7. This petition is also filed on behalf of Richard and Sharon Chambers, 5920 Our Robbies Rd., Jupiter, FL 33458. The Chambers purchased two puppies from Precious Puppy in Jupiter, Florida, and were provided OCVI's, signed by Dr. Dale Mitchell, DVM, but stamped with the statement "Original Vaccines Done by Breeder or Breeder's Veterinarian." Accordingly, the Chambers cannot verify if the vaccines indicated on the health certificate, and "certified" by Dr. Mitchell, were actually administered to their puppies. One of the puppies developed kennel cough, in spite of supposedly having been vaccinated against it. The kennel cough progressed to pneumonia and required emergency veterinary care.

8. This petition is also filed on behalf of Miriam Barkley, who lives at 600 SW 13th Avenue #7, Ft. Lauderdale, FL 33312. Ms. Barkley purchased a Yellow Labrador Retriever puppy from Puppy Palace in Hollywood, Florida and was provided an OCVI. At 13 weeks of age the puppy has bilateral hip dysplasia with severe right sided coxal subluxation and will require thousands of dollars worth of surgery, if she is even a

candidate for the surgery. Otherwise she must be euthanized. In spite of the requirement that each pet dealer provide consumers with a certificate of veterinary inspection signed by a veterinarian that certifies that "the animal was found to have been healthy at the time of the veterinary examination" the OCVI she was provided contains no such certification.

9. This petition is also filed on behalf of Sheree Thomas, 874 Hibiscus Street, Boca Raton, FL 33486. Ms. Thomas was sold a puppy by Puppy Palace of Boynton Beach, and was given an OCVI upon which the attesting veterinarian's signature had been forged. Her puppy contracted distemper, a contagious disease for which the puppy had supposedly been vaccinated.

10. Petitioner Connie Crews purchased two puppies from Puppy Palace in Hollywood, FL. One puppy, Trinity, suffered kennel cough that developed into severe bronchial pneumonia for which she was hospitalized. Petitioner Connie Crews incurred more than $4,000 in veterinary expenses saving Trinity's life. The other puppy, Neo, also had kennel cough, and suffers a bone defect in both shoulders. Petitioner Crews was provided an OCVI with each puppy, indicating that the puppies had been vaccinated for kennel cough. However, the OCVIs were not signed by the attesting veterinarian, Dr. William Rasberry, DVM, but rather had been stamped with a signature stamp which had been provided to the pet store.

19. For purposes of this order the foregoing allegations have been deemed true or accurate. No evidence or stipulations of fact regarding the Petitioners was presented.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.54, and 120.56, Fla. Stat. (2007).

21. Section 120.52(15), Florida Statutes (2007), defines "rule." That section provides, in part:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

22. Section 120.54(1)(a), Florida Statutes (2007), provides:

> Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

23. Section 120.56, Florida Statutes (2007), provides in pertinent part:

> (1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.--
>
> (a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

(b) The petition seeking an administrative determination must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by it.

(2) CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.--

(a) Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule by filing a petition seeking such a determination with the division within 21 days after the date of publication of the notice required by s. 120.54(3)(a), within 10 days after the final public hearing is held on the proposed rule as provided by s. 120.54(3)(c), within 20 days after the preparation of a statement of estimated regulatory costs required pursuant to s. 120.541, if applicable, or within 20 days after the date of publication of the notice required by s. 120.54(3)(d). The petition shall state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. The petitioner has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. Any person who is substantially affected by a change in the proposed rule may seek a determination of the validity of such change. Any person not substantially affected by the proposed rule as initially noticed, but who is substantially affected by the rule as a result of a change, may challenge any provision of the rule and is not limited to challenging the change to the proposed rule.

