



Board of Appeals of Baltimore County

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September 15, 2016

Jonny Akchin, Assistant County Attorney
Department of Permits, Approvals and Inspections
County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204

Brett S. Bolling
8213 Brattle Road
Baltimore, Maryland 21208

RE: *In the Matter of: Brett S. Bolling*
Case No.: CBA-16-048

Dear Messrs. Akchin and Bolling:

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

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

Very truly yours,

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

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Duplicate Original Cover Letter

c: Herman Jackson
Rashiden McDonald
Bernard J. Smith, Chairman / AHB
April Naill / Animal Control Division
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

IN THE MATTER OF
BRETT S. BOLLING - APPELLANT

8213 Brattle Road
Baltimore, MD 21208

RE: Citation No. E51019 – Public Nuisance Animals
AHB Case No.: 4250

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. CBA-16-048

* * * * *

OPINION

This case comes to the Board on appeal of the final decision of the Animal Hearing Board of Baltimore County (“AHB”) wherein the AHB upheld Citation E4250 (Public Nuisance Animals) and imposed a civil penalty of \$150.00 for each of the alleged ten violations of Section 12-3-109(a)(3) of the Baltimore County Code (the “BCC”). The total amount of the Civil Penalty is \$1,500.00.

A hearing before this Board was held on July 13, 2016. Mr. Brett S. Bolling (sometimes herein referred to as the “Appellant”) represented himself *pro se*. The County was represented by Jonny Akchin, Assistant County Attorney.

Facts and Background

On February 22, 2106, Animal Services received a notarized affidavit from Mr. Herman Jackson, the Complainant (“Mr. Jackson”), alleging that the Appellant’s dogs bark all night¹. Specifically, Mr. Jackson’s Affidavit² states that the dog(s) were heard barking on the following dates and times:

1. January 21, 2016 from 6:00 p.m. to 8:00 p.m.

¹ On February 18, 2016, a second neighbor, Rashida McDonald also filed an Affidavit complaining about the Appellant’s dog barking on sixteen different occasions. The AHB did not proceed on Ms. McDonald’s Affidavit. Ironically, Ms. Jackson and Ms. McDonald are close neighbors; however, the dates listed in their affidavits when the dogs were allegedly barking were all different and the dates and times never overlapped.

² See, the Notice of Complaint and Violation dated February 24, 2016 which is related to the Affidavit filed by Herman Jackson alleging ten violations of Article 12-3-109 (a) (3).

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2. January 22, 2016 from 6:55 a.m. to 12:00 p.m. and 9:30 p.m. to 10:00 p.m.
3. January 24, 2016 from 9:30 p.m. to 10:00 p.m.
4. January 26, 2016 from 11:30 p.m. to 12:00 a.m.
5. February 2, 2016 from 2:57 a.m. to 3:30 a.m.
6. February 4, 2016 from 8:00 p.m. to 8:30 p.m. and 11:30 p.m. to 11:45 p.m.
7. February 5, 2016 from 10:15 p.m. to 10:45 p.m.
8. February 8, 2016 from 10:30 p.m. 11:00 p.m.
9. February 11, 2016 from 4:30 p.m. to 6:30 p.m.
10. February 16, 2016 from 8:50 p.m. to 11:00 p.m.

Mr. Jackson testified that he has never seen the dogs barking because there are a line of trees that obstruct his view into the Appellant's backyard. He testified that he lives in a cul-de-sac and that the Appellant's backyard faces his front door. Also, he testified that the Appellant's backyard is elevated and is situated above his property. Mr. Jackson testified that he has never spoken to the Appellant about his dogs allegedly barking at night or in the early morning hours. He also stated that on one occasion, at 1:30 a.m., he drove to the Appellant's home at 8213 Brattle Road, Pikesville, Maryland 21208, so that he could see exactly where the sound of a barking dog was coming from. Although Mr. Jackson visited the Appellant's home on that occasion, he did not see the Appellant's dog barking.

Ms. Rashida McDonald, who resides at 8206 Daren Court, Pikeville, Maryland 21208, also filed an Affidavit dated February 18, 2016 alleging that on sixteen different occasions she heard the Appellant's dogs barking at night and in the early morning hours³. Ms. McDonald served as a witness for Mr. Jackson, the Complainant, and testified that she hears the Appellant's dogs bark all night. She testified that she knows that it is the Appellant's dogs because she has followed the sounds of barking back to his address. She further stated that she has spoken to the Appellant several times regarding the dogs barking. Ms. McDonald testified that recently the barking has decreased. Ms. McDonald testified that she knows the dogs barking at night belong to the

³ As previously stated this Affidavit was not the subject of the Notice of Complaint and Violation dated February 24, 2016.

