



Office of Law

MEMORANDUM

TO: Robert B. Wasserbach
New Castle County Auditor

FROM: Marlaine A. White
Sr. Assistant County Attorney

DATE: August 28, 2013

RE: New Castle County's Response to the County Auditor's Memorandum Regarding the Audit of New Castle County's Contractual Relationship with the Kent County Society for the Prevention of Cruelty to Animals – Comments and Recommendations Requiring Internal Action

On May 9, 2013, you submitted to David Grimaldi, Chief Administrative Officer, and James McDonald, Deputy Chief Administrative Officer, the above-referenced Memorandum highlighting several issues raised by the Independent Audit, and requesting internal action by New Castle County management. You also requested New Castle County's written response to the comments and recommendations contained in the Memorandum.

The managerial, financial and contractual problems discussed in the Independent Audit Report and the Memorandum, are of great concern to New Castle County. Thank you very much for bringing these issues to New Castle County's attention through your and the Independent Auditor's thorough investigative work on the contractual relationship between New Castle County and the Kent County Society for the Prevention of Cruelty to Animals. Thank you also for granting New Castle County an extension to respond to your May 9, 2013 Memorandum. Please accept this Memorandum as New Castle County's formal response to the May 9, 2013 Memorandum's comments and recommendations regarding the issues raised in the Independent Audit.

1.0 General Comments

1.1 Review of the KCSPCA Financials

Under the General Comments section, the May 9, 2013 Memorandum ("Memorandum") recommends New Castle County ("County") management perform a more detailed assessment of the ability of the Kent County Society for the Prevention of Cruelty to Animals ("KCSPCA") to fulfill its contractual and legal requirements, in light of its financial condition.

Response:

The County is concerned about inconsistencies in KCSPCA's financial statements uncovered by the Independent Audit, and KCSPCA's overall financial condition. The County also takes very seriously its obligation to ensure that its vendors are in compliance with local, state and federal laws, as outlined in the contract. To those ends, the County has taken steps to address these issues.

First, the County met with Kevin Usilton, KCSPCA Director, and Alex Moore, Chairman of KCSPCA's Board of Directors. At that meeting, and in subsequent conversations, the County has made clear to KCSPCA that it expects KCSPCA to abide by all applicable State and County laws, regulations and rules. The County has also made clear to KCSPCA that applicable law includes 3 *Del. C.* § 80, et seq., Delaware's Shelter Standards Law, or CAPA. Specifically, the County emphasized that in the contract KCSPCA expressly agreed to "humanely euthanize all of said dogs redeemed within the time or method prescribed by law and under such rules and regulations as the County or the State of Delaware may adopt from time to time." Thus, even though Delaware enacted its Shelter Standards Law after the contract's inception, KCSPCA agreed to abide by any such changes. The County expects KCSPCA to honor its written commitment to comply with all applicable laws.

Second, the current contract expires on December 31, 2013. Per its terms, it cannot be renewed. The Request for Proposals ("RFP") for a new contract was issued on August 1, 2013. It breaks down into segments the overall animal control service – control, intake, sheltering. The RFP allows a bidder to bid on a single service segment, a smaller set of service segments, or to bid on the entire service. The aim of the RFP is to allow the bidder to show, and the County to review, a more detailed itemization of costs. As the bid response will be incorporated into the contract (as in the current contract), this detailed cost information should facilitate the County's monitoring of the vendor's compliance with the contract's terms and the expenditure of County funds in provision of animal control services.

Third, the County has assigned Major Matthew Jamison and Sr. Cpl. Mark Tobin (an expert canine trainer and handler) in Public Safety, James McDonald in the Executive Office, Marlaine White in the Law Department, and Andria Smith in Administrative Services to monitor the contractual relationship. The team will ensure that for the remainder of the contract term KCSPCA fulfills its contractual obligation to comply with all applicable State and County laws, regulations and rules.