(b) The administrative law judge may declare the proposed rule wholly or partly invalid. Unless the decision of the administrative law judge is reversed on appeal, the proposed rule or provision of a proposed rule declared invalid shall not be adopted. However, the agency may proceed with all other steps in the rulemaking process, including the holding of a factfinding hearing. In the event part of a proposed rule is declared invalid, the adopting agency may, in its sole discretion, withdraw the proposed rule in its entirety. The agency whose proposed rule has been declared invalid in whole or part shall give notice of the decision in the first available issue of the Florida Administrative Weekly.

(c) When any substantially affected person seeks determination of the invalidity of a proposed rule pursuant to this section, the proposed rule is not presumed to be valid or invalid.

* * *

(4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES; SPECIAL PROVISIONS.--

(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

(b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. If a hearing is held and the petitioner proves the allegations of the petition, the agency

shall have the burden of proving that rulemaking is not feasible and practicable under s. 120.54(1)(a).

(c) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order. The division shall transmit a copy of the final order to the Department of State and the committee. The Department of State shall publish notice of the final order in the first available issue of the Florida Administrative Weekly.

(d) When an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

(e)1. If, prior to a final hearing to determine whether all or part of any agency statement violates s. 120.54(1)(a), an agency publishes, pursuant to s. 120.54(3)(a), proposed rules that address the statement, then for purposes of this section, a presumption is created that the agency is acting expeditiously and in good faith to adopt rules that address the statement, and the agency shall be permitted to rely upon the statement or a substantially similar statement as a basis for agency action if the statement meets the requirements of s. 120.57(1)(e).

2. If, prior to the final hearing to determine whether all or part of an agency statement violates s. 120.54(1)(a), an agency publishes a notice of rule development which addresses the statement pursuant to s. 120.54(2), or certifies that such a notice has been transmitted to the Florida Administrative Weekly for publication, then such publication shall

constitute good cause for the granting of a stay of the proceedings and a continuance of the final hearing for 30 days. If the agency publishes proposed rules within this 30-day period or any extension of that period granted by an administrative law judge upon showing of good cause, then the administrative law judge shall place the case in abeyance pending the outcome of rulemaking and any proceedings involving challenges to proposed rules pursuant to subsection (2).

* * *

4. If an agency fails to adopt rules that address the statement within 180 days after publishing proposed rules, for purposes of this subsection, a presumption is created that the agency is not acting expeditiously and in good faith to adopt rules. If the agency's proposed rules are challenged pursuant to subsection (2), the 180-day period for adoption of rules is tolled until a final order is entered in that proceeding.

5. If the proposed rules addressing the challenged statement are determined to be an invalid exercise of delegated legislative authority as defined in s. 120.52(8)(b)-(f), the agency must immediately discontinue reliance on the statement and any substantially similar statement until the rules addressing the subject are properly adopted.

(f) All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be consolidated with a proceeding under any other section of this chapter. Nothing in this paragraph shall be construed to prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e). (Emphasis Added.)

24. Section 828.29, Florida Statutes (2007), provides, in pertinent part:

> (1)(a) For each dog transported into the state for sale, the tests, vaccines, and anthelmintics required by this section must be administered by or under the direction of a veterinarian, licensed by the state of origin and accredited by the United States Department of Agriculture, who issues the official certificate of veterinary inspection. The tests, vaccines, and anthelmintics must be administered no more than 30 days and no less than 14 days before the dog's entry into the state. The official certificate of veterinary inspection certifying compliance with this section must accompany each dog transported into the state for sale.
>
> (b) For each dog offered for sale within the state, the tests, vaccines, and anthelmintics required by this section must be administered by or under the direction of a veterinarian, licensed by the state and accredited by the United States Department of Agriculture, who issues the official certificate of veterinary inspection. The tests, vaccines, and anthelmintics must be administered before the dog is offered for sale in the state, unless the licensed, accredited veterinarian certifies on the official certificate of veterinary inspection that to inoculate or deworm the dog is not in the best medical interest of the dog, in which case the vaccine or anthelmintic may not be administered to that particular dog. Each dog must receive vaccines and anthelmintics against the following diseases and internal parasites:
>
> 1. Canine distemper.
>
> 2. Leptospirosis.

