

December 20, 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. **V19009833**

GAVIN O'REILLY

Animal Services Enforcement Appeal

Activity no.: A19005649

Appellant: **Gavin O'Reilly**

[REDACTED]
Lake Oswego, OR 97034

Telephone: [REDACTED]

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King County: Regional Animal Services of King County
represented by **Chelsea Eykel**
Regional Animal Services of King County
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FINDINGS AND CONCLUSIONS:

Overview

1. Gavin O'Reilly challenges a Regional Animal Services of King County (Animal Services) notice and order asserting that Mr. O'Reilly's dog, Hunter, was vicious and unlicensed and requiring various compliance terms. 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 sustain both violations, reduce the applicable penalty, and overturn the prohibition against continuing to take Hunter to off-leash dog parks.

Background

2. The dispositive facts here are not in dispute. On August 26, Mr. Singh was running around a lakeside path, going the opposite direction as the O'Reillys. The O'Reillys had Hunter on a leash, on the opposite side of approaching pedestrians. As Mr. Singh jogged by the second time, Hunter dashed behind the O'Reillys and lunged at Mr. Singh, catching him on the back of his arm.
3. Animal Services served a violation notice asserting that Hunter's behavior qualified him as "vicious" and that Hunter was unlicensed at the time. Animal Services ordered various compliance items, most pertinently that Hunter be restrained on a leash at all times when off the O'Reillys' property, effectively prohibiting Hunter from exercising in a dog park. Ex. 6. Mr. O'Reilly timely appealed, targeting the dog park prohibition. Ex. 1. We went to hearing on December 11.
4. 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.

Licensing

5. Subsection A of KCC 11.04.030 requires all dogs eight weeks and older that are harbored, kept or maintained in King County be licensed and registered. Subsection F clarifies that the licensing requirements "shall not apply to dogs... whose owners are nonresidents temporarily within the county for a period not exceeding thirty days." Here, the O'Reillys were in King County for significantly longer than the thirty days leading up to August 26.
6. Normally, we only reduce a licensing penalty when, prior to hearing, the appellant duly licenses the animal. However, the O'Reillys moved to Oregon five days after the incident. Thus, there would have been no reason to license Hunter in King County. The O'Reillys noted at our December 11 hearing that they have signed a lease to move back to King County. We will reduce the penalty, conditioned on them licensing Hunter promptly after returning to King County.

Vicious

7. The County defines vicious 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 11.04.020.BB. And 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. We have not required an actual bite to sustain a viciousness designation, given the “including, but not limited to” language in the County definition. Conversely, we have overturned many vicious animal designations where the dog had gotten close, barked aggressively, and scared a person, but did not actually lunge at (or otherwise try to get at) someone. Our viciousness rulings have tracked RCW 9A.28.020, which includes in the definition of “criminal attempt” the requirement that the accused perform some “act which is a substantial step toward the commission of that crime”—some step towards actual contact, not just proximity.
9. Mr. Singh was candid that while he thought (and thinks) it was a bite and not a scratch, he could not say for sure. It all happened, in his words, so fast. (Given that Hunter struck him from behind, we actually would have been wary if Mr. Singh had claimed definitive knowledge of what precisely happened.) Having reviewed hundreds of photos in past dog cases, the photo of Mr. Singh’s arm looks to us a little more like a bite than a scratch. We can make out what appear to be five faint teeth indentations above an area with a rounded, deep purple mark—not a mark we would expect from the impact of a mere paw—and then three pronounced drag marks. It is close, but judging by a preponderance of the evidence standard, we find it was a bite.
10. In any event, bite or scratch, Hunter performed an act endangering Mr. Singh’s safety. Although there is some dispute about how close Mr. Singh got to the O’Reillys as they passed each other, there is no dispute that Mr. Singh was running *away* from the O’Reillys when Hunter darted behind the O’Reillys and struck a retreating Mr. Singh. Thus, even under Mr. O’Reilly’s version of events, Hunter endangered a person, without legally-sufficient “provocation,”¹ and constitutes a danger to the safety of someone like Mr. Singh. We uphold the viciousness designation.
11. The real source of contention—and the reason the case did not settle prior to hearing—was that Animal Services’ order requires Hunter to be on a leash at all times off the O’Reilly property, effectively prohibiting Hunter from running free in off-leash parks. Ex. 9. Mr. O’Reilly’s uncontroverted testimony is that they take Hunter to dog parks a minimum of five days a week and have never had an incident there. In fact, Mr. O’Reilly added that the only time they have had trouble with Hunter is when Hunter has been on a leash (as Mr. Singh discovered, to his dismay).
12. In prescribing the requirements for maintaining a vicious dog in King County, Animal Services “must” take into consideration, among other factors, the nature of the behavior

