

January 23, 2019

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
Telephone (206) 477-0860
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www.kingcounty.gov/independent/hearing-examiner

REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file no. **V18008849**

KIMBERLY ELLIOTT

Animal Services Enforcement Appeal

Activity no.: A18006093

Appellants: **Kim and Patrick Elliott**
32033 NE 95th Place
Carnation, WA 98014
Telephone: (425) 736-0278
Email: kapa6@hotmail.com

King County: Regional Animal Services of King County
represented by **Chelsea Eykel**
21615 64th Avenue S
Kent, WA 98032
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal as to violation, partially grant as to penalty amount

EXAMINER PROCEEDINGS:

Hearing Opened:	January 9, 2019
Hearing Closed:	January 9, 2019

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

After hearing the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, the examiner hereby makes the following findings, conclusions, and decision.

FINDINGS AND CONCLUSIONS:

1. Regional Animal Services of King County (Animal Services) served a violation notice on Kimberly Elliott, stemming from her dog Lily's bite to the face of a visitor to the Elliott home. Because we do not find the bite was legally provoked, we uphold the viciousness designation. However, we significantly reduce the monetary penalty.
2. Destiny Peterson testified that on November 15, 2018, she was hot tubbing and drinking with Ms. Elliott's adult son, Patrick. She recalled having three shots of whisky that evening. Recognizing that she had had too much to drink to drive safely, she and Patrick agreed she would sleep it off on the couch. While on the couch, Patrick invited Lily up on the couch to join them. Patrick told her that Lily had snapped at another friend's hand, but Patrick did not mention that Lily was protective of the couch.
3. As Ms. Peterson tried to get more comfortable, she repositioned herself so that she was facing more towards Lily. She thinks Lily was sleeping and she startled Lily, bumping Lily's rear end either with the corner of her head or with her ponytail. Lily did not growl or otherwise warn her, but instead directly bit her on the face. She then called her parents, who took her to the hospital, where she received five stitches to her upper lip. Ex. 3.
4. Ms. Elliott testified that she was asleep that night, but she awoke to loud noises. She came down to find Ms. Peterson in the bathroom and Patrick in the family room. She told Patrick to find Ms. Peterson a ride home. Ms. Elliott went back to bed, only reemerging after the altercation. She said that Patrick told her that he had Lily on his lap when Ms. Peterson tried to pet Lily, provoking the bite.
5. Ms. Elliott explained that Lily is a rescue dog, who came with aggression issues. She has trained Lily, but Lily is still protective. She has been working with Lily to break her food aggression, which she attributed to Lily having been near-starved as a puppy. Lily is still protective of the couch, which is Lily's bed; she has been working with Lily to make her less protective of that area. She explained that Lily is not comfortable being touched.
6. Ms. Elliott has previously invited other people onto the couch. When she did, she let visitors know that a part of the couch was Lily's spot. Lily had not previously had any altercation with anyone sitting on the couch. She thinks alcohol skewed Ms. Peterson's judgment, that Patrick told her not to touch Lily, and that Ms. Peterson was trying to pet Lily when the bite occurred.

7. Animal Services served a violation notice. Ex. 6. It asserted that Lily was “vicious,” which KCC 11.04.020.BB defines as:

Having performed the act of, or having the propensity to do any act, endangering the safety of any person, animal or property of another, including, but not limited to, biting a human being or attacking a human being or domesticated animal without provocation.

KCC 11.04.230.H declares as a nuisance, “Any animal that has exhibited vicious propensities and constitutes a danger to the safety of persons or property off the animal’s premises or lawfully on the animal’s premises.”

8. Ms. Elliott timely appealed. Ex. 7.
9. Unless directed to by law—and no special directive applies to today’s case—the examiner does *not* grant substantial weight or otherwise accord deference to agency determinations. Exam. R. XV.F.3. Ours is a true *de novo* hearing. For those matters or issues raised in an appeal statement, Animal Services bears “the burden of proving by a preponderance of the evidence both the violation and the appropriateness of the remedy it has imposed.” KCC 20.22.080.G; .210. In particular, Animal Services bears the burden of showing, by a preponderance of the evidence, that Lily’s bite was unprovoked. *See also Morawek v. City of Bonney Lake*, 184 Wn. App. 487, 495, 337 P.3d 1097, 1101 (2014).
10. As our High Court instructs us, when analyzing “terms of art,” we look to “well-established meanings” of words in their specific context. *State, Dept. of Ecology v. Theodoratus*, 135 Wn.2d 586, 589, 957 P.2d 1241 (1998). “Provocation” is a staple of animal jurisprudence, and numerous courts that have analyzed the term in depth have noted that although dictionary definitions of “provocation” can be quite broad, the term applies more narrowly in the dog bite context. Otherwise animal control ordinances “could be interpreted to mean that provocation exists whenever any external stimulus has precipitated the attack or injury by an animal, *i.e.*, whenever the animal’s actions are not completely spontaneous.” *Robinson v. Meadows*, 203 Ill. App. 3d 706, 710, 561 N.E.2d 111 (1990).
11. Thus, “[n]ot every occurrence that stimulates a dog to bite an individual should be a defense.” *Stroop v. Day*, 271 Mont. 314, 318, 896 P.2d 439 (1995). An action that merely stimulates or excites a dog, without more, cannot qualify as “provocation.” *Engquist v. Loyas*, 787 N.W.2d 220, 225 (Minn. App. 2010), *aff’d in relevant part*, 803 N.W.2d 400 (Minn. 2011). In addition, provocation requires the dog’s reaction to be proportional to the victim’s act. *Bradacs v. Jacobone*, 244 Mich. App. 263, 273–75, 625 N.W.2d 108 (2001); *Kirkham v. Will*, 311 Ill. App.3d 787, 792, 724 N.E.2d 1062 (2000); *Stroop*, 271 Mont. at 319.
12. Having read dozens and dozens of judicial interpretations of “provocation” in the dog bite context, we are convinced that Lily’s response to Ms. Peterson brushing against her was nowhere close to the line of legal “provocation.” Especially given the severity of