3. Bordetella (by intranasal inoculation or by an alternative method of administration if deemed necessary by the attending veterinarian and noted on the health certificate, which must be administered in this state once before sale).

4. Parainfluenza.

5. Hepatitis.

6. Canine parvo.

7. Rabies, provided the dog is over 3 months of age and the inoculation is administered by a licensed veterinarian.

8. Roundworms.

9. Hookworms.

If the dog is under 4 months of age, the tests, vaccines, and anthelmintics required by this section must be administered no more than 21 days before sale within the state. If the dog is 4 months of age or older, the tests, vaccines, and anthelmintics required by this section must be administered at or after 3 months of age, but no more than 1 year before sale within the state.

(2)(a) For each cat transported into the state for sale, the tests, vaccines, and anthelmintics required by this section must be administered by or under the direction of a veterinarian, licensed by the state of origin and accredited by the United States Department of Agriculture, who issues the official certificate of veterinary inspection. The tests, vaccines, and anthelmintics must be administered no more than 30 days and no less than 14 days before the cat's entry into the state. The official certificate of veterinary inspection certifying compliance with this section must accompany each cat transported into the state for sale.

(b) For each cat offered for sale within the state, the tests, vaccines, and anthelmintics required by this section must be administered by or under the direction of a veterinarian, licensed by the state and accredited by the United States Department of Agriculture, who issues the official certificate of veterinary inspection. The tests, vaccines, and anthelmintics must be administered before the cat is offered for sale in the state, unless the licensed, accredited veterinarian certifies on the official certificate of veterinary inspection that to inoculate or deworm the cat is not in the best medical interest of the cat, in which case the vaccine or anthelmintic may not be administered to that particular cat. Each cat must receive vaccines and anthelmintics against the following diseases and internal parasites:

1. Panleukopenia.

2. Feline viral rhinotracheitis.

3. Calici virus.

4. Rabies, if the cat is over 3 months of age and the inoculation is administered by a licensed veterinarian.

5. Hookworms.

6. Roundworms.

If the cat is under 4 months of age, the tests, vaccines, and anthelmintics required by this section must be administered no more than 21 days before sale within the state. If the cat is 4 months of age or older, the tests, vaccines, and anthelmintics required by this section must be administered at or after 3 months of age, but no more than 1 year before sale within the state.

(3)(a) Each dog or cat subject to subsection (1) or subsection (2) must be

accompanied by a current official certificate of veterinary inspection at all times while being offered for sale within the state. The examining veterinarian must retain one copy of the official certificate of veterinary inspection on file for at least 1 year after the date of examination. At the time of sale of the animal, one copy of the official certificate of veterinary inspection must be given to the buyer. The seller must retain one copy of the official certificate of veterinary inspection on record for at least 1 year after the date of sale.

(b) The term "official certificate of veterinary inspection" means a legible certificate of veterinary inspection signed by the examining veterinarian licensed by the state of origin and accredited by the United States Department of Agriculture, that shows the age, sex, breed, color, and health record of the dog or cat, the printed or typed names and addresses of the person or business from whom the animal was obtained, the consignor or seller, the consignee or purchaser, and the examining veterinarian, and the veterinarian's license number. The official certificate of veterinary inspection must list all vaccines and deworming medications administered to the dog or cat, including the manufacturer, vaccine, type, lot number, expiration date, and the dates of administration thereof, and must state that the examining veterinarian warrants that, to the best of his or her knowledge, the animal has no sign of contagious or infectious diseases and has no evidence of internal or external parasites, including coccidiosis and ear mites, but excluding fleas and ticks. The Department of Agriculture and Consumer Services shall supply the official intrastate certificate of veterinary inspection required by this section at cost.

