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United Pet Supply, Inc d/b/a The Pet Company #29

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**BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF AGRICULTURE**

IN THE MATTER OF:

**United Pet Supply, Inc
d/b/a The Pet Company #29**

DOCKET NO: 01.15-093548J

INITIAL ORDER

This matter was heard January 10, 2007, before Lynn M. England, Administrative Law Judge, assigned by the Secretary of State, and sitting for the Commissioner of the Tennessee Department of Agriculture (the Department). The Department was represented by Mr. Thomas McIntire, Staff Attorney, and the Respondent, United Pet Supply, Inc. (United Pet) was represented by Mr. Andrew Pippinger, Esq. of the Chattanooga Bar.

The subject of this hearing is enforcement of a notice of violation issued to United Pet on March 2, 2006 with a penalty in the amount of Two thousand dollars (\$2,000.00).

After consideration of the record in this matter, it is determined that the Department has failed to shown by a preponderance of the evidence that Respondent violated the rules and regulations of the Department of Agriculture as they relate to the Tennessee Dog and Cat Act. Furthermore the decision of

the Department to issue civil penalties in this matter shall be **OVERTURNED**. This decision is based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Petitioner, United Pet Supply, Inc., d/b/a The Pet Company #29 (hereinafter UPS) is a New York Company authorized and licensed to operate a pet store in the Hamilton Place Mall in Chattanooga, Tennessee.
2. UPS is the holder of a Tennessee Dog and Cat dealer's license as issued by the Tennessee Department of Agriculture (hereinafter the Department).
3. On January 18, 2006, Dr. Jill Johnson, staff veterinarian for the Department conducted an inspection of the UPS store at Hamilton Place Mall in Chattanooga, Tennessee.
4. On that date, Dr. Johnson arrived at the UPS store between 10:30 a.m. and 11:00 a.m. to conduct her inspection.
5. Dr. Johnson observed seven (7) cages in the isolation area that were not clean and two (2) employees were not wearing gloves while cleaning the cages.
6. Dr. Johnson issued an official warning to UPS.
7. Dr. Johnson conducted a follow up inspection of the UPS Store at Hamilton Place Mall on January 24, 2006.
8. On that date, Dr. Johnson arrived at the UPS store between 10:30 a.m. and 11:00 a.m. to conduct her inspection.

9. Dr. Johnson observed twelve (12) cages in the isolation area had not been cleaned and the employees that were cleaning cages were not wearing gloves. Further, she observed dirty food bowls in the floor of the kennel and water standing in floor of the kennel. In addition, she found four (4) dirty kennels and the cages in the viewing area were dirty.

10. Dr. Johnson testified that during both inspections the employees were in the process of cleaning the kennels and cages when she arrived. She issued the citations based on the areas that had not been cleaned.

11. The UPS store's isolation room contains seventeen (17) cages with approximately thirty (30) kennels in the viewing area.

12. Randall Worley, an animal-care technician employed by UPS testified that he was present during both inspections by Dr. Johnson,

13. Mr. Worley', responsibilities as an animal care technician included cleaning the cages and kennels. He would remove and soak the water bottles from the cages, pull the trays, the grates and the kick boards from the bottom of the cages and clean them with bleach. He would then rinse them with water and spray them with sanitizer. This is a process he completed every morning beginning at approximately 6:00 a.m.

14. Mr. Worley worked the first shift which ended at noon. Other employees arrive at noon and continue to clean cages out throughout the day on an as needed basis.

CONCLUSIONS OF LAW

1. **DOG AND CAT DEALERS.** Purpose of provisions. – The purpose of this part is to protect the owners of dogs and cats from the theft of such pets, to prevent the sale or use of dogs and cats which have been stolen, and to ensure the humane treatment of dogs and cats in commerce and those used in research facilities. Tenn. Code Ann. §44-17-101.
2. “The commissioner may promulgate such rules and regulations as are reasonably necessary to implement the provisions of this part.” Tenn.Code Ann. §44-17-118.
3. “Each dealer licensed under this chapter shall comply in all respects with the regulations of this chapter and the standards set forth in Part 3 of Title 9 of the Code of Federal Regulations as amended, for the humane, care, treatment, housing, and transportation of animals. Tenn. Comp. Rules and Regs.0080-2-15-.06.
4. Tenn. Code Ann. §4-3-204(a) provides: The department or any board or commission attached to the department may, in a lawful proceeding respecting licensing as defined in the Uniform Administrative Procedures Act, complied in chapter 5 of this title, in addition to or in lieu of any other lawful disciplinary action, assess a civil penalty of not more than five hundred dollars (\$500) for each violation of statute, rule or order enforceable by the department or board or commission attached to the department.
5. “Cleaning of primary enclosures. Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosures, and to reduce disease, hazards, insects, pests and odors....The pans under primary enclosures with grill-type floors and the ground areas under raised runs with mesh or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food

waste and to reduce disease hazards, pests, insects and odors.” 9 CFR 3.11

6. “Drainage and waste disposal. Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry... Standing puddles of water must in animal enclosures must be drained or mopped up so that the animals stay dry.” 9 CFR § 3.1(f)
7. “Employees. Each person subject to the Animal Welfare regulations (9 CFR parts 1, 2 and 3) maintaining dogs and cats must have enough employees to carry out the level of husbandry practices and care required in this subpart. The Employees who provide for husbandry and care, or handle animals, must be supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of dogs and cats to supervise others. The employer must be certain that the supervisor and other employees can perform to these standards.” 9 CFR § 3.12

ANALYSIS

UPS has been cited by the Department of Agriculture for violations of the Tennessee Dog and Cat Act that occurred on January 18, 2006 and January 24, 2006. Specifically, cages not being cleaned, employees not wearing gloves during cleaning, water standing in floor of kennel, kennel area dirty and cages in viewing area dirty.

It is undisputed that the employees were in the process of cleaning the kennels and cages when Dr. Johnson arrived. It is also undisputed that the

employees were not wearing gloves while they were performing their cleaning duties.

While it may be preferable for employees to wear gloves while they are cleaning the kennels and cages, it is not a violation under 9 CFR § 3.12 as cited by the Department.

As to the other violations, it is clear that 9 CFR §3.1(f) provides there must be “regular and frequent collection, removal and disposal of animal and food wastes.” “Regular disposal of waste is not the same as *continuous* disposal of waste. No matter how regular the cleaning efforts of the kennel, there is bound to be *some* time of the date which an inspection will discover waste that has not been cleaned up at that particular moment.” Fred Hodgins, Janice Hodgins, Hodgins Kennels, Inc., v. United States Department of Agriculture, 238 F.3d 421 (2000).

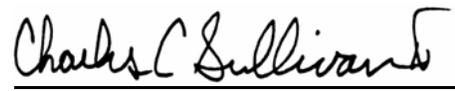
Based on the foregoing, it is therefore ORDERED that the notice of violation entered against UPS by the Department be OVERTURNED and the \$2,000 penalty be set aside.

This Initial Order entered and effective this 5th day of March, 2007.

Lynn M. England
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of

State, this 5th day of March, 2007.

A handwritten signature in cursive script that reads "Charles C. Sullivan, II". The signature is written in black ink and is positioned above a horizontal line.

Charles C. Sullivan, II, Director
Administrative Procedures Division