

February 24, 2020

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

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REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file nos. **V19009992 and V19009993**

ROBERT ARTHUR AND NANCY ARRIGONI

Animal Services Enforcement Appeal
V1900992 and V1900993

Activity no.: A19007505

Appellants: **Robert Arthur and Nancy Arrigoni**

[REDACTED]
Sammamish, WA 98075
[REDACTED]

King County: Regional Animal Services of King County
represented by **Shelby Russell**
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FINDINGS AND CONCLUSIONS:

1. This case stems from an October 2018 altercation where Leo, a dog belonging to Robert Arthur and Nancy Arrigoni (Appellants), escaped and bit a passerby. Animal Services cited Leo for being a vicious dog running at large and ordered Leo's removal. Appellants timely filed a challenge. 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 the vicious dog running at large violation but overturn the removal order.

September 2016 Attack and Its Aftermath

2. On September 26, 2016, Leo was declared vicious after he bit a person multiple times on September 19. The Notice of Violation and Order to Comply (NVOC) also set requirements Appellants had to meet to keep Leo in the County. Ex. 14 at 001.
3. Appellants claim they were not aware the 2016 NVOC had been issued. Ex. 16 at 001. Lack of actual receipt is not necessarily a get-out-of-jail-free card where the agency meets its service requirements. *In re Marriage of McLean*, 132 Wn.2d 301, 306-309, 937 P.2d 602 (1997) (“due process does not require proof of actual receipt of the mail by the addressee,” and if the legislature “had intended to require evidence of actual delivery, it could have said so expressly”). KCC 11.04.260.D is clear how Animal Services must serve its orders.¹ The (1) personally and (3) posting in on the front door are not in play here, but (2) allows for service:

By mailing a copy of the notice of violation and order by certified mail, postage prepaid, return receipt requested, to the person at the person’s last known address.

4. Here the NVOC contained a September 26, 2016, signature, under penalty of perjury, that the officer sent it certified mail. Ex. 14 at 001. Animal Services did not—as is typically its custom—include the postal service tracking data (which would definitely establish that the elements in subsection (2) had been met) in its filings with us.
5. That could have been a risky move, especially given that Appellants’ January 24 filing explicitly challenged their notice of the 2016 NVOC, asserting that they were not aware of the NVOC and it “should not have a bearing on this case.” Ex. 16. However, Animal Services had an even better ace in the hole: proof that 13 days after the NVOC was served (and thus within the 14-day window the NVOC set for paying the penalty) Appellants actually paid the penalty. So not only did Appellants (apparently) get *legal* notice, they got *actual* notice and promptly responded to it. Ex. 14 at 002; Ex. 15 at 005. That Appellants may have forgotten about it does not change the binding nature of Leo’s viciousness determination nor Appellants’ requirements for keeping Leo in the County. We will return to the 2016 compliance terms when we discuss removal.

October 2019 Incident

6. On the morning of October 18, Mr. Arthur went out to get Leo from his fenced-in inner enclosure. Leo got past him, escaped the inner fence, and made his way to the outer perimeter fence, where he squeezed under the gate as Mr. Arthur gave pursuit.
7. Leah Kay Mix happened to be driving by on the adjacent public road, and saw Leo running loose. She stopped to try to assist. Leo ran up and began circling her car. Mr. Arthur was also circling her car, unsuccessfully trying to get a hold of Leo. Ms. Mix thought if she got Leo’s attention, that would enable Mr. Arthur to catch Leo.

¹ This case comes out of the City of Sammamish, but Sammamish has mostly adopted KCC Title 11. SMC 11.05.010. We cite to Sammamish code where it differs.