Lily’s response—a bite to Ms. Peterson’s face, requiring stitches, instead of, for example a nip to the hand—Animal Services has met its burden of proof.¹

13. The penalty amount is a different story. Unlike the typical viciousness case, where a dog runs at large and attacks someone, at no point was Lily loose. That night, Ms. Elliott specifically advised Patrick to arrange a ride and get Ms. Peterson out of there, well before the bite occurred. Patrick is an adult. It was his—not Ms. Elliott’s—decision to have Ms. Peterson sleep on the same couch Lily sees as her bed, and to compound this by then allowing Lily up on the couch. A significant reduction in the fine for Ms. Elliott is appropriate.
14. Finally, we note that violation notices designating an animal as vicious typically order that the dog be contained in a fenced area and not let off the property without a leash. Later breaching such confinement terms can result in a dog’s removal. Animal Services’ notice here did not order any specific terms. Ex. 6. That makes sense here, because none of the standard terms of confinement had anything to do with the attack. Lily was in her own room, in her own house, at the time she bit Ms. Peterson’s face. However, if Lily gets out in the future, it would be a vicious-dog-running-at-large violation (carrying a \$500 penalty) and not a normal dog-running-at-large violation (carrying a \$50 penalty). KCC 11.04.230.B & .I; KCC 11.04.035.C.1.a & 2.a.

DECISION:

1. We DENY Ms. Elliott’s appeal as to Lily’s viciousness determination.
2. We PARTIALLY GRANT Ms. Elliott’s appeal as to \$350 of the \$500 penalty amount. The remaining \$150 is due to Animal Services by **March 22, 2019**.

ORDERED January 23, 2019.



David Spohr
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

King County Code 20.22.040 directs the Examiner to make the County’s final decision for this type of case. This decision shall be final and conclusive unless appealed to superior court by *February 22, 2019*. Either party may appeal this decision by applying for a writ of review in superior court in accordance with chapter 7.16 RCW.

¹ Patrick was not available (by phone or in person) to testify. Yet even assuming that his testimony would have matched Ms. Elliott’s hearsay version—that Lily was sitting on Patrick’s lap, that Patrick had advised Ms. Peterson not to touch Lily, and that Ms. Peterson tried to pet Lily—would still not be sufficient to qualify the bite to Ms. Peterson’s face as “provoked.”

**MINUTES OF THE JANUARY 9, 2019, HEARING IN THE APPEAL OF
KIMBERLY ELLIOTT, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE
NO. V18008849**

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Sergeant Chelsea Eykel, Destiny Peterson, and Kim Elliott.

The following exhibits were offered and entered into the record:

- Exhibit no. 1 Regional Animal Services of King County staff report to the Hearing Examiner
- Exhibit no. 2 Online complaint form of November 15, 2018, incident by Destiny Peterson, dated November 16, 2018
- Exhibit no. 3 Photograph of injury
- Exhibit no. 4 RASKC investigation report no. A18006093
- Exhibit no. 5 Official animal quarantine notice no. A18006093, dated November 17, 2018
- Exhibit no. 6 Notice of violation no. V18008849, issued November 17, 2018
- Exhibit no. 7 Appeal, received November 28, 2018

DS/ld

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file no. **V18008849**

KIMBERLY ELLIOTT
Animal Services Enforcement Appeal

I, Liz Dop, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **REPORT AND DECISION** to those listed on the attached page as follows:

- EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.
- placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED January 23, 2019.



Liz Dop
Legislative Secretary

Elliott, Kim and Patrick

Hardcopy

Eykel, Chelsea

Regional Animal Services of King County

Peterson, Destiny

Hardcopy