

D. MARIE DUEBEN AND MARK L. DUEBEN,
Petitioners,
v.
ROBERT THERIEN, JR., AND COLLEEN THERIEN,
Respondents. Dueben v. Therien

CMA 8329-96

Consumer Affairs

97 N.J.A.R.2d(CMA) 150; 1997 N.J. AGEN LEXIS 287

March 20, 1997 , Initial Decision, Initial Decision, Initial Decision, Initial Decision,
Initial Decision June 25, 1997 , Final Agency Decision, Final Agency Decision, Final
Agency Decision, Final Agency Decision, Final Agency Decision

COUNSEL: [*1]

D. Marie Dueben and Mark L. Dueben, petitioners, pro se

Michael J. Pifko, Esq., for respondents (Peterson, Book & Pifko, attorneys)

FINAL DECISION BY: MASIN, ALJ

INITIAL DECISION: Petitioners D. Marie Dueben and Mark L. Dueben, husband and wife, sold a Bichon Frise dog to the respondents, Colleen and Robert Therien, husband and wife, on Thursday, February 29, 1996. The purchase price was \$ 450.00. The Theriens returned the dog to the Duebens on Monday, March 4, 1996, invoking the provisions of N.J.A.C. 13:45A-12, a "lemon law for pets," which is a regulation established pursuant to the Consumer Protection Act, N.J.S.A. 56:8-4. See generally, *Pet Dealers Ass'n of New Jersey, Inc., v. Division of Consumer Affairs, Dep't of Law and Public Safety, State of N.J.*, 149 N.J. Super. 235 (App. Div. 1977), certif. denied 75 N.J. 16 (1977). N.J.A.C. 13:45A-12 provides protection for consumers who purchase animals from those sellers who come within the definition of those purveyors of animals to which the regulations apply, essentially those who are either in the business of pet sales or who sell five or more animals within a calendar year. *N.J.A.C. 13:45A-12.1*. Under the regulations, a purchaser who receives a certification from [*2] a veterinarian that the purchased animal was unfit for purchase may invoke several options, electing to return the animal to the seller and receive a refund of the purchase price, to keep the animal and receive the costs of medical evaluation and treatment of the disqualifying condition or to exchange the animal for a similarly priced substitute.

Once the purchaser exercises the option, *N.J.A.C. 13:45A-12.3(a)(9)* permits the seller to challenge the election made through a hearing held by the Director of the Division of Consumer Affairs, which has the statutory option to hear the case personally or to transmit it as a contested case to the Office of Administrative Law, pursuant to *N.J.S.A. 52:14B-1* to -15 and *N.J.S.A. 52:14F-1* to -13. Here, the matter was transferred to the OAL, and this judge held a hearing on February 11, 1997. n1 The record closed following the hearing.

THE REGULATIONS

Prior to discussing the evidence it may be helpful to review the terms of N.J.A.C. 13:45A-12, a regulation which has apparently not been the subject of much, if any, administrative litigation.

The regulation applies to "pet dealer(s)," defined as

any person engaged in the ordinary course of business [*3] in the sale of animals for profit to the public or any person who sells or offers for sale more than five animals per year.

N.J.A.C. 13:45A-12.1

The regulation declares it a deceptive practice under the Consumer Protection Act to sell an animal within the State without an animal history and health certificate and without providing these to the consumer. *N.J.A.C. 13:45A-12.2(a)*. The animal history and health certificate must be signed by the dealer, his agent, or employee, and "shall contain" the

animal's breed, sex, age, etc., the name and address of the person from whom the dealer purchased the animal, the breeder's name and address, the litter number, the name and registration number of the animal's sire and dam, the date when the dealer took possession of the animal and the shipping date, and certain health examination data. *N.J.A.C. 13:45A-12.2(a)(i)* to (viii).

