

December 26, 2019

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

King County Courthouse
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Seattle, Washington 98104
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REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file nos. **V19009933 and V19009934**

ERIN COLBRESE AND MEGAN SERNA

Animal Services Enforcement Appeals

Activity no.: A19006523

Appellant: **Erin Colbrese**

[REDACTED]
Shoreline, WA 98155

Telephone: [REDACTED]

Email: [REDACTED]

Appellant: **Megan Serna**

14704 22nd Avenue NE

Shoreline, WA 98155

Telephone: (360) 280-9954

Email: meganjserna@gmail.com

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

Regional Animal Services of King County

21615 64th Avenue S

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FINDINGS AND CONCLUSIONS:

Overview

1. Regional Animal Services of King County (Animal Services) served violation notices to Erin Colbrese and Megan Serna, asserting that Ms. Colbrese's dog, AJ, qualifies as vicious. Both Ms. Colbrese and Ms. Serna appealed. 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 uphold AJ's viciousness designation but substantially reduce the penalty.

Background

2. As events unfolded on September 20, Ms. Serna was inside her home. She had, in addition to her own dogs, Ms. Colbrese's dog (AJ) with her. Ms. Serna has a chain-link fence around her yard. The dogs typically go to the fence to greet passerbys, and there had never been any problems with other dogs.
3. Matthew Kincaid explained that he was walking his dog, Elvis along his normal route, which passed by the Serna property. Elvis often goes to the fence and touches noses with Ms. Serna's dog, Koba. September 20 started off no different. Elvis approached Koba and the fence line, milling about. Elvis started sniffing the grass like he was preparing to relieve himself, so Mr. Kincaid called Elvis back. Elvis started walking back and Koba started barking.
4. AJ came around the corner, at full speed, and went straight for the chain-link fence. He ran into it so hard that he went right under it. He came at Elvis. First AJ clamped down on Elvis's ear. AJ then repositioned his bite to grab Elvis's throat. Mr. Kincaid sustained several wounds trying to pry AJ's jaws off Elvis, although Mr. Kincaid explained that AJ was not trying to get at him personally, only at Elvis. Ex. 6. As Mr. Kincaid interpreted it, AJ was using Elvis as a chew toy, wrestling Mr. Kincaid for him.
5. Mr. Kincaid was not able to get AJ off. Neighbors also came to help, initially to no avail. Ms. Serna came out but she too was not able to get AJ off. At some point during the elongated attack, AJ also bit Elvis on both a front and a rear leg. Mr. Kincaid got exhausted, but the neighbors (including Ms. Serna) were eventually able to get AJ off. Mr. Kincaid took himself to the doctor and Elvis to the vet. His and Elvis's wounds are documented in exhibits 5 and 6.
6. From Ms. Serna's perspective, she was inside doing the dishes when she heard screaming. She saw AJ outside the fence, on the grassy area by the street. She came out and "was pulling and pulling" on AJ but could not get him off. Other neighbors were there kicking at AJ. Ms. Serna ran back into the house and got a harness. She and another neighbor were eventually able to get AJ off. She emphasized that nothing like this had ever happened, and AJ had never tried to barrel through the fence. Ms. Serna believes AJ must have been "provoked in some way."

7. Ms. Colbrese was not there, but she described how shocked she was on hearing the accounts. AJ had never done anything like this, and she provided letters from others explaining how non-aggressive AJ has been. Ex. 14. Like Ms. Serna, Ms. Colbrese thinks Elvis must have done something to provoke AJ, and that there must be more to the story than Mr. Kincaid is sharing.

Standard

8. 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.

9. Animal Services asserts that AJ is “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.”

Analysis

10. There is no question that AJ attacked Elvis, but both Ms. Serna and Ms. Colbrese assert that AJ must have been provoked to do so. Because provocation was raised in the appeal statements, it is Animal Services burden to prove that the attack was without provocation.
11. 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).
12. We found Mr. Kincaid straightforward and credible. Unfortunately, we hear many witnesses embellish lots of things under oath, but they typically do not volunteer information like a clarification that although AJ bit Mr. Kincaid a few times (as the

pictures show), AJ was not actually trying to get at Mr. Kincaid and Mr. Kincaid's injuries were just collateral damage from AJ's attack on Elvis.¹