(c) The examination of each dog and cat by a veterinarian must take place no more than 30 days before the sale within the state. The examination must include, but not be limited to, a fecal test to determine if the dog or cat is free of internal parasites, including hookworms, roundworms, tapeworms, and whipworms. If the examination warrants, the dog or cat must be treated with a specific anthelmintic. In the absence of a definitive parasitic diagnosis, each dog or cat must be given a broad spectrum anthelmintic. Each dog over 6 months of age must also be tested for heartworms. Each cat must also be tested for feline leukemia before being offered for sale in the state. All of these tests must be performed by or under the supervision of a licensed veterinarian, and the results of the tests must be listed on the official certificate of veterinary inspection.
(d) All dogs and cats offered for sale and copies of certificates held by the seller and veterinarian are subject to inspection by any agent of the Department of Agriculture and Consumer Services, any agent of the United States Department of Agriculture, any law enforcement officer, or any agent appointed under s. 828.03.
(Emphasis Added)

(4) A person may not transport into the state for sale or offer for sale within the state any dog or cat that is less than 8 weeks of age.

(5) If, within 14 days following the sale by a pet dealer of an animal subject to this section, a licensed veterinarian of the consumer's choosing certifies that, at the time of the sale, the animal was unfit for purchase due to illness or disease, the presence of symptoms of a contagious or infectious disease, or the presence of internal or external parasites, excluding fleas and ticks; or if, within 1 year following the sale of an animal subject to

this section, a licensed veterinarian of the consumer's choosing certifies such animal to be unfit for purchase due to a congenital or hereditary disorder which adversely affects the health of the animal; or if, within 1 year following the sale of an animal subject to this section, the breed, sex, or health of such animal is found to have been misrepresented to the consumer, the pet dealer shall afford the consumer the right to choose one of the following options:

(a) The right to return the animal and receive a refund of the purchase price, including the sales tax, and reimbursement for reasonable veterinary costs directly related to the veterinarian's examination and certification that the dog or cat is unfit for purchase pursuant to this section and directly related to necessary emergency services and treatment undertaken to relieve suffering;

(b) The right to return the animal and receive an exchange dog or cat of the consumer's choice of equivalent value, and reimbursement for reasonable veterinary costs directly related to the veterinarian's examination and certification that the dog or cat is unfit for purchase pursuant to this section and directly related to necessary emergency services and treatment undertaken to relieve suffering; or

(c) The right to retain the animal and receive reimbursement for reasonable veterinary costs for necessary services and treatment related to the attempt to cure or curing of the dog or cat.

Reimbursement for veterinary costs may not exceed the purchase price of the animal. The cost of veterinary services is reasonable if comparable to the cost of similar services rendered by other licensed veterinarians in proximity to the treating veterinarian and the services rendered are

appropriate for the certification by the veterinarian.

(6) A consumer may sign a waiver relinquishing his or her right to return the dog or cat for congenital or hereditary disorders. In the case of such waiver, the consumer has 48 normal business hours, excluding weekends and holidays, in which to have the animal examined by a licensed veterinarian of the consumer's choosing. If the veterinarian certifies that, at the time of sale, the dog or cat was unfit for purchase due to a congenital or hereditary disorder, the pet dealer must afford the consumer the right to choose one of the following options:

(a) The right to return the animal and receive a refund of the purchase price, including sales tax, but excluding the veterinary costs related to the certification that the dog or cat is unfit; or

(b) The right to return the animal and receive an exchange dog or cat of the consumer's choice of equivalent value, but not a refund of the veterinary costs related to the certification that the dog or cat is unfit.

(7) A pet dealer may specifically state at the time of sale, in writing to the consumer, the presence of specific congenital or hereditary disorders, in which case the consumer has no right to any refund or exchange for those disorders.