The regulation also provides that

If at any time within 14 days following that sale and delivery of an animal to a consumer, a licensed veterinarian certifies such animal to be unfit for purchase due to a non-congenital cause or condition . . . , a consumer shall have the right to elect one of the following options when [*4] the animal has not died:

- i. The right to return the animal and receive a refund of the purchase price, including sales tax, plus reimbursement of veterinary fees, . . . ;
- ii. The right to retain the animal and to receive reimbursement for veterinary fees incurred prior to the consumer's receipt of the veterinary certification, plus the future cost of veterinary fees to be incurred in curing or attempting to cure the animal . . . ;
- iii. The right to return the animal and to receive in exchange an animal of the consumer's choice, of equivalent value, plus reimbursement of veterinary fees

N.J.A.C. 13:45A-12.3(a)(6)

"Unfit for purchase" means any disease, deformity, injury, physical condition, illness or defect which is congenital or hereditary and severely affects the health of the animal, or which is manifest, capable of diagnosis or likely to have been contracted on or before the sale and delivery of the animal to the consumer

N.J.A.C. 13:45A-12.1

A certificate of unfitness delivered to the dealer "shall" be accepted if delivered within five days following the consumer's receipt thereof and the "certification" is to contain the name of the owner; date(s) of examination(s); [*5] breed, color, sex and age of the animal; statement of the doctor's findings; veterinarian's certification of unfitness for purchase; itemized statement of fees incurred; estimated fee to cure if possible; and doctor's name and address. *N.J.A.C. 13:45A-12.3(a)(7)*.

The election of options in regard to an animal certified as unfit must be confirmed in writing, *N.J.A.C. 13:45A-12.3(a)(8)* and the dealer must comply with the election within 10 days of the election. *N.J.A.C. 13:45A-12.3(a)(9)*. This later provision also details the dealer's right to contest the election. This is done by advising the Director of the Division of Consumer Affairs and the consumer in writing within five days of the receipt of the veterinarian's certification, and the regulation allows the dealer to have the consumer produce the animal for an examination by a veterinarian of the dealer's choice. The hearing which the Director shall provide in the case of a protest by the dealer is "to determine why the option elected by the consumer should not be allowed." *N.J.A.C. 13:45A-12.3(a)(9)*.

Finally, the dealer "shall give" a designated written notice to a consumer prior to the delivery of an animal. This is a "Know [*6] Your Rights" statement which advises the consumer of the "New Jersey Law Governing the Sale of Dogs and Cats." *N.J.A.C. 13:45A-12.3(a)(10)*.

EVIDENCE

Colleen Ann Therien, who already owned 2 dogs, a Siberian of 3 months and an 11-year-old mixed breed, testified that she purchased the dog as a birthday present for her 3-year-old daughter. She responded to a classified advertisement. After calling the telephone number supplied in the ad, she visited the Duebens' home, where she was only allowed to come onto the front porch where the business transaction occurred. She saw only one puppy there, and purchased it for \$ 450.00, paying by check. At the time of the purchase, she did not receive the dogs American Kennel Club ("AKC") papers, as Mrs. Dueben claimed that she had to pick them up at a post office box in Barnegat. The papers were received by Mr. Therien on Friday.

Mrs. Therien took the animal home in her van, and the animal was held during the trip. After its introduction into the house, Mrs. Therien noted that the dog was very quiet and seemed docile. However, she also noted that the dog had a severe odor and it vomited within twenty minutes of their arrival. It also appeared that [*7] the other two dogs did not take to the new addition.

By Monday, March 4, the dog had profuse diarrhea, could not walk, and vomited constantly. It refused to eat or drink and did not bark for three days. Concerned, Mr. Therien took the animal to a veterinarian, Dr. Briggs, who is

associated with the Ocean County Veterinary Hospital, a facility which the Theriens has previously used for their other dogs. Dr. Briggs issued a certificate which declared that the animal he examined was "unfit for purchase."

Mrs. Therien "probably saw" P-2, a Health Certificate issued on February 21, 1996, for an unnamed, 8-week-old Bichon Frise dog by Dr. Robert H. Cohen, V.M.D. Although the Certificate lists the dog's owners as Mrs. Dueben and a Gloria Anderson, Mrs. Therien claimed that at the time she purchased the dog, Mrs. Dueben did not tell her that she was not the owner of the dog. She believes that her husband received this and the AKC papers on Friday, March 1. The AKC papers were returned to Mrs. Dueben with the dog on March 4.

