

COPY

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

Department of State

RECEIVED BY: M. J. C.

PROTHONOTARY

---

BEFORE THE STATE BOARD OF VETERINARY MEDICINE

---

COMMONWEALTH OF PENNSYLVANIA,  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

v.

RUSTY HERR

DOCKET NO. 2296-57-09  
FILE NO. 09-57-05797

---

AMENDED ADJUDICATION AND ORDER

---

ROBIN J. BERNSTEIN, ESQ., CHAIRPERSON  
STATE BOARD OF VETERINARY MEDICINE

BASIL L. MERENDA, COMMISSIONER  
BUREAU OF PROFESSIONAL  
AND OCCUPATIONAL AFFAIRS

2601 N. THIRD STREET  
P. O. BOX 2649  
HARRISBURG, PA 17105-2649

## HISTORY

This case came before the State Board of Veterinary Medicine ("Board") to determine whether Rusty Herr ("Respondent") was subject to discipline by the Board for practicing veterinary medicine when he was not licensed to do so. The matter commenced when the Commonwealth filed an order to show cause on December 23, 2009, alleging that Respondent violated the Veterinary Medicine Practice Act ("Act"), Act of December 27, 1974, P.L. 995, No. 326, as amended, 63 P.S. §§ 485.1 *et seq.*, by performing a surgical operation, specifically what is referred to as a Gymer/Sterner Toggle Suture Repair of left displaced abomasum, on at least six cows that Respondent did not own, and by performing ultrasound for the detection of pregnancy on cows that Respondent did not own. Section 3(10) of the Act, 63 P.S. § 485.3(10), defines the practice of veterinary medicine to include performing a surgical operation and the practice, by any person who, diagnoses an animal's physical conditions by any mode. Section 28(c) of the Act, 63 P.S. § 485.28(c), provides that an unlicensed person may be disciplined for practicing veterinary medicine. Respondent was served with the order to show cause by certified mail on December 24, 2007, as evidenced by the certificate of service attached to the order to show cause.

Respondent did not file an answer to the order to show cause. On February 4, 2010, the Commonwealth filed a motion to enter default and deem facts admitted. On March 23, 2010, the Board issued an order granting the Commonwealth's motion. The Board deliberated the matter and now issues this adjudication and order in final resolution of this matter.

### FINDINGS OF FACT

1. Respondent does not currently hold and, at all times pertinent to the Factual Allegations, has never held a license authorizing him to practice veterinary medicine in the Commonwealth of Pennsylvania. (Board records; order to show cause, paragraphs 1 and 2).
2. Respondent's last known address is 200 Hawkins Road, Oxford, Pennsylvania 19363. (Order to show cause, paragraph 3).
3. Respondent is a dairy farmer. (Order to show cause, paragraph 4).
4. Respondent performed what is known as a Gymer/Sterner Toggle Suture Repair of left displaced abomasum procedures on six cows owned by other dairy farmers. (Order to show cause, paragraphs 5 and 12; exhibit A).
5. The Gymer/Sterner Toggle Suture Repair of left displaced abomasum is a surgical procedure. (Order to show cause, paragraph 7; exhibit A).
6. Respondent performed ultrasounds on cows owned by other dairy farmers in order to determine early pregnancy; scan ovarian structures; and detect early embryonic death, presence of twins, fetal sex of the calf to be born and more. (Order to show cause, paragraph 16; exhibit A).
7. Respondent received the Order to Show Cause on January 9, 2010. (Motion to enter default, exhibit A).
8. The Commonwealth mailed Respondent a copy of the motion to enter default and deem facts admitted on February 4, 2010. (Motion to enter default, certificate of service).
9. Respondent did not respond to the order to show cause or motion to enter default and deem facts admitted. (Docket no. 0255-57-07)

### CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter. (Finding of Fact no. 1).
2. Respondent has been afforded reasonable notice of the charges against him and has been given an opportunity to be heard in this proceeding in accordance with the Administrative Agency Law, 2 Pa. C.S. §504. (Findings of Fact nos. 7-9).
3. The facts deemed admitted demonstrate that Respondent is subject to discipline under section 28(c) of the Act, 63 P.S. § 485.28(c), in that Respondent practiced veterinary medicine when he was not authorized by license to do so. (Findings of Fact nos. 1, 4-6).