8. Here the testimony diverges slightly—but as we discuss later, not legally significantly. Ms. Mix remembers that Leo came at her first, and she stuck out her hand to try to prevent Leo from jumping up and scratching the car’s paint. Ex. 7. Mr. Arthur remembers that Leo only went after Ms. Mix *after* she stuck out her hand. In any event, Leo bit Ms. Mix’s finger, Ex. 8 at 005–07, resulting in what she described as a little lasting nerve damage.
9. Animal Services served an October 24 NVOC. Appellants timely appealed. 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. 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.
10. Leo’s actions in October 2019 would—even without the 2016 attack—have qualified him as vicious. There is some dispute about whether Ms. Mix stuck her hand out first, or whether she stuck her hand out only after Leo came at her car. We found her more credible, but it does not impact our analysis. Under *either* her or Mr. Arthur’s version, an elderly woman, sticking her hand out of a car on a public street, does not amount to “provocation.”²
11. We start with the general proposition that reaching one’s hand out towards a dog typically does not constitute “provocation.” *State v. Ruisi*, 9 Neb. App. 435, 443, 616 N.W.2d 19, 26 (2000). Certainly, we could envision a scenario where sticking a hand out might constitute “provocation,” or a least would require a more careful balancing. Say a dog is trapped in a corner, with no place to retreat from an oncoming stranger. The dog gives a warning growl, but the stranger still advances and tries to pet it. Maybe that scenario could amount to “provocation.” Here, in contrast, there is no question that Ms. Mix remained seated in her car, on a public street, the entire time. Leo had plenty of space to avoid an unwanted altercation. Instead, Leo went after Ms. Mix. He was not “provoked” to do so.
12. That result does not change because we accept Appellants’ testimony about Anatolian shepherds being livestock protection dogs from Turkey, from whom protectiveness has intentionally not been bred out, and that Leo thought he was protecting Mr. Arthur, as Mr. Arthur stood about 10 feet away. The “provocation” inquiry “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) (underscore added) (*citing Kirkham v. Will*, 311 Ill. App. 3d 787, 792, 724 N.E.2d

²As 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).

1062 (2000)). So the question is not how, given Leo’s DNA, one would expect *Leo* to react to Ms. Mix’s hand, but how an average dog would have reacted. Having entertained hundreds and hundreds of animal enforcement cases, we find that deciding to bite Ms. Mix on even Mr. Arthur’s version events was well outside the average dog’s response.

13. Our finding also does not change because Appellants do not believe that Leo is a vicious dog. As set forth in the code sections described above, the meaning of the word “vicious” in the animal control context is broader than the word’s everyday usage (which might be “mean–spirited or deliberately hurtful; malicious”). Viciousness, as we analyze it, is not about a state of mind, but about actions. Even if Leo had not already been definitively determined to be vicious in 2016, we would uphold a viciousness determination today because on October 18, 2019, Leo performed an act endangering the safety of a person, namely biting a human being without provocation, and constitutes a danger to the safety of persons off Leo’s premises. KCC 11.04.020.BB., SMC 11.05.015.H.
14. We say “would” because Animal Services was more measured in its NVOC. It did not assert that the October 18 act qualified as an independent violation of subsection H. (the viciousness subsection). Instead it only cited Mr. Arthur for a violation of subsection L, which declares as a nuisance:

Any vicious animal or animal with vicious propensities that runs at large at any time it is off the owner’s premises and not securely leashed on a line or confined and in the control of a person of suitable age and discretion to control or restrain the animal.

“Control” itself means, at a minimum, to be “restrained from approaching any bystander” when “off the premises of the owner.” KCC 11.04.020.AA. That is a much easier violation for Animal Services to prove. Leo was a vicious dog by virtue of his 2016 designation, and on October 18, Leo was not secured and prevented from approaching Ms. Mix. We sustain the violation.

December 2019 Incident

15. On December 22, 2019, Leo got again and was later cited. When we asked why the third NVOC was not included in our record, Animal Services explained that it had not included it because it based its October 24, 2019, removal order on the 2016 confinement terms and the October 19, 2019, escape. Fair enough. We will not consider the December incident further.

