

November 15, 2019

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

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REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file no. **V19009616**

VANESSA PAI-THOMPSON AND ELBERT AULL

Animal Services Enforcement Appeal

Activity no.: A19003982

Appellants: **Vanessa Pai-Thompson and Elbert Aull**

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King County: Regional Animal Services of King County
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FINDINGS AND CONCLUSIONS:

Overview

1. Animal Services issued notices of violation and orders to comply (NVOCs) to both Elbert Aull and Vanessa Pai-Thompson (collectively, Appellants), asserting that their dog, Brooklyn, attacked, bit, and injured another dog and qualifies as vicious. Appellants timely appealed, not disputing that Brooklyn participated in the altercation, but asserting

that Brooklyn was provoked, and accordingly that the viciousness designation should be overturned. (Ex. 6.)¹ We convened a hearing on October 9, 2019, and we closed the hearing record that day.² After hearing the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments, and the relevant law, we deny the appeal.

Descriptions of the Altercation

2. In the early morning hours of July 7, Charmie Pepino (Ms. Pepino) described coming home to her apartment from a day trip. She took her two toy dogs, Loki and Thor, downstairs for one last relief break to a common area shared by apartment residents and their dogs. As she stood there, she heard the building's exit door open and close. In response, she moved further away from the common area's access point. She testified that:

a few seconds later, I saw a brown dog bigger than Loki and Thor rushing towards Loki and then after that he bit Loki...at the backside and then the dog kind of dragged us, me, Loki, and Thor...And then it was a bit of a struggle so I tried to hold onto the yellow post at that area. And then...the dog owner rushed in to get his dog away and separate the two dogs.

On questioning, she reiterated her recollection of the beginning of the interaction:

The dog rushed towards Loki, and then he bit [Loki's] backside and then the dog was tugging at Loki and then I was...pulling the leash...in the other direction, but it was a bit of a struggle, so I had to hold onto the yellow post near the parking area...

3. Appellant Elbert Aull described walking Brooklyn, a 70-pound Rhodesian Ridgeback, that night. He testified:

I took Brooklyn out for a walk...It was late, 12:30 sounds about right to me. I headed down the stairs...out the door [which] goes around a sharp corner...she [Brooklyn] was in a rush to get out, probably to use the bathroom. I'm in the process of trying to slow her down and shut the door and the leash slips out of my hand.

When Brooklyn slipped the leash, I shut the door...I come down the path and what I hear is dogs barking. And when I get out to where the fence

¹ Appellant's statement also asserted that the violation description in the NVOC was insufficient because it did not explicitly allege absence of provocation, nor did it describe facts supporting the absence of provocation. We understand that Mr. Aull practices criminal defense law, and thus might be thinking of the criminal law concept that all the necessary elements of a crime must be included in an indictment and brought before a grand jury, and that the government's failure to do this may be a fatal defect, even if the government supplements the record well before trial. *See, e.g., United States v. Du Bo*, 186 F.3d 1177 (9th Cir. 1999). Ours, however, is a civil administrative appeal. Animal Services' report and exhibits (submitted two weeks before our hearing) were sufficient.

² Due to a witness scheduling conflict, the parties jointly waived the examiner's normal deadline for holding a hearing.

ends and I can look out and see the generator what I see is Ms. Pepino has got her two dogs. What I encountered was it looked to me like Brooklyn and the gray dog, Loki, were biting at each other...it looked like the dogs were fighting. It wasn't just barking like bark, bark, bark, bark, it was back and forth like biting at each other. I didn't see anybody making contact but they were clearly biting at each other.

I saw that the person handling the dogs appeared to me to be a bit in shock...What I did is I grabbed Brooklyn's...leash and grabbed the harness and I yank her back. That did not have the intended affect. What happened after I grabbed Brooklyn was that from my perspective a fight where dogs are just trying to bite each other turned into something very different. My dog, after I grabbed her and started pulling her back, grabbed hold of the other dog and as I tried to separate them, she tried to drag the other dog with us. My attempt to end the fight, it backfired. So I let go.

At that point, I'm trying to think as fast as I can. My dog had just grabbed this other dog. So I kicked Brooklyn's legs out from underneath her. I grabbed the leash and when I kicked her she let go...

Code Standards

4. Unless directed to by law—and no special directive applies to today's case—an 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.
5. The definition of “vicious,” KCC 11.04.020.BB, is:
 - ...having performed the act of, or having the proapsensity 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.

The elements of a vicious nuisance violation, KCC 11.04.230.H, are:

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.

