

OFFICE OF ADMINISTRATIVE LAW

300 Capitol Mall, Suite 1250
 Sacramento, CA 95814
 (916) 323-6225 FAX (916) 323-6826

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 IN THE OFFICE OF

2012 MAR 12 PM 2:34



Edmund G. Brown, Jr.
 GOVERNOR
 STATE OF CALIFORNIA

Date: March 12, 2012

To: Tiffany Kossick

From: Chapter Two Compliance Unit

Subject: **2012 OAL DETERMINATION NO. 4(S)**
(CTU2012-0111-01)
 (Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
 Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation the Veterinary Medicine Board's inclusion of the use of scalers to clean animal teeth as the practice of veterinary medicine.

On January 11, 2012, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether the Veterinary Medicine Board's (Board) inclusion of the use of scalers to clean animal teeth as the practice of veterinary medicine. The Board has issued several letters advising practitioners of "anesthesia-free dentistry"¹ that the use of a scaler to clean an animal's teeth is a dental operation that is within the scope of the practice of veterinary medicine constitutes an underground regulation. An example of the letters, with personal information redacted, is attached as Exhibit A. You argue that there is no intention in statute or regulation to include anesthesia-free dentistry as within the scope of practice of veterinary medicine. You argue that the Board impermissibly expanded on the definition of "dental operation" as used in Business and Professions Code section 4826.

Business and Professions Code section 4826 states, in relevant part:

A person practices veterinary medicine, surgery, and dentistry, and the various branches thereof, when he or she does any one of the following:

....

(d) Performs a surgical or dental operation upon an animal.

...

The Board adopted California Code of Regulations, title 16, section 2037 to implement and make specific Business and Professions Code section 4826. Section 2037 provides:

The term "dental operation" as used in Business and Professions Code

¹ "Anesthesia-free dentistry" is the use of metal tools of various shapes and sizes, called scalers, to remove plaque from the teeth of animals, usually dogs and cats.

section 4826 means:

- (1) The application or use of any instrument or device to any portion of an animal's tooth, gum or any related tissue for the prevention, cure or relief of any wound, fracture, injury or disease of an animal's tooth, gum or related tissue; and
- (2) Preventive dental procedures including, but not limited to, the removal of calculus, soft deposits, plaque, stains or the smoothing, filing or polishing of tooth surfaces.
- (3) Nothing in this regulation shall prohibit, however, any person from utilizing cotton swabs, gauze, dental floss, dentifrice, toothbrushes or similar items to clean an animal's teeth.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,² which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).³ Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

Generally, a rule which meets the definition of "regulation" in Government Code section 11342.600 is required to be adopted pursuant to the APA. In some cases, however, the Legislature has chosen to establish exemptions from the requirements of the APA. Government Code section 11425.60 states:

- (a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.
- (b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. **Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340).** An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.
- (c) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been

² "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

³ Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

(d) This section applies to decisions issued on or after July 1, 1997. Nothing in this section precludes an agency from designating and indexing as a precedent decision a decision issued before July 1, 1997. [Emphasis added.]

In May and June of 2002, the Board cited two persons for using a scaler to remove plaque from a dog's teeth in violation of Business and Professions Code section 4826. The matter was appealed, and on September 20, 2004, the Administrative Law Judge hearing the matter issued a proposed decision which addressed the use of scalers to clean an animal's teeth. On October 14, 2004, the Board accepted and adopted the decision as the decision of the Director of the Department of Consumer Affairs, Veterinary Medical Board. On October 20, 2005, the Board adopted this decision as a precedent decision.⁴ The decision stated:

....
Respondent argues that a metal scaler is similar in nature to the items enumerated in subdivision (3) above [of California Code of Regulations, title 16, section 2037], thus putting use of this instrument outside the definition [of] dental operation. Respondent is wrong on this point. The items listed in subdivision (3) are all soft material items, items that a lay person could easily use without fear of harming the pet. The metal scaler is not at all similar to these items. It is a curved steel pick with a sharp point which, according to expert testimony, common sense, and Respondent's own words, could harm an animal unless great care is taken in its use.

The Administrative Law Judge in this matter concluded that the use of the scaler "...falls squarely within the statutory definition of a dental operation...."

The Board has adopted a precedent decision that directly addresses the issue of whether the use of a scaler is within the definition of a "dental operation." The adoption of this decision was done in compliance with Government Code section 11425.60.⁵ The letters sent by the Board advising practitioners of "anesthesia-free dentistry" that the use of a scaler to clean an animal's teeth is a dental operation that is within the scope of the practice of veterinary medicine are consistent with the precedent decision. Thus the letters do not constitute an underground regulation.⁶

⁴ The Administrative Law Judge's decision and the adoption of the decision as a precedent decision are attached as Exhibit B.