(8) The refund or exchange required by subsection (5) or subsection (6) shall be made by the pet dealer not later than 10 business days following receipt of a signed veterinary certification as required in subsection (5) or subsection (6). The consumer must notify the pet dealer within 2 business days after the veterinarian's

determination that the animal is unfit. The written certification of unfitness must be presented to the pet dealer not later than 3 business days following receipt thereof by the consumer.

(9) An animal may not be determined unfit for sale on account of an injury sustained or illness contracted after the consumer takes possession of the animal. A veterinary finding of intestinal or external parasites is not grounds for declaring a dog or cat unfit for sale unless the animal is clinically ill because of that condition.

(10) If a pet dealer wishes to contest a demand for veterinary expenses, refund, or exchange made by a consumer under this section, the dealer may require the consumer to produce the animal for examination by a licensed veterinarian designated by the dealer. Upon such examination, if the consumer and the dealer are unable to reach an agreement that constitutes one of the options set forth in subsection (5) or subsection (6) within 10 business days following receipt of the animal for such examination, the consumer may initiate an action in a court of competent jurisdiction to recover or obtain reimbursement of veterinary expenses, refund, or exchange.

(11) This section does not in any way limit the rights or remedies that are otherwise available to a consumer under any other law.

(12) Every pet dealer who sells an animal to a consumer must provide the consumer at the time of sale with a written notice, printed or typed, which reads as follows: It is the consumer's right, pursuant to section 828.29, Florida Statutes, to receive a certificate of veterinary inspection with each dog or cat purchased from a pet dealer. Such certificate shall list all vaccines and deworming medications administered to the animal and shall state that the animal has

been examined by a Florida-licensed veterinarian who certifies that, to the best of the veterinarian's knowledge, the animal was found to have been healthy at the time of the veterinary examination. In the event that the consumer purchases the animal and finds it to have been unfit for purchase as provided in section 828.29(5), Florida Statutes, the consumer must notify the pet dealer within 2 business days of the veterinarian's determination that the animal was unfit. The consumer has the right to retain, return, or exchange the animal and receive reimbursement for certain related veterinary services rendered to the animal, subject to the right of the dealer to have the animal examined by another veterinarian.

(13) For the purposes of subsections (5)-(12) and (16), the term "pet dealer" means any person, firm, partnership, corporation, or other association which, in the ordinary course of business, engages in the sale of more than two litters, or 20 dogs or cats, per year, whichever is greater, to the public. This definition includes breeders of animals who sell such animals directly to a consumer.

(14) The state attorney may bring an action to enjoin any violator of this section or s. 828.12 or s. 828.13 from being a pet dealer.

(15) County-operated or city-operated animal control agencies and registered nonprofit humane organizations are exempt from this section.

(16) A pet dealer may not knowingly misrepresent the breed, sex, or health of any dog or cat offered for sale within the state.

(17) Except as otherwise provided in this chapter, a person who violates any provision of this section commits a misdemeanor of the

> first degree, punishable as provided in s. 775.082 or s. 775.083. (Emphasis Added.)

25. Based upon the foregoing statute, the Department is directed to "supply the official intrastate certificate of veterinary inspection required by this section at cost."

26. The foregoing statute dictates that each dog or cat must be accompanied by a current official certificate of veterinary inspection. This OCVI is defined as:

> ...a legible certificate of veterinary inspection signed by the examining veterinarian licensed by the state of origin and accredited by the United States Department of Agriculture, that shows the age, sex, breed, color, and health record of the dog or cat, the printed or typed names and addresses of the person or business from whom the animal was obtained, the consignor or seller, the consignee or purchaser, and the examining veterinarian, and the veterinarian's license number. The official certificate of veterinary inspection must list all vaccines and deworming medications administered to the dog or cat, including the manufacturer, vaccine, type, lot number, expiration date, and the dates of administration thereof, and must state that the examining veterinarian warrants that, to the best of his or her knowledge, the animal has no sign of contagious or infectious diseases and has no evidence of internal or external parasites, including coccidiosis and ear mites, but excluding fleas and ticks. (Emphasis Added.)