¹ 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).

giving rise to the viciousness determination, including the extent of the injuries and the circumstances surrounding the incident. KCC 11.04.290.A.1.f.

13. Animal Services offered some arguments at hearing for why Hunter should not be allowed in off-leash parks, such as Hunter's large size. However, those sounded like an after-the-fact rationalization, and not the result of Animal Services having taken into consideration the circumstances of Hunter's altercation with Mr. Singh or something specific about Hunter. Instead, Animal Services explained the real reason our dispute went to hearing:

Considering Mr. O'Reilly's request to be allowed to take his dog to dog parks after being declared vicious and understanding that [Animal Services'] policies and procedures [for] protecting public safety does not include allowing vicious dogs to be off leash at dog parks, I suggest scheduling the case for hearing.

Ex. 9. That does not seem to match the requirement that Animal Services "must take into consideration" certain factors in setting compliance terms that KCC 11.04.290.A.1 contemplates be done for each vicious animal. The code also clarifies that keeping a vicious animal on a leash is a requirement that "may" (discretionary) not "shall" (mandatory) be added. KCC 11.04.290.A.2.

14. In any event, because Mr. O'Reilly raised the dog park prohibition in his appeal statement, Animal Services bears "the burden of proving by a preponderance of the evidence...the appropriateness of the remedy it has imposed." KCC 20.22.080.G; .210.
15. We have upheld a dog park prohibition against a challenge in three types of fact patterns, none of which we find applicable today:
- *The owners are in denial about the threat their dog poses and/or have a history of not being able to control their dog, causing us to doubt their willingness or ability to do so in a dog park scenario.* Here, Hunter was on a leash during the entire August 26 altercation. Animal Services agreed the O'Reillys were not behaving irresponsibly. Mr. O'Reilly recognized that, whether a bite or scratch, Mr. Singh "did not deserve it," and Mr. O'Reilly was willing to accept the viciousness designation and the other compliance terms, so long as he could continue taking Hunter to dog parks. Ex. 9. He discussed at length their strategy for controlling Hunter. And there is no evidence of any incidents other than August 26.
 - *The dog exhibited behavior that could be repeated if left to run free in a dog park. For example, where an appellant's dog launched a predatory, sneak attack from behind on a much smaller dog on a public street, we denied the request.* Here, while on a leash Hunter lunged at and bit (or at least scratched) a jogger. That does not translate into an obvious threat in the off-leash dog park scenario.
 - *The extent of the injuries and/or severity of the attack.* While we find, slightly more likely than not, that Hunter bit, and did not just scratch Mr. Singh, that we needed the

above analysis illustrates the relatively minor injury Hunter inflicted. Exhibit 4 illustrates this even better. That is not to minimize Mr. Singh's experience, but he accurately described it as "a little rip" and said his doctor agreed it was "not serious."

We overturn the dog park prohibition and will rewrite the compliance terms.