⁵ Government Code section 11425.60 requires the agency adopting a precedent decision to compile an index of its decisions and publish it in the California Regulatory Notice Register. The Board published the index on March 9, 2012. While the publication was not timely, this defect has been cured.

⁶ The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground

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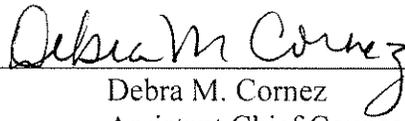
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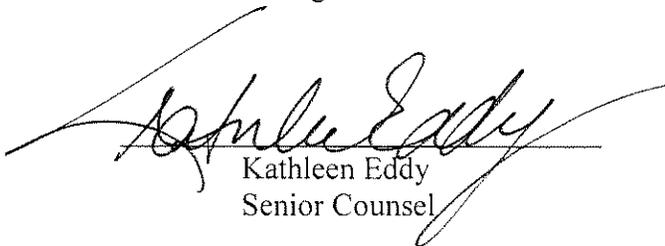
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(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.



Debra M. Cornez
Assistant Chief Counsel/
Acting Director



Kathleen Eddy
Senior Counsel

Copy: Susan Geranen

regulation include, but are not limited to, the following:

- (A) The challenged rule has been superseded.
- (B) The challenged rule is contained in a California statute.
- (C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.
- (D) The challenged rule has expired by its own terms.
- (E) **An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule.** [Emphasis added.]

EXHIBIT

A



VETERINARY MEDICAL BOARD
REGISTERED VETERINARY TECHNICIAN COMMITTEE
1420 HOWE AVENUE, SUITE 8, SACRAMENTO, CA 95825-2228
WEBSITE: <http://www.vmb.ca.gov> / EMAIL: webmaster@vmb.ca.gov
TELEPHONE: (916) 263-2610 / FAX: (916) 263-2621



September 14, 2001

[REDACTED]

RE: Anesthesia Free Dental Cleaning
Case # NV 2002 113

Dear Owner/Manager:

The Veterinary Medical Board received information that you will be providing anesthesia free teeth cleaning services on October 9, 2001 at the [REDACTED]. Please be advised that performing dental services on animals constitutes the practice of veterinary medicine. I would like to advise you that any person practices veterinary medicine, surgery, dentistry, and the various branches thereof, when he or she does the following:

- (1) The application or use of any instrument or device to any portion of an animal's tooth, gum or any related tissue for the prevention, cure or relief of any wound, fracture, injury or disease of an animal's tooth, gum or related tissue; and
- (2) Preventive dental procedures including, but not limited to, the removal of calculus, soft deposits, plaque, stains or the smoothing, filing or polishing of tooth surfaces.
- (3) Nothing in this regulation shall prohibit, however, any person from utilizing cotton swabs, gauze, dental floss, dentifrice, toothbrushes or similar items to clean an animal's teeth.

Please be advised that in order to perform teeth cleaning services, you must be working under the direct supervision of a California licensed veterinarian who is responsible for the examination of the animal and recordkeeping. I would also like to advise you that practicing veterinary medicine without a license is considered illegal and could result in a \$2,000 fine or up to one year in the county jail, if convicted of these charges.

You must cease and desist from providing anesthesia free teeth cleaning services without the direct supervision of a California licensed veterinarian. Copies of the applicable laws are enclosed.

Please provide a written response indicating that you understand the laws within 15 days. If you have any questions or need additional information, please feel free to contact Gina Bayless, Enforcement Program Manager at (916) 263-2610.

Thank You,

Susan M. Geranen
Executive Officer

EXHIBIT

B

BEFORE THE
VETERINARY MEDICAL BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Citation Appeals of:)	Citation No. 1499-C
)	OAH No. L2003020193
)	
LINDEN CLARK)	
_____)	Citation No. 1498-C
)	OAH No. L2003020194
CANINE CARE, INC.)	
CINDY COLLINS, PRESIDENT)	
)	PRECEDENTIAL DECISION
)	No. 2005-01
Respondents.)	
-----)	

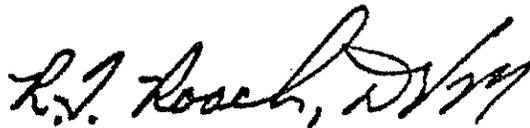
PRECEDENTIAL DECISION
(Government Code Section 11425.60(b))

The Veterinary Medical Board of California hereby designates as precedential the below-listed parts of the Decision in the Matter of the Citation Appeals of Linden Clark (Citation No. 1499-C) and Canine Care, Inc., Cindy Collins, President (Citation No. 1498-C):

- (1) Findings of Fact Nos. 1-11;
- (2) Determination of Issues Nos. 1-3.