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Appellant because his dog has a very distinct and identifiable bark. She also testified that there is another large dog and a smaller dog in the neighborhood but it is not those dogs barking at night because she believes they stay in the owner's home at night.

Mr. Steven Sodipu, Ms. McDonald's father, testified that he has lived with his daughter for at least nine months and that he hears the Appellant's dogs barking all night long. Mr. Sodipu did not know the breed or color of the dogs because he has not seen the dogs and has only heard them barking from his residence.

Mr. Brett Bolling, the Appellant, testified that his three dogs are out between 6 a.m. and 8 p.m. and housed in individual kennels. He testified that he leaves his dogs in the outdoor kennels while he is at work from 8:30 a.m. to 4:30 p.m. He stated that when he arrives at home after work he feeds, grooms, and exercises the dogs until it is time for them to come into the house at 8:00 p.m. When the dogs are inside, they are kept in crates in his basement. The Appellant stated that no one can see his dogs while they are in his backyard because in his backyard there is bamboo, brush, and weeds in the back which obscures the view. The Appellant testified on October 24, 2015 he sent a problem barker, Bailey, to Michigan. He testified that he had three dogs at the time of filing of Mr. Jackson's Affidavit and complaint. He pointed out that his dogs are not aggressive and that he gives his dogs basic obedience training. The dogs also receive show training at a facility at the Reisterstown Road Armory. He denied that his dogs are out after 8:00 p.m. because he takes them into his home. The Appellant testified that his dogs are not barking at night because they are not left outside. He also testified that there are other large dogs in the neighborhood.

Although Ms. McDonald and Mr. Sodipu testified that they hear the dogs barking at night, neither of them provided testimony supporting the specific allegations made by Mr. Jackson in his

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Affidavit dated February 22, 2016. Instead, Ms. McDonald addressed the allegations stated in her Affidavit dated February 18, 2016.

In an opinion dated May 3, 2016, the AHB found that pursuant to Section 12-3-109(a)(3) of the Baltimore County Code (the “BCC”) the Appellant’s dogs were declared Public Nuisance Animals and imposed a civil penalty in the amount of \$1, 500.00.

Standard of Review

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

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

When determining the factual finding of an agency, the appropriate standard of review is whether there is substantial evidence from the record as a whole. *Eller Media Co. v. Mayor of Baltimore*, 141 Md. App. 76, 84 (2001). If reasoning minds could reasonably reach the conclusion reached by the agency from the facts in the record, then the agency’s findings are based on substantial evidence and the court has no power to reject that conclusion. *Columbia Road Citizens’ Ass’n v. Montgomery Cnty.*, 98 Md. App. 695, 698 (1994). Judicial review of an agency decision does not involve an independent decision on the evidence instead, a court is limited to determining whether there is substantial evidence in the record as a whole to support the agency’s findings and

conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. *United Parcel Serv., Inc. v. People's Counsel for Baltimore Cnty.*, 336 Md. 569, 577 (1994).

When considering whether an agency erred as a matter of law, the reviewing court decides the correctness of the agency's conclusions and may substitute the court's judgment for that of the agency. *People's Counsel for Baltimore Cnty. v. Prosser Co.*, 119 Md. App. 150, 168 (1998). The "substantial evidence test" also applies when there is a mixed question of law and fact. In other words, the agency has correctly stated the law and the fact finding is supported by the record, but the question is whether the agency has applied the law to the facts correctly. *Cowles v. Montgomery Cnty.*, 123 Md. App. 426, 433 (1998). Therefore, the order of an administrative agency must be upheld on review if it is not premised upon an error of law and if the agency's conclusions on questions of fact or on mixed questions of law and fact are supported by substantial evidence. *Kohli v. LOCC, Inc.* 103 Md. App. 694, 711 (1995).

Decision

Section 12-3-109 – PUBLIC NUISANCE ANIMALS - states that:

(a) "Public nuisance animal" defined. In this section, "public nuisance animal" means an animal that:

- (1) Damages the property of a person other than its owner;
- (2) Causes unsanitary conditions in or on public property;
- (3) Excessively makes disturbing noises;
- (4) Chases passing vehicles; or
- (5) Is an animal at large that is female dog or cat in heat.

(b) Prohibition. An owner of an animal may not allow it to be a public nuisance animal.

