

**IN THE MATTER OF
ANDREW MILLER - APPELLANT**
1817 Middleborough Road
Baltimore, MD 21221

**RE: Citation Nos. (1) E45482A --- License Required
(2) E45482B --- Dangerous Animal ***
AHB No.: DD4397

*** BEFORE THE
* BOARD OF APPEALS
* OF
BALTIMORE COUNTY
* Case No. CBA-18-002**

* * * * *

OPINION

This case comes to the Board on appeal of the final decision of the Baltimore County Animal Hearing Board (hereinafter "AHB"), wherein the AHB upheld Citation E45482B (Dangerous Animal) and dismissed E45482A (License Required) with regard to the animal at issue, "Slug", owned by the Appellant Andrew Miller ("Appellant").

AHB found Appellant purchased a proper license for his dog Slug, a Black English Labrador, and was not in violation of Baltimore County Code (hereinafter "BCC") §12-2-201. AHB also found Slug attacked and injured a person, exhibited aggressive or dangerous behavior, was not adequately confined or restrained, and therefore a dangerous animal as defined under BCC §12-8-102(a)(1) and (2). AHB ordered that Slug become the property of Baltimore County and be humanely euthanized. AHB further ordered that:

If the respondent should not appeal these findings the Board shall waive all civil monetary penalties due pursuant to this decision. If the respondent appeals this decision the civil monetary penalty of One Thousand Dollars (\$1,000.00) shall be payable to Baltimore County, Maryland. If the respondent should appeal this decision an addition [sic] two (2) months of boarding must be paid at the time of the appeal. The respondent will be charged for board for every day that this case is under appeal. The boarding fee is \$15.00 per day for each day 'Slug' is impounded at the Baltimore County Animal Shelter. If the respondent should not appeal this decision the boarding fees will be waived.

A hearing before this Board was originally held on September 7, 2017 and held over until September 12, 2017 at the request of new counsel for Andrew Miller, Esther Anne Benaroya, Esq. The County was represented by Jonny Akchin, Assistant County Attorney. The Board reviewed the following from the AHB record:

1. August 9, 2017 Appeal from Andrew Miller;
2. August 3, 2017 Findings and Decision (and Order) of the AHB;
3. July 25, 2017 Affidavit of Complaint by Donald Allen McGinnity, Jr.;
4. July 24, 2017 Affidavit of Complaint by Brandy L. Poluszny;
5. July 22, 2017 Affidavit of Complaint by Anthony Fryza;
6. July 20, 2017 Baltimore County Police Department Incident Report Number 172020354;
7. July 20, 2017 Franklin Square Hospital Center Physician's Orders document and Patient and Medication Educations forms entitled "Forearm Fracture" and "Animal Bite"; and
8. August 1, 2017 audio recording of the AHB hearing.

Background

Brandy Poluszny (hereinafter "Complainant") was visiting the home of Andrew Miller (1817 Middleborough Road) on July 20, 2017. Complainant had been at Appellant's home for approximately four (4) hours with Slug, even walking with him unleashed. While Complainant was cleaning up the breakfast bar, Slug jumped on her back and bit her. Appellant and Anthony Fryza pulled Slug off of the Complainant and assisted her with obtaining medical treatment. The Complainant sustained puncture marks, a broken arm in two (2) places and plates in her arm. Anthony Fryza testified he was at Appellant's home for approximately three (3) hours on July 20.

Mr. Fryza did not see Slug jump on Complainant. Mr. Fryza recalled the dog was asleep minutes before; he heard Slug growl before the attack. Appellant and Mr. Fryza stated Slug is not vicious or mean, but makes random attacks on people.

Appellant did not deny the events reported by Complainant and Mr. Fryza. Appellant's position at the hearing was that he would do whatever was necessary to help Slug and in order that he could improve as a dog owner to save his attachment to Slug. Appellant was willing to have Slug spayed or neutered, and have him professionally trained. He believed Slug could be saved. Complainant requested Slug not be euthanized, but not returned to Appellant.

Following the hearing, the AHB dismissed the citation for License Required and upheld the citation for Dangerous Animal with the additional provisions cited above.

Standard of Review

BCC §12-1-114 (f) and (g) requires that all hearings before this Board from the AHB be heard on the record from the AHB hearing. Upon review of the transcript and evidence in the AHB record, this Board has the authority to:

- (i) Remand the case to the Animal Hearing Board;
- (ii) Affirm the decision of the Animal Hearing Board; or
- (iii) Reverse or modify the decision of the Animal Hearing Board if a finding, conclusion or decision of the Animal Hearing Board:
 - 1. Exceeds the statutory authority or jurisdiction of the Animal Hearing Board;
 - 2. Results from an unlawful procedure;
 - 3. Is affected by any other error of law;
 - 4. Subject to paragraph (2) of this subsection, is unsupported by competent, material and substantial evidence in light of the entire record as submitted; or
 - 5. Is arbitrary and capricious.