Specifically:

Inspections – The County has performed two unannounced inspections of KCSPCA's facilities. Sr. Cpl. Tobin conducted the first inspection. It included a review of the facilities and procedures for intake of dogs. The recommendation from the inspection was to review KCSPCA's euthanasia records, review the animal control unit, review the medical treatment provided at Rainbow Kennels and the length of stay for dogs at Rainbow Kennels. (KCSPCA

uses Rainbow Kennels in its provision of animal control services to the County.) The second inspection, conducted by Major Jamison and Sr. Cpl. Tobin, revealed gaps in KCSPCA's statistical and other information. Specifically, KCSPCA staff could not answer Sr. Cpl. Tobin's questions about how many arrests had been made between January 2013 and the end of May 2013, how many control vehicles were assigned to the County, and how many animals at the Kent County facility were sourced to the County. Major Jamison and Sr. Cpl. Tobin also inspected Rainbow Kennels. During the inspection, Rainbow Kennels was left unstaffed for the lunch period. They did, however, find both the Kent County and Rainbow Kennel facilities to be clean and otherwise organized. KCSPCA animal control personnel subsequently provided some of the requested information.

The County will continue to conduct unannounced inspections through the remainder of the contract. Each inspection, in addition to a general review, will include a specific focus – e.g., euthanasia record review, drug logs review.

Complaints – The County has received several complaints from concerned citizens. Marlane White has handled citizen response and contacting KCSPCA regarding complaints. To date, these complaints have been resolved positively.

1.2 Animal Control Officers and Their Legal Authority

Under Section 1.2, Animal Control Officers and Their Legal Authority, the Memorandum requests that the County Law Department determine if there are any legal ramifications to the County not appointing KCSPCA animal control officers as Animal Control Constables and dog wardens prior to August 2012; and determine if 24 *Del. Admin. C.* § 2400, et seq., applies to Animal Control Constables, and if so, ascertain whether KCSPCA's animal control officers have met those requirements.

Response:

The County is alarmed by the two previous administrations' irresponsible disregard of their legal obligation to swear in KCSPCA's animal control officers as Animal Control Constables. That this dereliction of duty continued for two years and eight months into the contractual relationship is inexcusable, especially in light of the County's established practice of swearing in Code Enforcement officers. Moreover, it appears that this deficiency would not have been addressed, but for the County Auditor's and Independent Auditor's investigation. Equally alarming is the former County Attorney's response to the Auditors' inquiry - merely referring the Auditors to Section 1 of Article XIV of the Delaware Constitution of 1897. Rather than justifying the previous administrations' neglect of their legal duty to swear in KCSPCA's animal control officers, the cited section (discussed below) states that public officers are required to swear an oath unless exempted by law. There is no such exemption for Animal Control Constables in the State or County Code. The former County Attorney's citation to the State Constitution for the notion that the County need not swear in KCSPCA animal control officers is nonsensical.

Moving forward, all animal control officers contracted or employed by the County will be sworn in as Animal Control Constables at the inception of employment or a contractual relationship. The County will also ensure any future animal control contract will contain a clear definition of animal control officers, which will encompass the descriptions and duties outlined in both the State and County codes. Finally, the County thanks the Auditors for their persistent efforts to get the previous administrations to acknowledge and fulfill their legal obligation to swear in KCSPCA's animal control officers.

1. Potential legal ramifications.

KCSPCA animal control officers should have been sworn in by the County at the inception of the contract. As the Memorandum indicates, State and County Code provisions pertaining to animal control personnel are less than consistent. Taken together, however, those provisions clearly demonstrate that animal control personnel are public officers.