Mrs. Therien testified that her husband was fully in agreement with the purchase of the dog and had agreed to spend even more than the \$ 450.00 which she paid for this [*8] particular animal. At the time of the purchase, no history of the animal was provided, no information as to its breed, sex, litter number, sire and dam, or the date when the Duebens gained possession of the animal. Mrs. Dueben represented herself as the breeder. She recalls that Mrs. Dueben did mention that there was another puppy in the house, a dog with an "undershot," that is, a lower jaw that protruded. She denied that her other dogs had mauled the new puppy.

Robert Therien, Jr., testified that he was happy that his wife had purchased the dog for their daughter in accordance with previous discussions which he and his wife had had. He described the severe odor which the dog exhibited on Thursday evening as "sour," "infected," "rotten," and certainly not a normal odor associated with a dog. On Thursday evening he called Mrs. Dueben to ask her about the reaction which his other dogs were having to the new arrival, and he asked her if she would take the puppy back. She said "absolutely not," and he does not recall that she said anything regarding "unfit for purchase" matters.

When Mr. Therien took the dog to Dr. Briggs, he could not supply any history regarding the dog, except of [*9] course the observations of what had occurred since Thursday. Briggs examined the dog, and mentioned the "unfit for purchase" certificate and the rights of a purchaser under the law. He also said that he could give the dog shots and "go from there." No cost for this treatment was mentioned. Therien then asked Briggs for the "Unfit" certificate.

When Mr. Therien returned the dog to the Dueben home on Monday, he asked for a refund of the purchase price, but Mrs. Dueben advised him that she had 10 days within which to issue the refund. She later called and said that she did not intend to issue any refund. As a result, Therien went to the Howell Police Department where he signed a complaint against Mrs. Dueben for theft by deception, a violation of *N.J.S.A. 2C:20-4A*. The charge was suggested as the appropriate one by Detective Daniel Raimondi, who simply listened to Therien's rendition of the facts and then told him that if he wished to file a complaint he could do so, and told him where to go to file it. (The charge resulted in an initial finding of guilt at the municipal court level, but the decision was reversed on appeal to the Superior Court).

Mr. Therien denied that he or his wife [*10] were ever advised by Mrs. Dueben of their rights as purchasers of the dog, nor about the election of remedies. He returned the AKC papers to Mrs. Dueben with the dog.

Dr. Warren F. Briggs, V.M.D., testified that he has been licensed as a veterinarian in New Jersey since October 1992. He has worked as an associate at the Ocean County Veterinary Hospital and the emergency service to which that hospital subscribes since that time. In practice he has examined a couple of hundred Bichon Frise dogs. Dr. Briggs did not know Mr. Therien on a social basis prior to the visit on March 4, although he may have seen other dogs of the Theriens previously.

Dr. Briggs first took a history of the dog, which in this case was the most abnormal aspect of the examination. The physical exam revealed a normal temperature and a weight of seven pounds, which was determined by first weighing himself and the dog and then himself on a bathroom scale in the examining room. (He did not know who calibrates the scales). The owners spoke of large volumes of profuse, liquidy diarrhea and the doctor noted some diarrhea staining on the hind end which he did not believe was consistent with normal bowl movement. However, [*11] the dog did not appear to be dehydrated, which he would expect to see if it had suffered profuse diarrhea and vomiting. He did not detect any unusual odor. A fecal exam performed by use of an instrument introduced into the colon produced very liquidy material, but showed no parasites. No x-rays or blood tests were performed. The dog did present an abnormal appearance, in that the dog was lethargic, looked sick and had the demeanor of a sick puppy. He had no reason to disbelieve the Therien's description of the dog's course over the previous several days, and he deemed his findings consistent with the history. He diagnosed the puppy as a "sick pup," most likely suffering from a gastrointestinal disorder. This was a diagnosis based mostly upon observation and history, with no specific way to prove it accurate. He did not write this diagnosis on the "Unfit for Purchase" certificate as he felt that what he wrote was adequate.