Analysis

6. We start our analysis with witness credibility. We found all the witnesses credible.
7. Brooklyn’s owners were forthcoming about her reactivity, all the efforts they have taken to train her, and her heightened state that day. Particularly impressive was Mr. Aull’s detailed recollection of the altercation, occasionally peppered with regret about some of his actions.
8. During cross-examination, Mr. Aull attempted to discredit Ms. Pepino by pressing her on inconsistencies in her recollection. For example, he questioned the physical description of him she relayed to her sister (who then wrote it in her complaint, Exhibit 4), though he later described the lighting conditions as similar to a “Walmart parking lot.” He also questioned her recollection of the series of events, particularly, whether she thought Loki was in Brooklyn’s jaws for most of the interaction.
9. Ms. Pepino (we observed her as a petite and slender woman) and her two toy dog companions faced frightening circumstances that night. They were out in the dark by themselves and were then rushed by a 70-pound dog loose with no owner in sight. We think it is unreasonable, unrealistic, and, frankly, unfair to expect Ms. Pepino to possess a laser-like recollection of the events. Her brain was likely flooded with adrenalin and she might have even been in shock.
10. While Ms. Pepino didn’t fully articulate the events from beginning to end, she was consistent on three points: that her first sight of Brooklyn was as she “rushed” towards Ms. Pepino and her dogs, that Brooklyn bit Loki’s backside, and that Ms. Pepino had to hold onto a nearby pole in order to keep she and her dogs from being dragged by Brooklyn.
11. Ms. Pepino’s quick decision to grab hold of a nearby pole likely prevented an even worse outcome here. The injuries to Loki could have been more severe, and Ms. Pepino and Thor might have sustained injuries themselves. She did what she could in the moment to protect herself and her dogs.
12. Next, we address whether the altercation was an “attack.” The 70-pound Brooklyn charged at Loki, a toy dog. Then, when pulled away from Loki, Brooklyn lunged, grabbed, and bit the significantly smaller dog. Exhibit 5 is a series of photographs showing the results of the bite: a 3-cm-wide laceration, the drain that had to be put in, and Loki’s shredded harness. Brooklyn “attacked” Loki.
13. Now, we review whether the attack was provoked.
14. Appellants put forth a number of factors they say provoked Brooklyn’s behavior:
 - A. Brooklyn is a rescue who takes regular medication to treat an anxiety condition. Two trainers who specialize in anxious dogs worked with Brooklyn and submitted letters attesting to improvements in her anxious reactivity behaviors.

- B. Days of fireworks and a maintenance problem that caused a persistent buzzing sound from the hallway outside their apartment, “were incredibly stressful for Brooklyn...[her] behavior changed noticeably...she hid in the bathroom much of the time—sometimes climbing inside the bathroom tub.”
- C. The physical setting, i.e., “on property where she lives and in a confined space.” In a letter Brooklyn’s former trainer, August Henrich, CCS, opined that Brooklyn experienced “territorial aggression.” (Ex. 6b.)
- D. “The fact that she was faced with two dogs, the frontal pressure of the dogs facing her head-on and who may have appeared suddenly, the barking that preceded the fight, the other dog biting at Brooklyn, and the potential escalating impact of a shock collar.”

Ex. 6.

- 15. These explanations are perfectly reasonable, were credibly stated, and supported with documentary evidence. However, determining whether they qualify as *legal* provocation is our task.
- 16. As our Supreme Court instructs, 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).
- 17. “Provocation” is a staple of animal jurisprudence, and numerous courts analyzing 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). 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).
- 18. The “provocation” inquiry is not whether a dog with reactive tendencies felt real fear and could be expected to lash out, but instead, it:
 - focuses ‘on how an average dog, neither unusually aggressive nor unusually docile, would react to an alleged act of provocation.’

Bradacs v. Jacobone, 244 Mich. App. 263, 273, 625 N.W.2d 108, 113 (2001) (*citing Kirkham v. Will*, 311 Ill. App. 3d 787, 792, 724 N.E.2d 1062 (2000)).

19. Similarly, the question is not whether Loki’s vehement barking and snapping was justified, but whether Brooklyn’s charging, lunging, and biting, under our circumstances, was grossly out of proportion to those inciting acts. *Stroop v. Day*, 271 Mont. 314, 319, 896 P.2d 439 (1995).
20. We also look to our animal enforcement regulatory scheme. KCC 11.04.010.A reads:

It is declared the public policy of the county to secure and maintain such levels of animal care and control as will protect animal and human health and safety, and to the greatest degree practicable to prevent injury to property and cruelty to animal life.
21. If we applied Appellants’ arguments to this and all similar scenarios, which is that the specific proclivities and background of a particular dog should control whether an attack is warranted, people would have no reasonable expectation of physical safety for themselves, their animals, or their property. That is an absurd result.
22. On the night of the incident, Ms. Pepino had a right to expect safety. Neither she nor her dogs did anything other than go to the bathroom. Loki barked and snapped, but only after Brooklyn charged at him and his owner.
23. Whether or not the Pepinos use a shock collar on their dog is irrelevant here. Brooklyn, a 70-pound dog, charged at Loki, a toy dog. Brooklyn was not legally provoked.
24. Does Brooklyn present a risk to others moving forward? Brooklyn’s owners are clearly very responsible and prior to this incident took a number of steps to seek training and manage Brooklyn’s anxiety. They clearly love her very much. None of those efforts prevented Brooklyn from unprovokedly attacking another dog. According to their own account, they cannot control whether circumstances will again arise that trigger Brooklyn. Others need to be protected from that possibility. We sustain the vicious nuisance designation.
25. We are confident that Brooklyn’s owners will continue to make efforts to improve Brooklyn’s behavior and use control measures, like a muzzle, to prevent harm to others. We hope no future incidents that could lead to further enforcement efforts ever occur. Their proactive steps warrant a reduction in the penalty to \$250.

Future Looking Items for Animal Services

26. First, in addition to issuing duplicative violations, the Department compounded this error by failing to forward us a copy of each version of the violation. While here Appellants (both attorneys) were able to adjust, these kinds of paperwork errors confuse the average *pro se* appellant. The Department must implement a comprehensive plan to prevent future slip ups. No system is full-proof, and we expect and tolerate occasional mistakes, but Animal Services’ mistakes have started stacking up in recent cases.
27. Second, this is another recent vicious nuisance violation issued that lacks a corresponding confinement order. An animal declared vicious, “may be harbored, kept

or maintained in King County only upon compliance with those requirements prescribed in an NVOOC.” KCC 11.04.290.A. The public needs to be protected against attacks by vicious dogs. If Animal Services does not believe that any control requirements are necessary, that seems a good indication that an officer does not believe the animal really constitutes a danger. If so, Animal Services should not be issuing a vicious nuisance violation.

28. Starting immediately, Animal Services shall instruct its field officers that writing violations is not an opportunity to minimize the seriousness of a viciousness designation and the need for compliance.

DECISION:

1. Animal Services proved by a preponderance of the evidence a violation of KCC 11.04.230.H. We DENY the appeal as to Brooklyn’s vicious nuisance designation.
2. We reduce the penalty to \$250.
3. There might be future, unique circumstances where a dog qualifies as vicious, and yet there is no need for compliance terms. If so, that needs to be clearly articulated. From this point forward, it is our standing order that where Animal Services issues a viciousness designation without an accompanying confinement order, the issuing officer must appear at hearing and testify why they concluded that what happened was serious enough to warrant a viciousness designation, yet there was no need for compliance terms, and how that assessment comports with enumerated factors that KCC 11.04.290.A requires be considered.

ORDERED November 15, 2019.



Vonetta Mangaoang

Hearing Examiner *pro tem*

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 *December 16, 2019*. Either party may appeal this decision by applying for a writ of review in superior court in accordance with chapter 7.16 RCW.

MINUTES OF THE OCTOBER 9, 2019, HEARING IN THE APPEAL OF VANESSA PAI-THOMPSON AND ELBERT AULL, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NO. V19009616

Vonetta Mangaoang was the Hearing Examiner in this matter. Participating in the hearing were Chelsea Eykel, Charmie and Celyn Pepino, Elbert Aull and Vanessa Pai-Thompson. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

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 | Notice of violation no. V19009616, issued July 19, 2019 |
| Exhibit no. 3 | RASKC investigation report no. A19003982 |
| Exhibit no. 4 | Complaint form of July 7, 2019 incident by Celyn Pepino for Charmie Pepino, dated July 7, 2019 |
| Exhibit no. 5 | Photographs of Loki |
| Exhibit no. 6 | Appeal, received August 11, 2019 |
| | A. Letter from Melissa Hawkins with AVSAB Statement, dated August 7, 2019 |
| | B. Letter from August Henrich, dated August 8, 2019 |
| | C. Video of Brooklyn inside |
| | D. Video of Brooklyn outside |
| | E. Video of Brooklyn walking with muzzle |
| | F. Photograph of pettrainer remote |
| Exhibit no. 7 | Map of subject area |

VM/js

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file no. **V19009616**

VANESSA PAI-THOMPSON AND ELBERT AULL

Animal Services Enforcement Appeal

I, Jessica Oscoy, 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 November 15, 2019.



Jessica Oscoy
Legislative Secretary

Henrich, August

Hardcopy

Pai-Thompson/ Aull, Vanessa/Elbert

Hardcopy

Pepino, Charmin/Celyn

Hardcopy

Russell, Shelby

Regional Animal Services of King County