This precedential designation shall become effective on October 20, 2005.

IT IS SO ORDERED October 20, 2005.



R. Troy Roach, DVM, President
FOR THE VETERINARY MEDICAL BOARD (VMB)
DEPARTMENT OF CONSUMER AFFAIRS

BEFORE THE
VETERINARY MEDICAL BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Citation Appeals of:

LINDEN CLARK

Citation No. 1499-C
OAH No. L 2003020193

CANINE CARE, INC.,
CINDY COLLINS, PRESIDENT

Citation No. 1498-C
OAH No. L 2003020194

Respondents.

PROPOSED DECISION

Administrative Law Judge Ralph B. Dash, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California on February 26 and 27, 2004, and in Burbank, California on March 29 and 30, 2004.

Diana Woodward Hagle, Deputy Attorney General, represented Complainant.

John K. McKasson, Attorney at Law, represented Respondents Canine Care, Inc. and Linden Clark.

The record remained open to permit the parties to obtain a transcript of the proceedings and to submit closing and reply briefs. Each party filed closing and reply briefs which were read and considered. The record was closed on August 27, 2004.

FACTUAL FINDINGS

1. Susan M. Geranen issued the Citations in her official capacity as Executive Officer, Veterinary Medical Board, Department of Consumer Affairs ("Board").

2. Neither Respondent Cindy Collins, President of Canine Care, Inc. ("Respondent Collins"¹) nor Respondent Linden Clark ("Respondent Clark") holds or has ever held a license to practice veterinary medicine in California. Neither Respondent is a registered veterinary technician.

3. On June 3, 2002, the Board issued Citation No. 1499-C to Respondent Clark, charging him with violating section 4825 of the Business and Professions Code², the unlicensed practice of veterinary medicine. Respondent Clark was fined \$500.00. As part of the citation, the Board issued an order of abatement requiring this respondent to: "immediately take such measures as are necessary to practice at an acceptable standard of care."³

4. On May 31, 2002, the Board issued Citation No. 1498-C to Respondent Collins. The citation charges her with violating section 4883, subdivision (j), in conjunction with section 4825, aiding or abetting the unlicensed practice of veterinary medicine. Respondent Collins was fined \$500.00 and was ordered to immediately cease aiding and abetting the unlicensed practice of veterinary medicine.

5. Both citations arise out of the same alleged set of facts. Respondent Collins, through her company, Canine Care, Inc., provides, among other things, "anesthesia free"⁴ cleaning of the teeth of dogs and cats. The services are rendered by persons whom Respondent Collins has trained. The services are generally rendered in participating pet grooming salons. The pet owner is charged a fixed rate, typically \$85 for a dog. From that amount, the salon owner receives a small fee, and the balance is split between the person who did the teeth cleaning and Respondent Collins. The teeth cleaners work as independent contractors. The Respondent Collins sets up the arrangements with the grooming salons, schedules the teeth cleaners to provide the services that are to be rendered at any given salon on any given day, and pays the teeth cleaners their share of the fee.

6. The citations allege that on February 23, 1999, a customer of Studio Star Groomers in Burbank, California brought her Brussels-Griffon dog "Rowdy" in for a teeth-cleaning procedure. That service was rendered by someone "probably" affiliated with Respondent Collins' company, but there was no evidence presented as to that person's identity.⁵

¹ The citation was directed to Ms. Collins as president of Canine Care, Inc.; the reference to "Respondent Collins" is merely for convenience.

² Unless otherwise noted, all statutory references are to the Business and Professions Code.

³ This particular order is somewhat unclear as written. However, the citation sets forth a lengthy narrative as to the factual basis for its issuance, thus making clear Respondent Clark was ordered not to perform pet teeth cleaning until he was properly trained and licensed.

⁴ Respondent markets her services on the basis that anesthesia free teeth cleaning is safer for pets than having the animal placed under sedation by a veterinarian teeth cleaning.