## DISCUSSION

### Applicable Law

This matter is brought under section 28(c) of the Act, which provides as follows:

**§ 485.28. Penalties**

\* \* \*

(c) In addition to any other civil remedy or criminal penalty provided for in this act, the board, by a vote of the majority of the maximum number of the authorized membership of the board or by a vote of the majority of the duly qualified and confirmed membership or a minimum of four members, whichever is greater, may levy a civil penalty of up to one thousand dollars (\$1,000) . . . on any person who practices veterinary medicine or performs the duties of an animal health technician without being properly licensed or certified to do so under this act . . . .<sup>1</sup>

63 P.S. §485.28(c).

The Act defines the practice of veterinary medicine at section 3 as follows:

**(10) "Practice of veterinary medicine"** includes, but is not limited to, the practice by any person who (i) diagnoses, treats, corrects, changes, relieves or prevents animal disease, deformity, injury or other physical, mental or dental conditions by any method or mode, including the prescription or administration of any drug, medicine, biologic, apparatus, application, anesthetic or other therapeutic or diagnostic substance or technique, (ii) performs a surgical operation, including cosmetic surgery, upon any animal . . . .

63 P.S. §485.3(10)

### Due Process

Prior to entering an adjudication, the law mandates that the Board consider whether Respondent was provided adequate notice of the charges against him and an opportunity to present a defense to the charges. "Adequate notice of administrative action is notice which is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency

---

<sup>1</sup> Section 28 of the Act, 63 P.S. § 485.28, was repealed insofar as inconsistent with Act 25 of July 17, 2009, P.L. 95, 63 P.S. § 2205(b)(4) (amending the maximum civil penalty to \$10,000). In its order to show cause, the Commonwealth failed to allege any dates of Respondent's practice. Act 25 of July 17, 2009, became effective on September 15, 2009. In the absence of any allegation that Respondent practiced veterinary medicine after that date, the Board will use the prior \$1,000 civil penalty as the maximum allowable penalty per act of unlicensed practice.

of the action and afford them an opportunity to present their objections.” Clark v. Commonwealth, Dept. of Pub. Welfare, 427 A.2d 712, 714 (Pa. Cmwlth. 1981) (citation omitted). “Notice of administrative action mailed to the interested party’s last known address has been found to be reasonable notice.” Kobylski v. Commonwealth, Milk Mktg. Bd., 516 A.2d 75 (Pa. Cmwlth. 1986). “Actual notice . . . is not required to meet the constitutional standard.” Id.

Respondent was served with the order to show cause. (Finding of fact no. 7). The notice and order to show cause clearly and specifically stated the charges against Respondent and directed Respondent to file an answer. The notice and order to show cause told Respondent how to request a hearing and clearly warned Respondent that if he did not file an answer within 30 days he would be deemed to have waived his right to a hearing and final judgment might be entered without a hearing. Due process does not confer an absolute right to be heard, but only requires that a party be provided with an opportunity to be heard. Goetz v. Commonwealth, Dep’t of Environmental Resources, 613 A.2d 65, 67 (Pa. Cmwlth. 1992), appeal denied, 533 Pa. 663, 625 A.2d 1196 (1993). The Board concludes that Respondent had notice of the charges and was given an opportunity to be heard, but did not take advantage of the opportunity. For the foregoing reasons, the Board concludes that the Commonwealth met its due process burden.

#### Discussion

The Board is authorized to discipline unlicensed persons who practice veterinary medicine in the Commonwealth. Respondent does not now nor has he ever held a license to practice veterinary medicine. Both the performance of a surgical procedure, such as the Gymer/Sterner Toggle Suture Repair, and the diagnosis of a physical condition, such as detecting through ultrasound whether an animal is pregnant, constitute the practice of veterinary medicine.

Respondent did not own the cows upon which these procedures were performed.<sup>1</sup> The Board concludes that the Commonwealth has met its burden and that Respondent is subject to discipline by the Board.

In determining the appropriate sanction, the Board considers the seriousness of the violation(s) and any evidence in mitigation presented by Respondent. In this case, Respondent chose not to file an answer to the order to show cause or to appear at a hearing to offer evidence in mitigation.

The Board has a statutorily-mandated duty to protect animal owners from unlicensed persons practicing veterinary medicine. Respondent performed bovine surgeries. Veterinarians who repair a displaced abomasum perform additional pre-surgical and post-surgical procedures to minimize serious risks to the animals and ensure the livelihood of Pennsylvania's dairymen. The General Assembly determined that the health of animals and interests of animal owners was best protected by allowing only licensed veterinarians to perform surgical procedures on animals. Respondent's actions endanger not only the cows on which he performs his procedure, but also the livelihood of the dairymen. It is imperative the Board protect both animals' health and welfare as well as the dairyman's livelihood by enforcing statutory prohibitions on unlicensed practice. These interests are of the utmost importance to the Board. Unlicensed practice is not viewed lightly.