The Delaware Code refers to "animal control constable," "dog warden," and "dog control agent." Though the Code makes subtle distinctions between "animal control constable" and "dog warden," it appears to imbue these positions with the same rights and duties. According to 9 *Del. C.* § 901, a dog control agent is an "individual employed by a county or employed by an independent contractor of a county, for the purpose of enforcing dog control laws, rules, regulations and ordinances." In pertinent part, 9 *Del. C.* § 917 (c) states that "the term 'animal control constable' shall have the meaning ascribed in Chapter 29 of Title 10" and "'dog warden' shall mean a person employed by the county or animal control agency to enforce the dog control laws and ordinances of this State or county and any of its political subdivisions."

New Castle County Code Section 4.02.001 defines "Animal control officer" as "a person employed by the State, County or an animal control agency as an enforcement officer." Also, Sections 4.02.002 and 22.02.007 similarly state:

The County Executive may appoint the animal control officers, contingent on funds available, responsible for the enforcement of this section as code enforcement constables or officers for the limited purpose of issuing summons for violation of this Chapter.

Animal Control Constables are public officers statutorily created by the Delaware Code under Chapter 29 of Title 10 – Courts and Judicial Procedure, Part II – Court Officers and Employees. Animal Control Constables and Code Enforcement Constables are established and governed by 10 *Del. C.* §§ 2901 – 2902(A). As public officers, they are required to be sworn in before performing their duties. Section 1 of Article XIV of the Delaware Constitution (1897) states, in pertinent part, "all public officers executive and judicial, except such inferior officers as shall be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe" the oath or affirmation outlined in the section. There is no such exemption for Animal Control Constables in the State or County Code.

Again, at the inception of the contract, KCSPCA animal control officers should have been sworn in as Animal Control Constables for New Castle County, under the same procedure

used for Code Enforcement personnel. Every Code Enforcement officer is sworn in before he or she may act on behalf of the County. This was confirmed by James Smith, Acting Land Use General Manager, and Al Washington, Assistant Land Use Administrator in charge of Code Enforcement. Though technically a person could be employed in the capacity of a Code Enforcement officer before being sworn in, he or she could not perform code enforcement duties. It is standard County procedure that each Code Enforcement officer is sworn in by the County Executive, who signs the oath. Only after the officer has been sworn in by the County Executive, can he or she perform any code enforcement duties.

To date, there is no pending litigation concerning the authority of KCSPCA employees or the validity of their animal control actions taken on behalf of the County from January 1, 2010 to August 2012. While some claims are already barred by applicable statutes of limitations, actions could be initiated through August 2014, two years from the exact date KCSPCA's animal control officers were sworn in by the County.

In any litigation challenging the authority of KCSPCA animal control officers or the validity of their actions taken during the relevant time period, two factors would likely mitigate in the County's favor –KCSPCA's animal control officers had been previously sworn in by the State of Delaware pursuant to an existing Rabies Control contract; and, the actions of KCSPCA's animal control officers were valid as acts of constables de facto.

First, KCSPCA has made multiple representations that their control personnel were already sworn in by the State of Delaware. In their Response to Bid #10SA-309 ("Response"), KCSPCA specifically states:

Kent County SPCA has 27 Trained Animal Control Officers (ACO) on staff that is [sic] currently sworn in officers of the State of Delaware. All are currently performing animal control duties. (Pg. 7)

Also, in response to the Audit inquiry, KCSPCA represented that their officers were still sworn in by the State of Delaware pursuant to their Rabies Control contract with DNREC. Further, the process by which the County assumed the State's animal control duties lends support to the position that KCSPCA's animal control officers' State oath would mitigate against a claim of invalid action or authority. The contract between the County and KCSPCA for the provision of animal control services was an immediate result of the Legislature's delegation of the State's animal control duties and obligations to the three counties by House Bill 233, signed into law on July 22, 2009. It required the three counties to assume the State's animal control duties as of January 1, 2010. Because the statute simply shifted to the three counties the animal control duties KCSPCA had previously performed for the State, a court would likely view the effect of the State oath as continuing and valid.