Removal

16. A dog declared vicious “may be harbored, kept or maintained in King County only upon compliance with those requirements prescribed by the manager.” KCC 11.04.290.A.1. Here, the terms for keeping Leo in the County were prescribed in the 2016 NVOC. That Appellants may have forgotten that they received (and paid the fine associated with) that NVOC does not change its legally binding effect. The pertinent requirement was that Appellants:

Secure your animal in a fenced area suitable for the size of the animal when your animal is unattended and outside your home. Lock all passages with a padlock to prevent accidental release.

17. Animal Services removal order asserted that on October 18 Leo had violated the NVOC by running at large and biting a person. Ex. at 004. It sought removal under KCC 11.04.290.A.3, which provides for removing a dog where the NVOC's requirements are not met. Ex. 3 at 003.
18. Much hearing discussion focused on the outer fence, where Leo eventually escaped the property on October 18. However, that perimeter fence was only, in Appellants' words, a second line of defense. Leo was contained in the *inner* yard. More importantly, Leo was not "unattended," the starting point for that NVOC requirement. Rather, Mr. Arthur was out with Leo and actively trying to retrieve Leo and bring him back into the house when Leo slipped past him. Animal Services has not proven that Appellants were failing to comply with the 2016 NVOC's requirements on October 18. KCC 20.22.210. Thus, removal is not warranted.

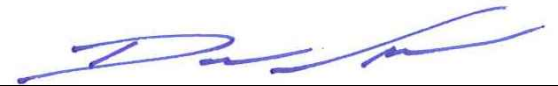
Future-Looking

19. Appellants seem to finally have a handle on containing Leo. Appellants explained at hearing that they now keep Leo on a cable line when he is outside. Animal Services' field notes seemed to confirm this. Ex. 10 at 002 n.3. The consequences of another slip up are steep. First, Leo running at large in the 12 months following October 18 would carry a \$1,000 penalty. KCC 11.04.035.C.2.b. Removal remains a possibility either under KCC 11.04.290.A.3 (for violation of the 2016 NVOC requirements), or under subsection B.1 (if Leo receives a third NVOC in a one-year period). So there is not much margin for error.

DECISION:

1. We sustain the October 24 NVOC. Appellants shall pay the \$500 penalty by **April 24, 2020**.
2. We overturn the October 24 removal order.

ORDERED February 24, 2020.



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 *March 25, 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 FEBRUARY 12, 2020, HEARING IN THE APPEAL OF ROBERT ARTHUR, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NOS. V19009992 and V19009993

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Sgt Russell, Leah Mix, Nancy Arrigoni, and Robert Arthur. 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. V19009992, issued October 24, 2019 |
| Exhibit no. 3 | Notice and order for removal no. V19009993 with proof of service, issued October 24, 2019 |
| Exhibit no. 4 | Appeal, received November 9, 2019 |
| Exhibit no. 5 | RASKC investigation report no. A19-007505 |
| Exhibit no. 6 | Statement from Leah Kay Mix |
| Exhibit no. 7 | Email from Leah Kay Mix with photos, sent October 24, 2019 |
| Exhibit no. 8 | Email from Leah Kay Mix with photos, sent October 19, 2019 |
| Exhibit no. 9 | RASKC investigation report no. A16-004961 |
| Exhibit no. 10 | RASKC investigation report no. A19-009295 |
| Exhibit no. 11 | Statement from Leah Kay Mix with photos, sent December 24, 2019 |
| Exhibit no. 12 | RASKC investigation report no. A19-009328 |
| Exhibit no. 13 | Map of subject area |
| Exhibit no. 14 | Notice of violation no. V16006177, issued September 26, 2016 |
| Exhibit no. 15 | RASKC: Additional photographs, received January 27, 2020 |

DS/vt

February 24, 2020

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CERTIFICATE OF SERVICE

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ROBERT ARTHUR AND NANCY ARRIGONI

Animal Services Enforcement Appeal
V1900992 and V1900993

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 February 24, 2020.



Jessica Oscoy
Legislative Secretary

Mix, Leah

Hardcopy

Nancy Arrigoni, Robert Arthur

Hardcopy

Russell, Shelby

Regional Animal Services of King County