Dr. Briggs had previously issued perhaps six "Unfit" certificates, and, given his findings, he told the Theriens about the existence of the law and their right to such a certificate if they desired one. He would not issue one for a healthy dog. In his professional [*12] opinion this dog was unfit for purchase.

The doctor commented upon information he later was presented with about an examination of a dog, purportedly named "Sugar," produced at the Veterinary Hospital later that same afternoon by a Donna Anderson and examined by Dr. Falk, a partner in the hospital. This dog was said to be twelve weeks old. He concluded that the dog Falk examined was a different dog than the one he saw that morning. This conclusion was based upon the fact that Dr. Falk recorded the dog's weight as five pounds rather than seven, and the dog Falk saw was suffering from an internal parasite, coccidia, which was found in a fecal smear, which had not been the case with the dog seen by Briggs. He would not anticipate that the dog weighing seven pounds in the morning would weigh five in the afternoon, or that it would have developed a parasitic condition in a few hours, particularly since coccidia is usually pretty easy to find. He felt that the material he had collected from the colon during his own exam was a sufficient quantity to have allowed him to find this parasite if the dog had the parasite. Briggs also saw no ear mites in his exam, but Falk did. Anderson did not [*13] tell Falk that the dog she presented had been sold, nor that it had been seen that morning by Briggs. She claimed that she needed a health certificate because she was going to Canada for the weekend.

Dr. Robert H. Cohen V.M.D., licensed in New York, New Jersey and Pennsylvania since 1954, saw a Bichon Frise on February 21, 1996. In fact, he saw two dogs that day, said to be eight weeks old, a male and a female. The age was provided to him as a part of the history which he took. Each was in good health. He provided the Health Certificate, P-2, for an unnamed dog. On March 7, he saw a five pound Bichon, in good health, which he was told was called "Sugar." This dog showed no evidence of any staining on its body, no ear mites, and he took no stool sample. Dr. Cohen opined that a dog could suffer diarrhea and appear lethargic from something it ate, such as chocolate, insects, other inappropriate foods, or from chilling. If a dog has not eaten or drank at all for several days it would become dehydrated, lose weight and become toxic. The dog that he saw on March 7 showed no indications of these conditions. If Dr. Briggs saw the dog on the 4th and the animal was ill and remained untreated [*14] Cohen would perhaps see evidence of the problems in her coat three days later.

The doctor said that he never spoke to Mrs. Therien and did not say that he "saw so many of Mrs. Dueben's dogs." He has known the Duebens for several years, seeing them occasionally in his Howell Township office, which he opened after April 1995. He saw them, perhaps as late as the later part of 1995, and they mostly brought in puppies for examination. He saw perhaps 6 to 12 over the period of a year, but he did not ask if they were being sold. Most of the dogs were Westies, not Bichons.

The Health Certificate which Dr. Cohen provided was on a form prepared for him by Mr. Dueben, and Cohen dictated the information, which Dueben then transcribed. The doctor agreed that there was no way that he could say that the dog he saw on the 7th was the same dog he saw on February 21. It was "unusual" for the Duebens to present a Bichon, but he had seen their Bichons before.

Annette Perri, who described herself as a friend of the Duebens who had Christmas dinner at their home, testified that on the morning of March 4 she was at the Dueben house. She had a dog whose fur was severely matted and Mrs. Dueben was showing [*15] her how to get the matting out. There was a knock on the door and after Mrs. Dueben answered it she came back in with a puppy, which Perri held. The puppy never left Perri's sight and this same dog was the one Mrs. Dueben and she later took to the veterinarian. Before the trip to the doctor, Perri observed the dog to walk around the kitchen and it licked her face. It was more active when it was taken to the vet than when first dropped off. It was not lethargic and never "just laid there." She saw no other Bichons in Dueben's house then, but could not recall if the Duebens had a litter of Bichons around Christmas 1995.