Second, KCSPCA's officers' actions taken pursuant to the contract would likely be valid as those of constables de facto. Legal treatises maintain that a constable's actions will be presumed valid if taken pursuant to the enabling statute and/or done by one serving under color of office. Specifically, "acts of one serving under color of office, although the person has not

qualified as a constable de jure, may be valid as those of a constable de facto.” 80 C.J.S. *Sheriffs and Constables* § 23 (2013). And, “acts of one serving under color of office may be valid as those of a de facto constable, although the person is not under bond . . . failed to renew a bond, or where the term of the constable’s appointment has expired.” *Id.* In general, “all that is required to make an officer de facto is that officer claim the office, be in possession of it and perform its duties under the color of election or appointment.” 70 AM. JUR. 2D *Sheriffs, Police and Constables* § 15 (2013). Though Delaware case law does not directly address the issue of validity of a constable’s authority or action, cases generally hold that the acts of de facto officers are valid as to third persons and the public. See *State v. Deakyne*, 58 A.2d 129 (Del. Super. 1948). Also, when a constable acts as an agent of a government entity, if it is clear that he or she performed his or her functions pursuant to the enabling statute, the action taken by the constable should withstand a legal challenge to its validity. See e.g., *Morris v. Blake*, 552 A.2d 844 (Del. Super. 1988), *aff’d*, *Sussex County v. Morris*, 610 A.2d 1354 (Del. 1992).

2. Applicability of 24 *Del. Admin. C.* § 2400.

Delaware Administrative Code, Title 24, § 2400 does not apply to Animal Control Constables. Chapters 27, 28 and 29 of Title 10 of the Delaware Code cover Constables, Justice of the Peace Constables, and Code Enforcement and Animal Control Constables, respectively. Each constable classification has distinct and separate duties, authorities and jurisdictions. General Constables have the broadest powers and duties, and have jurisdiction throughout the State of Delaware. See 10 *Del. C.* §§ 2705 and 2706. In contrast, Code Enforcement and Animal Control Constables have limited duties and authority, and do not have jurisdiction outside the county or municipality in which they are employed. See 10 *Del. C.* § 2902. Also, Code Enforcement and Animal Control constables are prohibited from carrying firearms while on duty. 10 *Del. C.* § 2702 (c).

The Board of Examiners of Constables is created and established under Chapter 27 of Title 10 of the Delaware Code, which creates and establishes general Constables. See 10 *Del. C.* § 2702. Only Chapter 27 references the Board of Examiners. There is no such reference in Chapter 28 or Chapter 29. Additionally, Section 5.0 of 10 *Del. Admin. C.* § 2400 provides a specific firearms policy for Constables. As stated above, Animal Control Constables are statutorily prohibited from carrying firearms in performing their duties. The relevant Delaware Code provisions demonstrate a clear distinction between general Constables and Animal Control Constables. The Code also demonstrates a clear intent for 24 *Del. Admin. C.* § 2400 to apply to Constables authorized under Chapter 27 of Title 10, not to Animal Control Constables authorized under Chapter 29 of Title 10. A discussion with Ms. Peggy Anderson, Licensing Specialist in the Delaware Department of Safety and Homeland Security, Division of State Police, Professional Licensing, confirmed this reading of the Delaware Code. She also confirmed that Chapter 27 Constables must execute an oath before performing their duties.

2.0 Contract, Contract Management and Reporting

2.1 Contract Review

Under the Contract Review section, the Memorandum recommends that future County contracts contain termination clauses to ensure legal and financial protection for the County, and consider incorporating a set of Performance Measurement Standards.

Response:

The County agrees that the current contract is deficient. The County is at a loss to understand why the previous administrations approved a contract lacking essential provisions that would enable the County to terminate the contract early. Such provisions are necessary to the County as the steward of taxpayers' money, especially in instances where early termination becomes necessary due to a vendor's inadequate provision of services or a vendor's failure to abide by applicable laws. Also troubling is that the County's standard indemnification clause is not contained in the body of the contract, but merely incorporated by reference to the RFP.