13. One thing the overwhelming majority of our 200+ viciousness designation appeal have had in common is that one witness typically testifies to something along the lines of, "It all happened so fast." The violence is usually over in a few seconds, often with just one bite-and-release administered. In such cases, the question of whether a dog was legally "provoked" turns on testimony about split-second actions detailing exactly how an altercation started. Before dog *B* bit dog *A*, had dog *A* run aggressively at him, or had dog *A* simply walked up, wagging his tail? Did the complainant step on the dog just before the dog bit the complainant? For such close calls, precise details matter.
14. Here, AJ's attack on Elvis is the longest sustained attack by one dog on another that we can recall. Even the dog's caretaker, Ms. Serna, came out well after AJ was engaged; she was pulling and pulling on AJ, and still could not get him off. Ms. Serna had time to run back into the house, get a harness, come back out, and find AJ still at it, even with other neighbors kicking at AJ. 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. AJ's actions here were grossly disproportionate to any provocation.
15. Even if—contrary to the weight of the evidence—Mr. Kincaid was embellishing or leaving out critical details on how the attack started, it would not change our decision. Suppose, for example, that Elvis had been the dog who started the barking, or maybe even that Elvis charged the fence. If AJ had run through the hypothetical hole Elvis theoretically created, a few bites to Elvis to get him to scam might have been considered "provoked." But even in our fanciful retelling of a hypothetical event, AJ's sustained attack on Elvis would have been grossly disproportionate to anything Elvis conceivably could have done to start it. Again, we find that the attack started as Mr. Kincaid described it. But even if we assumed there were large chunks of the origin story missing, we would still conclude there was no legal provocation.
16. We decide cases based on the specifics of an altercation. This cuts both ways. On the one hand, despite the "having the propensity to do any act," in the viciousness definition—which seems to offer an alternative avenue for Animal Services to prove viciousness (i.e. divining that a dog that has not actually done anything violent nonetheless has an inclination to do something violent)—we have always based our decisions on an animal actually performing some act. On the other hand, all the supportive letters (or even testimony at hearing) from people not present for a disputed incident, about how friendly and well-behaved a dog generally is, have not trumped actual evidence about violence on a specific day. So while we accept that September 20 was not in keeping with AJ's normal behavior, that fact does not greatly change our analysis—indeed we see such testimonials in many, if not most, viciousness appeals.

¹ By "volunteer" we mean that this was not some admission Mr. Kincaid agreed to on cross-examination, but something Mr. Kincaid unilaterally presented during his initial narrative.

17. We find that AJ attacked a dog (and bit a person), without legally sufficient provocation, and constitutes a danger to the safety of at least one person and his animal, off AJ's property. We sustain the viciousness designation.
18. We significantly reduce the monetary penalty. Although a chain-link fence does not provide the security of a solid fence, there was nothing prior to September 20 that would have put Ms. Serna or Ms. Colbrese on any heightened alert. As Ms. Serna explained, she had no idea AJ would or even could bust through the fence. Animal Services agreed that neither Ms. Serna nor Ms. Colbrese would have had any way of knowing this would happen until it actually happened. Ms. Colbrese explained the steps she has taken to make sure it does not happen again, including no longer leaving AJ with Ms. Serna, and keeping AJ in a (solid) fenced yard. On these facts, a significant penalty reduction is in order.

DECISION:

1. We deny the appeals as to AJ's viciousness designation.
2. We reduce \$500 penalty to \$100.

ORDERED December 26, 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 27, 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 ON THE APPEALS OF
ERIN COLBRESE, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE
NOS. V19009933 and V19009934**

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Chelsea Eykel, Matthew Kincaid, Erin Colbrese, and Megan Serna. 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 | King County CAD Report |
| Exhibit no. 3 | RASKC investigation report no. A19006523 |
| Exhibit no. 4 | Online complaint, from September 20, 2019 incident by Matt Kincaid, sent September 22, 2019 |
| Exhibit no. 5 | Photographs of Elvis' wounds |
| Exhibit no. 6 | Vet bill |
| Exhibit no. 7 | Photographs of Matt Kincaid's wounds |
| Exhibit no. 8 | Notice of violation and order no. V19009933, sent October 6, 2019 |
| Exhibit no. 9 | Notice of violation and order no. V19009934, sent October 6, 2019 |
| Exhibit no. 10 | Appeal for V19009933, received October 28, 2019 |
| Exhibit no. 11 | Appeal for V19009934, received October 28, 2019 |
| Exhibit no. 12 | Map |
| Exhibit no. 13 | Appellant: Letter from Danielle Potter, submitted November 26, 2019 |
| Exhibit no. 14 | Appellant: Letter from Ashley Kilkenny, submitted November 26, 2019 |
| Exhibit no. 15 | Appellant: Photographs of AJ, submitted, November 27, 2019 |

DS/jo

December 26, 2019

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file nos. **V19009933** and **V19009934**

ERIN COLBRESE AND MEGAN SERNA

Animal Services Enforcement Appeals

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 26, 2019.

Colbrese, Erin

Hardcopy

Eykel, Chelsea

Regional Animal Services of King County

Kincaid, Matthew

Hardcopy

King County Sherriff Dispatch

Hardcopy

Serna, Megan

Hardcopy