D. Marie Dueben testified that her girlfriend, Gloria Anderson, had two puppies. Dueben herself had had a five month old "undershot" Bichon, which was "already gone," and still had a seven year old spayed and a two year old which was not at her house. Anderson wanted to sell the puppies and ran an advertisement. She took the puppies to Dueben's house. Mrs. Therien called her on a Thursday, by which time she only had a female puppy left. Therien came to the house where Dueben showed her the puppy on the concrete front porch, which was 12 x 32 feet. Dueben told her [*16] that she was not a dog breeder and that the puppy belonged to a friend, who had the AKC papers. Therien was leery because of the lack of paperwork. Dueben told her she could wait and buy the animal the next day, but Dueben would not hold the dog for Therien if she received an offer for it before Therien returned. Therien took the dog, but the check was no good. Dueben acknowledged that she did not provide Therien with the name and address of the breeder, as she did not know who this was, or the sire and dam, or the date she took possession, which she said was February 21.

Additionally, she did not provide a "warning in writing" because the dog was inoculated, or a written explanation of the options available to the buyer if the dog was unfit. She did not maintain a copy of the health history and certificate for one year. She had no sign on her premises and did not think that she had to have one. She had some knowledge of the law regarding the rights of purchasers of unfit dogs.

According to the witness, Mr. Therien called her that night. At first he represented that he was a Howell Township police officer, which she later determined he was not. He told her that his Husky had mauled [*17] the new dog. He wanted to return the dog. He said nothing about vomiting or diarrhea. Mrs. Dueben heard Mrs. Therien in the background, saying that she would keep the dog and sell it. Dueben told Mr. Therien that she only had to take back the dog if it was sick and unfit for purchase. Therien told her that he would be at her house the next day to get the papers. He did, and he gave her a good check. She then heard nothing on Saturday and Sunday. However, on Monday morning, Mr. Therien was at her door, handing her the dog, the "Unfit" certificate and the papers, although she later realized that the AKC papers were not included and she does not know where they are.

After Therien returned the dog, Mrs. Dueben took the dog to Ocean County Veterinary Hospital because Dr. Cohen is semi-retired and leaves his office at 12 noon. She used her maiden name, which coincidentally (they are not related) was the same as the woman listed as the co-owner of the dog examined by Dr. Cohen on February 21, because she did not want to conflict or prejudice the doctors because she did not know what Therien had told them. She said that the dog's name was Sugar. Dr. Falk examined the dog and gave her a certificate [*18] of health.

Mrs. Dueben, who has bred Westies for 20 years, had no litter of Bichons. She "may" have sold five or more dogs in 1994. She denied that there were two different dogs examined by Briggs and Falk. She still has the "Therien" dog.

In rebuttal, Mr. Therien denied that he had threatened to stop payment of the check. He denied that any chocolate or other inappropriate food was given to the puppy. There was no "20 minute fight" on the telephone, as Mrs. Dueben claimed. He never told her that the Husky mauled the puppy.

A certified transcript of the testimony of Dr. Peter M. Falk given in the Howell Township Municipal Court during the proceedings on the theft by deception charges against Mrs. Dueben was entered into evidence. He identified Mrs. Dueben as the person presenting the dog to him at 2:47 P.M. on March 4. He indicated that he had not been present to observe the dog seen by Dr. Briggs on the morning of March 4, but when asked if there were two different dogs seen by he and Briggs, Falk commented that while he did not actually know, he thought "it would be unusual to have that many discrepancies." As for the weight difference, each of the six examining rooms at the [*19] hospital has a different scale and they are "relatively accurate." The differential between five and seven pounds was "percentage wise a large discrepancy," whereas if he were speaking of a hundred pounds and a hundred and two pounds the difference would not be significant.

Considering that "Dr. Briggs is very good and highly competent" and "it would be hard for me to think that there would be three discrepancies in us examining the same dog," Falk stated that the combination of the notes of Dr. Briggs' morning examination, which indicates no sign of parasites or ear mites, as well as the significant weight differential, and admittedly "hearsay" information from his receptionist that the morning and afternoon dogs "looked different and their attitude was different," indicated to him that while "it's not that something can't happen in a few hours but I think that it is likely that that may, that it was not the same dogs," and that "to a reasonable degree of certainty or probability" "two" dogs were presented that day.