When assessing a factual finding of an agency, the appropriate standard of review is whether there is substantial evidence from the record as a whole. *Eller Media Co. v. Mayor of Baltimore*, 141 Md. App. 76, 84 (2001). If reasoning minds could reasonably reach the conclusion

reached by the agency from the facts in the record, then the agency's findings are based on substantial evidence and the reviewing court has no power to reject that conclusion. *Columbia Road Citizens' Ass'n v. Montgomery Cnty.*, 98 Md. App. 695, 698 (1994). Judicial review of an agency decision does not involve an independent decision on the evidence instead, a court is limited to determining whether there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. *United Parcel Serv., Inc. v. People's Counsel for Baltimore Cnty.*, 336 Md. 569 577 (1994).

When considering whether an agency erred as a matter of law, the reviewing court decides the correctness of the agency's conclusions and may substitute the court's judgment for that of the agency. *People's Counsel for Baltimore Cnty. v. Prosser Co.*, 119 Md. App. 150, 168 (1998). The "substantial evidence test" also applies when there is a mixed question of law and fact. In other words, the agency must have substantial evidence to support its' conclusion. *Cowles v. Montgomery Cnty.*, 123 Md. App. 426, 433 (1998).

Decision

Based on the evidence presented at the AHB that the Appellant had obtained the proper licensing for Slug, we agree with the decision reached by the AHB as to the Citation E45482A (License required) and the dismissal of the fine for same.

As to Citation E45482B (Dangerous Animal), there was no dispute by the Appellant on appeal as to the attack by Slug on the Complainant, or the AHB's finding that Slug was a "dangerous animal". Accordingly, the only issue appealed here was as to the disposition of Slug.

However, on the issue of disposition, we find that the AHB's Findings and Decision fails to identify what evidence, if any, the AHB relied upon to justify its Order directing that Slug not

be returned to the Appellant and that he be humanely euthanized. The AHB is directed to make factual findings and to support its decision based on the evidence. Here, we find that the AHB's decision on the disposition of Slug was unsupported by competent, material and substantial evidence in light of the entire record as submitted.

On this issue, our review of the record below indicates that evidence was presented that Appellant took care of his dog and at least illustrates some evidence of responsibility as an owner. There was also evidence that Appellant is willing to undertake significant additional measures to help ensure that an attack like this would never occur again. Yet, the AHB Decision was devoid of any explanation as to whether the AHB considered the Appellant's actions in caring for his dog, and/or whether the AHB considered conditions that could be imposed upon Appellant and Slug to help facilitate a reunion and help prevent other attacks. Given that the deliberations of the Animal Hearing Board are held in private, this Board has no information as to the factors that the AHB found persuasive in the disposition of Slug.

In light of the lack of substantiation for the AHB Findings and Decision on the disposition of Slug, we were equally concerned about statements heard in the audio recording of the AHB hearing that conclusions were drawn by members of the AHB before all of the evidence was submitted. Statements were made by AHB members as to the dog's intent in attacking the Complainant when the AHB members did not personally observe the attack. We find these statements unfitting for a fact finder to make during the course of a due process hearing and can only be viewed as preconceived bias toward the dog and its owner. We were also concerned about criticisms offered by the AHB members during the hearing to the Appellant as to how the Appellant should discipline the dog. Lastly, when the AHB members made physician

recommendations during the course of a hearing to the Complainant, such statements are not only beyond the purview of a fact finder, but strongly suggest a predisposition to favor an injured party.

Having said that, the evidence as to the injuries of the Complainant were substantial and our observations as to statements by AHB members are not intended in any way to diminish the undisputed attack by Slug, and pain endured by the Complainant. However, this Board is charged with appellate review of the record below and strives to make certain that both parties are provided a fair hearing and that an impartial decision is made based on the evidence presented; not on preconceived notions which have no place in due process, particularly when it is ordered that a person's property will be destroyed.

The record also revealed the presence of other witnesses and/or evidence regarding Slug's disposition, were offered by the Appellant but not accepted by the AHB. Accordingly, the AHB shall hold an evidentiary hearing for further fact finding and determination, solely on the issue of whether Slug should be euthanized or whether Slug can and/or should be reunited with Appellant. The issue of whether Slug is a dangerous animal is not disputed, was not an issue on appeal and will not be an issue at the remand hearing.