Any future contract for animal control will contain an early termination clause allowing the County to terminate the contract without penalty. It will also contain a clear definition of adequate performance. Adequate performance will include, among other things, a requirement that the vendor abide by all applicable federal, state, and county laws, regulations and rules; a requirement of secure control and accounting of its controlled substances supply, use and disposal; and a requirement that statistical information is accurate and verifiable. It will also include a set of objective measurements to gauge the vendor's performance under the contract and its expenditures of taxpayers' funds. Finally, the County's standard indemnification clause (and other standard protections) will be expressly delineated in the body of the contract.

2.2 Contractor (Vendor) Management

Under the Contract (Vendor) Management section, the Memorandum recommends the County Executive assign a County employee responsibility for ensuring KCSPCA complies with the terms of its contract. The employee should work in the department to which the contract is assigned, understand the contract's terms, understand all applicable federal, state and county laws, develop a plan for monitoring compliance, and regularly report to the County Executive's Office regarding contract compliance and vendor performance.

Response:

The County has made several advances consonant with the Memorandum's recommendations. Since receiving and reviewing the Independent Audit Report, the County has taken steps to monitor KCSPCA and ensure its compliance with all applicable State and County statutes, regulations and rules. A previously mentioned, a team has been assembled and charged with monitoring the contract for the remainder of its term – Major Matthew Jamison and Sr. Cpl. Mark Tobin in Public Safety; James McDonald, Deputy Chief Administrative Officer; Marlaine White, Sr. Assistant County Attorney; and Andria Smith, Acting Chief of Administrative Services. The employees assigned to monitor the contract have thoroughly acquainted themselves with the contract's terms and the applicable federal, state and county laws, regulations and rules.

As detailed in the previous section, the County has made two unannounced inspections of KCSPCA's facilities. Major Jamison and Sr. Cpl. Tobin will continue to conduct unannounced inspections through the remainder of the contract. Other team members will periodically participate in the inspections. Again, each inspection, in addition to a general review, will include a specific focus – e.g., euthanasia record review, drug logs review. The County will continue to investigate and resolve all citizen complaints regarding KCSPCA's provision of animal control services under the existing contract. The County will also look into the following issues observed by the Independent Auditor: KCSPCA only sending monthly reports summarizing the control portion of their organization, and no monthly reports regarding the sheltering portion; the change in KCSPCA's hours of operation, with no prior notice to the County, which could impair County residents' access to KCSPCA's services under the contract; the change in KCSPCA's fees without notice to the County, in contravention of Section 6 of the contract, which states that all such fees established shall be done so with the concurrence of the County; and, ensuring KCSPCA's contractually required insurance coverage is maintained through the completion of the contract. Lastly, any future contract awarded to a vendor providing animal control services will incorporate the recommendations from the Independent Audit.

The County trusts this response addresses the concerns and recommendations raised in the May 9, 2013 Memorandum. Please be assured the County is deeply concerned about the issues discovered by the Independent Audit. The County will take appropriate steps to ensure that for the remainder of the contract KCSPCA abides by all the terms of the contract and applicable federal, state and county laws. The County will also thoroughly examine KCSPCA's statistics on euthanasia, adoptions, and returns, as well as supporting documentation. Finally, the County will take all necessary measures to ensure the animals taken in by KCSPCA under the existing contract are given the best, most compassionate care.

Cc: Thomas P. Gordon, County Executive
David Grimaldi, Chief Administrative Officer
James McDonald, Deputy Chief Administrative Officer
Elmer Setting, Chief of Police
Joseph Bryant, Public Safety Director
Bernard V. Pepukayi, County Attorney
Darryl Parson, County Solicitor
Michael Coupe, Chief Financial Officer
Andria Smith, Acting Chief of Administrative Services
Major Matthew Jamison
Sr. Cpl. Mark Tobin