DISCUSSION AND ANALYSIS

Initially, the provisions of the regulations are not applicable to anyone who sells a dog, but only come into play when the seller is a "pet [*20] dealer" as defined by the regulation. The record here as to the Duebens' business activities is sketchy at best, but Mrs. Dueben believed that she had sold at least five dogs in 1994, and it seems that she regularly breeds Westies, if not also Bichons. She specifically agreed that she was not denying that the regulation covered her. In this consumer protection context, the burden of establishing that a person who has sold a pet is not a "dealer" under the definition properly falls upon the seller, who in most instances will be in a far better position to know whether or not five or more sales have occurred per year. Since the respondents have not disputed coverage, I FIND that Mrs. Dueben is a "pet dealer" subject to the regulations.

Before proceeding to determine the facts and apply the law to them, it should be noted that in the course of the testimony it became clear that neither the Duebens as dealers or Dr. Briggs, as the examining and certifying veterinarian, complied with all of the detailed provisions of the regulations as far as the provision of the required information about the dog's pedigree, breeder, sire, dam, etc., or about the exact technical diagnosis and fees needed

[*21] to probably cure the animal. While these matters are generally important, and at times the absence of one or another of these may be important and even fatal to a party's case under the regulations, I do not deem the absence of any of these to require that either party not have their opportunity to receive a decision on the merits.

The regulation provides for a hearing at which the dealer may attempt to demonstrate why the option elected should not be permitted. This wording is problematic, because the ability to elect an option only comes into play once the consumer has received a certificate of unfitness from a veterinarian. If the only issue which the seller can contest is the option selection, this may mean that the validity of the declaration of unfitness cannot be contested. The dispute over selection of the option may then revolve on such matters as whether an unfit dog can be returned for refund and reimbursement, or whether, in some cases, the expenses and fees related to a probable cure may be sufficiently small that return of an expensive dog would be an unreasonable choice, as opposed to retention by the consumer and reimbursement for the veterinary fees and expenses necessary [*22] for the cure. In the present case, where the dispute has centered upon whether the animal was actually unfit, the determination of this question of the proper reading of the statute is crucial, for if the narrow reading is proper, there is nothing to decide. The Briggs certification of unfitness is conclusive, the propriety of the selection of the return option has not been challenged as an unreasonable choice if the dog was indeed sick. However, it seems far more likely that the intent of the regulations is to allow both a challenge to the option selected and, more fundamentally, a challenge to the actual declaration of unfitness, for if the animal was indeed fit, then the selection of any option would be an unreasonable one. The interests of both the seller and the consumer are protected by such a reading.

Based upon the evidence, including an evaluation of the credibility of the witnesses, I FIND that the dog purchased by the Theriens was unfit. While the Duebens attempt to suggest that Mr. Therien's supposed dissatisfaction with the purchase was the cause of a fraudulent story of a sick dog, I found the Theriens to be credible, and the determination of Dr. Briggs that the animal [*23] was sick with gastrointestinal problems supports their version of the events. As for Dr. Briggs, I found him to be a competent and caring professional whose professional opinion as to the animal's condition is worthy of belief. Given the timing of the history and symptoms related by the Theriens, I have no doubt that the animal suffered from a "physical condition, illness . . . which was . . . likely to have been contracted on or before the sale and delivery of the animal to the consumer" and thus a condition which falls within the definition of an animal "unfit to purchase."

The evidence convinces me that Dr. Falk did not see the same dog as did Dr. Briggs. As Dr. Falk opined, there were too many discrepancies between what he found in his exam and what Dr. Briggs found in his, and while a difference in the weight of the same dog might be caused by scales which were not equally calibrated, given the other differences found during the exams the weight difference instead points to the presentation of a different animal to Dr. Falk than the one sold to the Theriens. It is not certain whose animal this second dog was, the Duebens, the co-owner Ms. Anderson's, or someone else's animal, [*24] but I am convinced that it was not the dog which the Theriens purchased. As for Ms. Perri, I did not find her testimony credible, especially in light of the totality of evidence pointing in a different direction than her testimony was meant to lead.