27. In this case, the Petitioners maintain that the Respondent's memorandum and the Fuchs statement are agency policy that have not been properly adopted through the

rulemaking procedures set forth by law. The Petitioners argue that the statement by Diana Fuchs at the rule making workshop conflicts with law. Further, the Petitioners maintain that the adopted language of the new OCVI form (as incorporated into the proposed rule) is an invalid exercise of legislative authority because it modifies or contravenes Section 828.29, Florida Statutes (2007), and is arbitrary and capricious.

28. First, as to the proposed rule, it must be noted that the Department has utilized an OCVI form since 1999. The Petitioners take exception to the form because it does not specify that the inspecting veterinarian has determined the cat or dog to be "healthy." To this end Petitioners rely on the language found in Section 828.29(12), Florida Statutes (2007). This subsection, however, speaks to the consumer's right to receive the OCVI at the time of purchase. The term "healthy" as used in this subsection can only relate back to the prior definition of the OCVI. "Healthy" as used in this subsection is not defined elsewhere. Therefore, the specific language required (as defined by the Legislature) for the OCVI must govern. Moreover, the consumer's options (when the pet may be found to be unfit for purchase), are clearly delineated. The concept of "healthy" relates to those options. A pet may be found to be unfit for purchase despite a veterinary inspection. For example, the law contemplates that in the case of congenital

or hereditary disorders, up to one year may be allowable for the consumer to seek remedy. Based upon the foregoing, the Petitioners' challenge to the OCVI, as contemplated by the proposed rule, must fail. The OCVI form conforms to the statutory definition and is reasonable to put the public (and veterinarians) on notice of what the Legislature requires.

29. As to the unpromulgated statement of July 6, 2006, the Department has announced its intention, after reviewing the matter through the rulemaking process, that it will not attempt to enforce the language of the memorandum. As such, the Petitioners' concerns regarding this memorandum are moot.

30. Notwithstanding that conclusion, however, it is further determined that the memorandum could not be a rule. First, the Department does not have disciplinary jurisdiction over licensed veterinarians. Second, the memorandum on its face advises that the information is for "guidelines and reminders." Memoranda issued for merely informational purposes do not, absent more, rise to the level of a "rule" especially, since in this case, the Department was not seeking to implement, interpret, or prescribe law or policy for its agency or anyone governed by its authority. This agency provides a form as directed by the law. Persons who fail or refuse to abide by the subject matter requirements of the law are held accountable through disciplinary proceedings or criminal prosecution. While

the Department may act as a complainant (as any citizen might), the law conveys no authority on the Department to enforce the terms of Section 828.29, Florida Statutes (2007).

31. Similarly, the Fuchs statement is not unpromulgated agency policy. Ms. Fuchs' comment is not an agency statement of general applicability. If in order to comply with the professional guidelines of Chapter 474, Florida Statutes (2007), veterinarians are required to supervise the administering of vaccines (and this would clearly be the language of Section 828.29(1)(b)7. Florida Statute (2007)), the informal comments of a Department employee cannot relieve the veterinarian of that responsibility. Further, as read in its entirety, Section 828.29, Florida Statutes (2007), grants consumers specific options when a dog or cat is sold in violation of the health standards set forth in the law. The inarticulate comments of an agency employee cannot diminish or limit those options and do not rise to the level of "rule" as that term is used in Florida law. And, as previously stated, the agency did not have jurisdiction to enact the statement as a rule in any event.

32. As to the memorandum and the OCVI form, the Department took appropriate steps to engage in rulemaking in a timely manner. It is concluded that the Department acted expeditiously and in good faith to address the Petitioners' concerns. That the Department does not have jurisdiction to enact more

stringent or controlling rules does not condemn the effort shown. Further, as the Department does not seek to rely on the statements of its memorandum (were they deemed a "rule"), additional rulemaking would not cure the Petitioners' concerns. The Department does not have the statutory authority to do more.