If, after the remand hearing, the determination is that Slug shall be returned to the Appellant the AHB Decision shall include any and all necessary and satisfactory measures and/or conditions that can and/or should be imposed upon Slug and Appellant to help ensure that an attack will never occur in the future. If there is a determination that the combination of Appellant and Slug poses a potential risk to public safety or is otherwise problematic, and that setting of remedial and protective measures and/or other conditions would not alleviate that risk or problem(s), the AHB shall identify the evidence that supports that decision.

Finally, the Board finds the imposition of the One Thousand Dollar (\$1,000.00) civil monetary penalty is an unlawful penalty as it was predicated upon the Appellant not filing an appeal from AHB's findings. A civil monetary penalty cannot be utilized to deter a party from filing an appeal of right which exists via statute. BCC § 12-1-114 states, in pertinent part, as follows:

(a) Authority to appeal. In accordance with §3-5-104 of the Code, a violator may appeal a decision of the Animal Hearing Board under this article to the Board of Appeals.

* * * *

(e) Filing fee.

(1) A filing fee established by the County Administrative Officer shall accompany the notice of appeal and petition.

BCC § 12-1-110 delineates, in pertinent part, civil penalties relating to the AHB as follows:

(e) Hearing.

(1) The Animal Hearing Board shall conduct a requested hearing and, guided by rules adopted by the Board, shall make findings of fact and conclusions of law.

(2) The Animal Hearing Board may:

(i) Dismiss the violation notice; or

(ii) Affirm the violation notice and determine:

1. An appropriate civil penalty; and
2. Other remedies as it considers appropriate.

(f) Penalties.

(1) (i) Except as provided in subparagraph (ii) and (iii) of this paragraph and paragraph (2) of this subsection, on adjudication, the penalty for:

1. A first violation of this article is \$30; and
2. Repeated violation of this article is \$150.

(ii) The penalty for cruelty to animals is \$250 per occurrence and \$250 per day as long as the conditions exist.

- (iii) The penalty for failure to obtain a license for a dog or cat, as required by § 12-2-201, is \$100.
- (iv) Each day of violation shall be considered a separate offense.

Given the statutory parameters for fees associated with appeals and the imposition of civil penalties, there is no statutory authority for AHB to tie a civil penalty to whether a party appeals its Decision. The Board finds tying the One Thousand Dollar (\$1,000.00) civil monetary penalty to Appellant not filing an appeal violates basic due process rights.

ORDER

THEREFORE, IT IS THIS 26th day of October, 2017, by the Board of Appeals of Baltimore County, it is:

ORDERED that the AHB's Decision to dismiss Citation E45482A (License Required) and the fine imposed be, and it is hereby, **AFFIRMED**; and it is further,

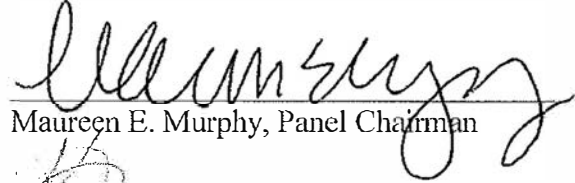
ORDERED, that the AHB Decision regarding the disposition of Slug in Citation E45482B (Dangerous Animal) be, and it is hereby **REMANDED** for an evidentiary hearing to receive evidence and for further fact finding and determination solely on the issues of whether Slug should be euthanized or and whether Slug can and/or should be reunited with the Appellant (not on the issue of whether Slug is a "dangerous dog"), including a consideration of the remedial and protective measures identified by Mr. Miller and/or other conditions deemed to be necessary and satisfactory for public safety; and it is further,

ORDERED, the Fifteen Dollar (\$15.00) per day boarding fees originally imposed are **AFFIRMED**; and it is further,

ORDERED, that the One Thousand Dollar (\$1,000.00) civil monetary penalty is **REVERSED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Maureen E. Murphy, Panel Chairman



Kendra Randall Jolivet



Jason S. Garber



Board of Appeals of Baltimore County

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October 26, 2017

Esther Anne Benaroya, Esquire
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Jonny Akchin, Assistant County Attorney
Department of Permits, Approvals and
Inspections
111 W. Chesapeake Avenue, Room 105
Towson, Maryland 21204

RE: *In the Matter of: Andrew S. Miller*
Case No.: CBA-18-002

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington".

Krysundra "Sunny" Cannington
Administrator

KLC/
Enclosure
Duplicate Original Cover Letter

c: Andrew S. Miller
Brandy Posluszny
Anthony Frya
Donald McGinnity, Jr.
Bernard Smith, Chairman/Animal Hearing Board
April Naill/Animal Services Division
Nancy C. West, Assistant County Attorney
Michael E. Field, County Attorney