The burden of proving that the option selected is not appropriate lies with the dealer. Since I CONCLUDE that the Theriens received an unfit dog from the Duebens and that their election to return the dog was a reasonable and proper one under the facts and the law, the Duebens have failed to sustain their burden and their challenge is therefore DISMISSED. The Theriens are entitled to receive a refund of the \$ 450.00 purchase price, plus sales tax, and the fees paid to Dr. Briggs, \$ 47.00. It is ORDERED that if payment of this amount has not already been made then it shall be made within 10 days of the issuance of the final decision of the Director of the Division of Consumer Affairs, or, in the absence of such decision or an extension of time for the issuance, no later than the 55th day following the date of this initial decision.

I hereby FILE my initial decision with the DIRECTOR OF THE DIVISION OF CONSUMER AFFAIRS for consideration. [*25]

This recommended decision may be adopted, modified or rejected by the DIRECTOR OF THE DIVISION OF CONSUMER AFFAIRS, who by law is authorized to make a final decision in this matter. If the Director of the Division of Consumer Affairs does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the DIRECTOR, DIVISION OF CONSUMER AFFAIRS, P.O. Box 45027, Newark,

New Jersey 07101, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

----- FOOTNOTE(S)-----

n1 The contested case was originally transmitted as D. Marie Dueben v. Robert Therien and Colleen Therien. Mrs. Dueben moved to amend the designation of parties to add her husband, who was the payee on the check issued by the purchasers. This application was granted, an application to delete Mr. Therien was denied. Mrs. Dueben contended that Robert Therien was not involved in the purchase, but it is clear that both Mr. and Mrs. Therien were involved in the several phases of the case.

----- END FOOTNOTE(S)-----

[*26]

FINAL DECISION AND ORDER

HERR, Director:

This matter was transmitted to the Office of Administrative Law by the Division of Consumer Affairs, Office of Consumer Protection and filed on September 13, 1996. Petitioners, Mr. and Mrs. Dueben (pet dealers), contested the consumer respondents' election to return a dog which they had purchased from the petitioners. The basis for the return was that the dog was "unfit for purchase" pursuant to *N.J.A.C. 13:45A-12.1* et seq. The matter was scheduled for a hearing before the Honorable Jeff S. Masin, Administrative Law Judge (ALJ). Following the hearing on February 11, 1997, Judge Masin issued an Initial Decision on March 27, 1997 finding that petitioners had failed to sustain their burden of proof and dismissing petitioners' challenge. The ALJ additionally found that respondents are entitled to receive a refund of the purchase price of the dog from petitioners in the amount of \$ 450.00 and the veterinary fees, in the amount of \$ 47.00, incurred by respondents in order to obtain the "unfit for purchase" certificate.

N.J.A.C. 13:45A-12.3(a)(6) permits a consumer who obtains an "unfit for purchase" certificate to elect from among various options. [*27] A consumer may, for example, retain the animal and receive a refund for the cost of care by a veterinarian, return the animal for a refund of the purchase price or exchange the animal for an animal of the consumer's choice. Pursuant to *N.J.A.C. 13:45A-12.3(a)(9)*, a pet dealer may challenge "a consumer's election" and a hearing must be held "to determine why the option elected by the consumer should not be allowed." I agree with the ALJ's finding that the intent of the regulations is "to allow both a challenge to the option selected and, more fundamentally, a challenge to the actual declaration of unfitness . . ."

With respect to this matter, I also agree with the ALJ's determination that the dispute focused on whether the animal was actually unfit for purchase. After considering the ALJ's Initial Decision, and carefully reviewing the record and exceptions filed by petitioner, I adopt the recommended findings of fact and conclusions of law and affirm the Initial Decision of the Administrative Law Judge. A determination in this case rested largely upon an assessment of the credibility of the witnesses. There is sufficient evidence to conclude that the credibility assessment performed [*28] by ALJ Masin was supported by the documentary evidence and the witness' testimony. Therefore, I adopt the ALJ's Initial Decision dismissing petitioners' challenge and ordering the reimbursement of the purchase price in the amount of \$ 450.00 plus sales tax and veterinary fees in the amount of \$ 47.00 within ten (10) days of the issuance of this Order.

This is the final agency decision in this matter.