At issue in this case is whether pursuant to Section 12-3-109(a)(3) of the BCC the Appellant's dog(s) is deemed a Public Nuisance Animal. The facts show that Mr. Jackson and Ms. McDonald both filed Affidavits alleging that the Appellant's dog(s) barked excessively. Mr. Jackson's Affidavit is dated February 22, 2016 and Ms. McDonald's Affidavit is dated February

18, 2016. The averments and allegations made in Mr. Jackson's Affidavit are different from the averments and allegations made in Ms. McDonald's Affidavit. At the hearing, Animal Services choose only to proceed on Mr. Jackson's Affidavit. At the hearing, Ms. McDonald and her father, Mr. Sodipu, only testified about the allegations made in the Affidavit submitted by Ms. McDonald. Neither Ms. McDonald nor Mr. Sodipu provided testimony to support the averments and allegations made in Mr. Jackson's Affidavit. Therefore, with respect to Mr. Jackson's Affidavit, which is the subject matter of Citation E4250, neither Ms. McDonald nor Mr. Sodipu's testimony can be used to show that the dog(s) were excessively barking on the ten (10) occasions listed in Mr. Jackson complaint.

Mr. Jackson identified ten (10) occurrences in his Affidavit whereupon the dogs were barking excessively. Mr. Jackson testified that he never spoke with the Appellant about the barking. He further testified that he never actually witnessed the dogs barking because he could not see the dogs from his property due to trees and vegetation obscuring the view of the Appellant's backyard, and he could not see dogs barking while he stood in front of the Appellant's home. Mr. Jackson testified that he recognized the sound of the Appellant's dog's (or dogs') bark. Ms. McDonald and the Appellant both testified that there are other large breed dogs in the neighborhood. Mr. Jackson testified that on one occasion he heard a dog(s) barking late at night. To be certain as to the identity of the dog barking and where the barking was coming from, at 1:30 a.m., Mr. Jackson drove to the Appellant's home and heard barking noise coming from the backyard of the Appellant.

Although Mr. Jackson's Affidavit listed ten (10) occurrences of excessive dog barking, evidence was only entered for one occurrence. Averments contained in an affidavit generally are not proof that the allegations contained therein are facts. An affidavit suffices in certain contexts,

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such as a Summary Judgment or a Motion to Dismiss, to place facts before the court where otherwise there would be no record. In certain limited situations, a court may consider an affidavit as a substitute for a witness at trial but generally an affidavit is not admissible at trial. *Imbraguglio, et al. v. Great Atlantic & Pacific Tea Company, Inc. et al.*, 358 Md. 194 (2000). Each allegation contained in Mr. Jackson's affidavit must be supported by competent, material and substantial evidence in light of the entire record as submitted in order to affirm the AHB's findings. Mr. Jackson testified that on one occasion, at 1:30 a.m., he was present at the Appellant's home and heard barking noises coming directly from the Appellant's home. On all other occasions, Mr. Jackson did not see the dogs barking, did not confirm that the barking sound was emanating from the Appellant's home but relied on his recollection of what he believed was the same dog that was barking on that one occasion, at 1:30 a.m., where he visited and confirmed that barking noise was coming from the appellant's home. In light of the fact that there are other large dogs in the neighborhood that could have been barking, there was insufficient evidence in the record to show that Mr. Jackson had conclusively identified the dog barking on all but one of the occasions listed in his affidavit.

Based on the evidence presented, we find that only one of the findings by the AHB was supported by the sufficient evidence. As such, the decision of the AHB is affirmed in part, but otherwise reversed.

ORDER

THEREFORE, IT IS THIS 15th day of September, 2016, by the Board of Appeals of Baltimore County,

ORDERED that the decisions of Animal Hearing Board in the above captioned case, that the dog owned by the Appellant was a Public Nuisance Animal on one occasion, January 26, 2016,

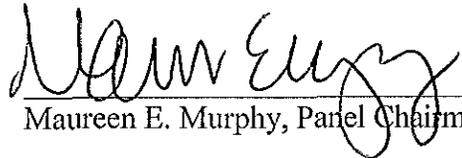
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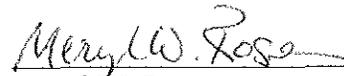
in violation of Section 12-3-109(a)(3) of the BCC be, and the same are hereby, **AFFIRMED**, as it is supported by competent, material and substantial evidence in light of the entire record as submitted and the total fine for said violation is One Hundred Fifty Dollars (\$150.00); and it is further,

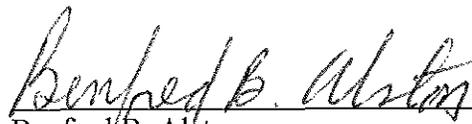
ORDERED that the remaining nine (9) violations found by the Animal Hearing Board were unsupported by competent, material and substantial evidence in light of the entire record as submitted and were otherwise arbitrary and capricious and are hereby **REVERSED**.

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

**BOARD OF APPEALS
OF BALTIMORE COUNTY**


Maureen E. Murphy, Panel Chairman


Meryl W. Rosen


Benfred B. Alston