16. Forward-looking, we understand that Animal Services issues thousands of violation notices a year, issuing notices at the "wholesale" level. So we do not come down hard on Animal Services for including the identical four compliance terms in almost every viciousness designation it issues, instead of undertaking the fact-specific analysis KCC 11.04.290.A.1 and A.2 seem to require *before* a viciousness order is issued on a given animal. Including the same four items on every viciousness creates consistency, and it and avoids a charge that a field officer was acting arbitrarily or capriciously.
17. However, at least by the time we get to the "retail" level of an appeal challenging a compliance term such as the off-leash requirement, Animal Services needs to make an individualized inquiry, based on at least the information provided by the complainant and the appellant. The fact that Animal Services' "policies and procedures [for] protecting public safety does not include allowing vicious dogs to be off leash at dog parks" does not come close to meeting its burden of proof that the remedy is appropriate in a given case. The policy cuts the other way.
18. Animal Services *always* rejecting a request that a vicious dog be allowed to run in off-leash parks gives its arguments in any particular case the "boy who cried wolf too many times" flavor, a defense of a policy instead of a measured, thoughtful, fact-specific analysis about whether, in a specific appeal, that particular vicious dog should be allowed to run off-leash. Animal Services arguments would ring less hollow in future cases if it could credibly assert something like, "If it was just *A*, *B*, and *C*, we could live with this vicious dog using an off-leash park under certain conditions, but because here we have *X*, *Y*, and *Z*, that is not appropriate." Those reasons need not match our bulleted items included above—Animal Services and an appellant are free to argue for any criteria they want, and we are flexible. However, a blanket prohibition is simply not going to fly.
19. In addition, this is far from the first case we recall where:
 - the appellant seemed ready to accept a viciousness designation and live with all terms *except* the off-leash dog park prohibition;
 - the issue the appellant was challenging and that drove everyone to expend time and resources on a hearing was a dispute over the off-leash dog park prohibition; and
 - the altercation was—within the whole gamut of least to most egregious behavior triggering a viciousness designation—towards the milder end.

We do not recall Animal Services meeting its burden of proof showing the appropriateness of the off-leash prohibition in any of those cases. It might be wiser to conserve everyone's time and resources for appeals where Animal Services' no-dog-park case is significantly stronger than in today's dispute.

20. As to the \$500 penalty applicable to viciousness designations, Animal Services agrees the O'Reillys were not behaving irresponsibly. Mr. Singh had passed them on one lap without incident. When Mr. Singh approached again, Hunter was secured on a leash, with the O'Reillys' bodies screening off Hunter from oncoming traffic. It is not clear what more, if anything, the O'Reillys could have done to prevent the August 26 incident. We reduce the penalty accordingly.

DECISION:

1. We DENY Mr. O'Reilly's appeal as to the licensing and viciousness violations.
2. As to the penalty amounts:
 - A. We REDUCE the otherwise-applicable \$125 licensing penalty to \$60, provided the O'Reillys license Hunter by **February 3, 2020**.
 - B. We REDUCE the otherwise-applicable \$500 viciousness penalty to \$100.
3. We MODIFY Animal Services' September 8, 2019, compliance order as follows (A. through D. being substantively unchanged, and E. being new):
 - A. Secure Hunter in a fenced area suitable for his size when unattended and outside the home. Lock all passages with a padlock to prevent accidental release.
 - B. Restrain Hunter using a leash no more than eight feet long, with a collar or harness, when taking Hunter off your property. A competent and capable person must handle Hunter at all times when attended outside.
 - C. If not already completed, microchip Hunter and provide the microchip number to the King County Animal Licensing Office (206) 296–2712 by **February 3, 2020**.
 - D. Keep Hunter current on his rabies vaccination.
 - E. Hunter is allowed to run in sanctioned off-leash dog parks, provided one of the adult O'Reillys is present, and provided Hunter is leashed at all times when not in the car or in the fenced, off-leash area.

ORDERED December 20, 2019.



David Spohr
King County 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 *January 20, 2020*. 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 DECEMBER 11, 2019, HEARING IN THE APPEAL OF GAVIN O'REILLY, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NO. V19009833

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Chelsea Eykel, Tarun Singh, and Gavin O'Reilly. 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 | Online Complaint form of August 26, 2019 incident by Tarun Singh, dated August 27, 2019 |
| Exhibit no. 3 | RASKC investigation report no. A19005649 |
| Exhibit no. 4 | Photographs of wound |
| Exhibit no. 5 | Medical Report |
| Exhibit no. 6 | Notice of violation no. V19009833, issued September 8, 2019 |
| Exhibit no. 7 | USPS tracking |
| Exhibit no. 8 | Appeal, received October 2, 2019 |
| Exhibit no. 9 | Email exchange ending November 26, 2019 |

DS/jo

December 20, 2019

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file no. **V19009833**

GAVIN O'REILLY

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 December 20, 2019.

Eykel, Chelsea

Regional Animal Services of King County

O'Reilly, Gavin

Hardcopy

Singh, Tarun

Hardcopy