⁵ Although there was no eyewitness testimony that a teeth cleaning was actually performed, the reasonable inference drawn from the evidence, including the fact that Rowdy was brought in for a teeth cleaning, the owner paid for a teeth cleaning, and the dog's teeth appeared to have been cleaned, is that Rowdy did in fact have his teeth cleaned on the date alleged. Respondent Collins' immediate payment of the veterinarian bills (\$1920.16) for the injuries

7. Rowdy is a small brachycephalic (meaning that his head is wider than it is long, giving the face a "pushed in" look) dog of sweet temperament and disposition. Shortly after picking Rowdy up from the teeth cleaning, the owner noticed Rowdy was not his usual self, would not eat or drink, and had blood around his mouth. The next day, she took Rowdy to a veterinarian who determined Rowdy's jaw was broken in three places. Although the evidence was circumstantial, Rowdy most likely received his injuries during the teeth cleaning. However, whether or not that was the cause of the injury does not have to be determined. The significant issue to be determined is whether Respondent Collins has aided and abetted the unlawful practice of veterinary medicine.

8. The citations allege that Respondents violated section 4826, subdivision (d), which defines the practice of veterinary medicine to include the performance of a dental operation upon an animal. The definition of dental operation is contained in California Code of Regulations, title 16, section 2037:

(1) The application or use of any instrument or device to any portion of an animal's tooth, gum or any related tissues for the prevention, cure or relief of any wound, fracture, injury or disease of an animal's tooth, gum, or related tissue; and

(2) Preventive dental procedures including, but not limited to, the removal of calculus⁶, soft deposits, plaque, stains or the smoothing, filing or polishing of tooth surfaces.

(3) Nothing in this regulation shall prohibit, however, any person from utilizing cotton swabs, gauze, dental floss, dentifrice, toothbrushes or similar items to clean an animal's teeth.

9. Respondent contends that the methods she uses and teaches for the cleaning of pets' teeth fall outside the above definition for two reasons. First, she contends, the procedure is cosmetic in nature, and is not intended to nor designed to prevent or cure any disease, thus falling outside subdivision (1) above. Second, Respondent contends the implements she uses in the cleaning are similar in nature to cotton swabs, toothbrushes, and the like, and thus are permitted to be used under subdivision (3). Without question, the techniques of anesthesia free teeth cleaning taught by Respondent Collins fall within the definition of a dental operation. Respondent Collins teaches her "independent contractors" to clean a dog's teeth by holding it down using a towel, placing a splint in the dog's mouth, soothing the dog with a gentle voice, and using a metal scraper to remove plaque and tartar from the dog's teeth. This method falls squarely with the definition found in subdivision (2) above.

Rowdy suffered, coupled with additional evidence presented of Respondent Collins' association with Studio Star Groomers, leads to the conclusion that the person performing the teeth cleaning was affiliated with Respondent Collins. However, there was no evidence presented as to that person's licensed status.

⁶ Commonly known as tartar.

10. The technical aspect of tooth and gum disease in dogs need not be discussed at length. Expert testimony made it clear that tartar build-up begins below the gum line, and if all tartar and plaque are not removed during a cleaning, especially the tartar below the gum line, severe problems may result, including gingivitis and tooth loss. Respondent Collins claims her method of teeth cleaning does not include scaling tartar from beneath the gum line⁷, and thus cannot prevent tooth disease. However, Respondent Collins method of teeth cleaning is specifically intended to and marketed by her as a preventive treatment for tooth and gum disease in dogs and cats. Respondent Collins is correct that her method does not cure or treat any disease, but that is only because the method is incompetent for that purpose. Respondent's techniques, as described by her⁸, are clearly intended by her to be a first line of defense against tooth disease in dogs and cats. The fact that it fails to do so is of no moment, and does not convert a veterinary dental procedure into a purely cosmetic one. As part of marketing her services, Respondent produced an "informercial" type program in which Respondent demonstrates, and verbally describes, her methods. In Respondent's own words:

It's very important for [dogs'] health. If you don't clean their teeth, they end up losing their teeth... We have a course where we teach people [how to clean a dog's teeth without anesthesia] at our school... We have locations throughout Southern California... You'll need a few things for the actual teeth cleaning. You'll need a towel and a table to work on. You'll also need a toothbrush, a dental scaler, two mouth stabilizers... You'll also need some polishing compound... [H]ere you can see how much tartar this dog has accumulated on her teeth. It's a substantial amount... It's very important that all of this is removed from their teeth because this is what causes them to have gingivitis and periodontal disease and eventually leads to tooth and bone loss. Also, the bacteria that's caused by all of this being on their teeth will eventually lead to heart and kidney disease in animals. So you don't want them to get periodontal disease. So it's real important to keep all of the stuff cleaned off their teeth... Once you've finished... you will polish their teeth using a small toothbrush and the polishing compound... Also, while you're cleaning the teeth, you'll want to check right along the gum line to make sure that you haven't left any tartar so you can go back and double-check and make sure that they're perfectly clean. This area right here is called the gingival... the purpose of the gingival is to keep tartar from forming beneath the gum line. But when their gums start getting in bad shape from a lack of cleaning, they will

⁷ In the infomercial, it appears that Respondent Collins' methods include removing plaque from beneath the gum line, although this is not readily apparent. She certainly teaches one to check for tartar beneath the gum line to ensure there is none.