Although diagnosis of pregnancy through ultrasound presents less risk to the animal and the animal's owner than the performance of surgical procedures, the General Assembly determined that this action should be limited to licensed veterinarians. The General Assembly authorized the Board to impose a maximum penalty of \$1,000 per count against unlicensed

---

<sup>1</sup> Section 32(4) of the Act, 63 P.S. § 485.32(4) provides an exemption from the act to "any person or his or her regular employe or agent while practicing veterinary medicine on his or her own animals." (63 P.S. § 485.32(4)).

individuals who practice the profession. The Board usually imposes the maximum penalty when there is a pattern of unlicensed practice. Although this was not an isolated incident, but rather a continued practice for which Respondent was paid, certain facts mitigate the penalty to be imposed. Specifically, in a letter sent to the Bureau of Enforcement and Investigation (Exhibit A to the order to show cause), Respondent stated that he was not aware that the Veterinary Medicine Practice Act prohibited him from performing “togglings” surgeries on cows and diagnosing conditions using ultrasound. In his letter, which was attached as an exhibit to the Order to Show cause, Respondent state that he was “no longer togglings other people’s cos.” (Order to Show cause, Exhibit A). Through this adjudication, Respondent has been advised that these practices are prohibited.

The Board finds that a civil penalty of \$500 per count should be assessed for Respondent’s performance of surgical procedures and the diagnosis of pregnancy in the cows. Should Respondent continue to violate the Act, he may be subject to the imposition of a \$10,000 civil penalty per act of practice.

Accordingly, the following Order shall issue:



**COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BEFORE THE STATE BOARD OF VETERINARY MEDICINE**

Commonwealth of Pennsylvania	:	
Bureau of Professional and	:	
Occupational Affairs	:	Docket No. 2296-57-09
v.	:	File No. 09-57-05797
Rusty Herr,	:	
Respondent	:	

**AMENDED ORDER**

AND NOW, this 14th day of May 2010, the State Board of Veterinary Medicine, having duly convened and considered the entire record of the proceedings, and based upon the foregoing findings of fact, conclusions of law and discussion, hereby finds that Rusty Herr, is subject to the imposition of a **CIVIL PENALTY** in the amount of **\$3,500**. The civil penalty shall be paid by certified check or money order made payable to the Commonwealth of Pennsylvania, State Board of Veterinary Medicine, and mailed to Board Counsel, State Board of Veterinary Medicine, 2601 N. Third Street, P.O. Box 2649, Harrisburg, PA 17105-2649. Failure to remit the civil penalty may result in additional legal action against Respondent.

Respondent Rusty Herr is hereby **ORDERED** to **CEASE** and **DESIST** from the unlicensed practice of veterinary medicine. Failure to cease and desist from veterinary medical practice may result in additional legal action.


This **ORDER** shall become effective on June 14, 2010, thirty days from the date of mailing.

**BY ORDER:**

**BUREAU OF PROFESSIONAL  
& OCCUPATIONAL AFFAIRS**

**STATE BOARD OF VETERINARY  
MEDICINE**

  
BASIL L. MERENDA,  
COMMISSIONER

  
ROBIN J. BERNSTEIN, ESQUIRE  
CHAIRPERSON

Respondent:

Rusty Herr  
200 Hawkins Road  
Oxford, PA 19363

Prosecuting Attorney:

Shawn E. Smith, Esquire  
2601 N. Third Street, P.O. Box 2694  
Harrisburg, PA 17105-2649

Board Counsel:

Teresa Lazo, Esquire  
2601 N. Third Street, P.O. Box 2694  
Harrisburg, PA 17105-2649

Date of Mailing:

May 14, 2010

## NOTICE

The attached Adjudication and Order represents the final agency decision in this matter. It may be appealed to the Commonwealth Court of Pennsylvania by the filing of a Petition for Review with that Court within 30 days after the entry of the order in accordance with the Pennsylvania Rules of Appellate Procedure. See Chapter 15 of the Pennsylvania Rules of Appellate Procedure entitled "Judicial Review of Governmental Determinations," Pa. R.A.P 1501 – 1561. Please note: An order is entered on the date it is mailed. If you take an appeal to the Commonwealth Court, you must serve the Board with a copy of your Petition for Review. The agency contact for receiving service of such an appeal is:

Board Counsel  
P.O. Box 2649  
Harrisburg, PA 17105-2649

The name of the individual Board Counsel is identified on the Order page of the Adjudication and Order.



COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE OF GENERAL COUNSEL

Teresa Lazo  
Assistant Counsel

tlazo@state.pa.us

May 14, 2010

*VIA CERTIFIED AND FIRST CLASS MAIL*

Rusty Herr  
200 Hawkins Road  
Oxford, PA 19363

**RE: Amended Final Adjudication and Order:  
Commonwealth of Pennsylvania, Bureau of Professional  
and Occupational Affairs v. Rusty Herr, Respondent  
Docket No. 2296-57-09  
File No. 09-57-05797**

Dear Mr. Herr:

Enclosed please find a Final Adjudication and Order issued by the State Board of Veterinary Medicine in the above-referenced matter. This order is being amended to reflect the corrected effective date.

Very truly yours,

Teresa Lazo, Counsel  
State Board of Veterinary Medicine

Enclosure

cc: Michelle Roberts, Board Administrator  
State Board of Veterinary Medicine