33. Pursuant to Florida law, only a "substantially affected person" may challenge the validity of a proposed rule. To this end, the person seeking an administrative determination that an agency rule is an invalid exercise of delegated legislative authority must show a real and sufficiently immediate injury in fact. See Lanoue v. Florida Department of Law Enforcement, 751 So. 2d 94 (Fla. 1st DCA 1999) and Ward v. Board of Trustees of the Internal Improvement Trust Fund and Department of Environmental Protection, 651 So. 2d 1236 (Fla. 4th DCA 1995). None of the Petitioners in this cause have pled or established an injury in fact. The Petitioners are required to meet their burden of proof as to the rule challenge and standing by a preponderance of the evidence. See Department of Health et al. v. Merritt, 919 So. 2d 561 (Fla. 1st DCA 2006). The Petitioners have failed to meet this burden. Taking all of the allegations as true, the Petitioners have not demonstrated standing or an injury in fact.

34. The Petitioner, HSUS, has not alleged or established that its members are substantially affected by the agency

statement or rule. No HSUS member was alleged to have been injured. No HSUS member filed a complaint with the Department and if one had the Department would not have subject matter jurisdiction. The minimum standard for "association" standing as set forth in Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243 (Fla. 1st DCA 2002) has not been pled or established.

35. Further, none of the individually named Petitioners sustained an injury within the zone of interest. Any substantially affected person may seek an administrative determination that a proposed rule is invalid but there must be a nexus between the claimant and the offending rule. None of the Petitioners are alleged to be veterinarians. None of the Petitioners as consumers filed complaints with the Department. It is not alleged that any individual Petitioner has been precluded from the remedies provided by the law. Whether any of the Petitioners filed a criminal complaint is unknown. The statute gives consumers very specific rights, but those options are not achieved through enforcement by the Department. The OCVI form does not create any right separate from the statutory guidelines. Accordingly, the Petitioners have failed to establish an injury in fact or law.

36. It is concluded that the language of the OCVI form as proposed in Florida Administrative Code Rule 5C-27.001 conforms

to the overall intent and language of the statute. Reading the statute as a whole it is certain that the legislature intended to provide options for consumers who purchase dogs and cats. The statute lists a series of protocols that govern the sale and places specific responsibilities on those who participate in the sale. The responsibility of the Department is limited. The Department is directed to supply the official intrastate certificate of veterinary inspection at cost. That OCVI must list all vaccines and deworming medications administered to the dog or cat, including the manufacturer, vaccine, type, lot number, expiration date, and the dates of administration, and must state that the examining veterinarian warrants that, to the best of his or her knowledge, the animal has no sign of contagious or infectious diseases and has no evidence of internal or external parasites, including coccidiosis and ear mites, but excluding fleas and ticks. See § 828.29(3), Fla. Stat. (2007). The proposed rule contains that provision.

37. For the reasons noted above it is concluded that the proposed rule is not an invalid exercise of legislative authority because it comports with the statutory authority from which it derived. Further, it is not arbitrary or capricious because it is supported by the logic and language of the statute it dove-tails. As such it is supported by reason and logic.

See Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks, 721 So. 2d 317 (Fla. 1st DCA 1998).

38. Under the guidelines of Section 828.29, Florida Statutes (2007), consumers who purchase animals that are "unfit for purchase" are provided certain options. The state has described the standards and procedures regarding the return of the animal, the exchange of the animal, or the acceptance of the animal (with certain expenses being reimbursable). The Department's role in this process is limited to its authority to inspect OCVI certificates and its obligation to supply the OCVI form at cost. Accordingly, the Petitioners' challenges to the proposed rule and the unpromulgated memorandum and Fuchs statement must fail.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the instant case is hereby dismissed.

DONE AND ORDERED this 21st day of December 2007, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.