⁸ Respondent did not testify; however a video tape of Respondent demonstrating her methods and a transcript thereof were admitted and show in detail exactly what Respondent does teach.

get tartar beneath the gum line. So you do need to double check there. [After the cleaning] you can see there is a big difference. And this will keep the animal very, very healthy.

11. Respondent argues that a metal scaler is similar in nature to the items enumerated in subdivision (3) above, thus putting use of this instrument outside the definition dental operation. Respondent is wrong on this point. The items listed in subdivision (3) are all soft material items, items that a lay person could easily use without fear of harming the pet. The metal scaler is not at all similar to these items. It is a curved steel pick with a sharp point which, according to expert testimony, common sense, and Respondent's own words, could harm an animal unless great care is taken in its use. Respondent teaches, and demonstrates in her "informercial", the "proper" way to use a metal scaler to remove tartar from a dog or cat's teeth. This is how Respondent Collins explains in her "informercial" the proper use of a scaler:

You'll start out by using a coarse--the coarse end of your scaler and you will need to hold the instrument properly. This is called a modified pen grasp. And you also have a fulcrum which is your ring finger and your small finger. And you need to have that stabilized on the animal's face or tooth somewhere. And then what you do is you do the exploratory stroke which is coming from the bottom of the tooth like this until you find the actual ledge of the tartar. And then you have your working stroke which is the actual removal of the tartar and that's the downward stroke. And maybe you could just see right then how some of the tartar starts popping off. You want to make sure you're real careful that you don't follow through...on your working stroke because you don't want to injure the animal....And there you can see a real big difference just on these upper teeth that I've already cleaned. I'm going to go over what we've learned on how to remove it. You want to find the base of the tartar and use your working stroke to come down and pull the tartar off, being careful not to follow through with your motion because you can hurt the animal. You can see how once the tartar pops away...my instrument stops.

LEGAL CONCLUSIONS

1. Cause does not exist to cite and/or fine Respondent Clark for practicing veterinary medicine because the evidence was insufficient to establish that he did so. There was no evidence presented that Respondent Clark was the person who cleaned Rowdy's teeth, or that even if he did, he used Respondent Collins' methods in so doing.

2. Cause does not exist to cite and/or fine Respondent Collins or Canine Care, Inc., for aiding and abetting the practice of veterinary medicine because the evidence was insufficient to establish that, as alleged in the citation, it was Respondent Clark who engaged in such practice. Because it is not known who actually cleaned Rowdy's teeth, it cannot be established that this person, even if affiliated with Respondent, did not possess the requisite license.

3. Respondent Collins clearly aids and abets the practice of veterinary medicine. There is no doubt the method she teaches for pet teeth cleaning falls squarely within the statutory definition of a dental operation set forth above. She should be permanently enjoined from this practice. However, on the state of the record in these proceedings, there is no basis for issuance of an order of abatement as the violations alleged were not proven.

ORDER

1. Respondent Clark's appeal of citation no. 1499-C is sustained. Said citation is dismissed.

2. Respondent Collins' appeal of citation no. 1498-C is sustained. Said citation is dismissed.

DATED: 9-20-04



RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
VETERINARY MEDICAL BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Citation Appeals of:

LINDEN CLARK

Citation No.: 1499-C
OAH No.: L2003020193

CANINE CARE, INC.
CINDY COLLINS, President,

Citation No.: 1498-C
OAH No.: L2003020194

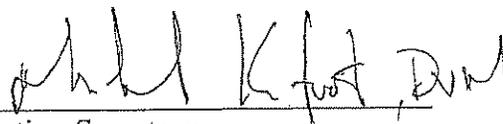
Respondents.

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted as the Decision of the Director of the Department of Consumer Affairs, Veterinary Medical Board in the above-entitled matter.

This Decision shall become effective November 18, 2004.

IT IS SO ORDERED October 14, 2004.


Executive Secretary

rfm