

May 13, 2020

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

King County Courthouse
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REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file nos. **V19010142 and V19009873**

SAMANTHA KING

Animal Services Enforcement Appeal

Activity no.: A19005338

Appellant: **Samantha King**

[REDACTED]
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King County: Regional Animal Services of King County
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FINDINGS AND CONCLUSIONS:

Overview

1. Samantha King appeals (1) a violation notice declaring her dog, Rhino, vicious and (2) an order to remove Rhino from the County. 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 (1) sustain the viciousness violation but reduce its monetary penalty and (2) sustain the removal order but provide Ms. King with some extra time to rehome Rhino and clarify that that monetary penalty will not attach if she timely complies.

Pertinent Evidence

Deputy David Vincent's Testimony

2. On May 29, Vincent was called to the King house for a case related to Ms. King's downstairs tenants. As Vincent walked up to the gate, he heard a lot of yelling, and saw two smallish pit bulls running around. The male tenant was able to get his dogs inside, and Vincent entered the yard and began talking to that tenant. As Vincent engaged in conversation, without warning Ms. King's dog, Rhino, bit him on his buttock, causing excruciating pain and extensive bruising. Exs. 15-16. Vincent screamed and turned around—not sure at first what hit him—and grabbed his gun. Ms. King came out and was able to control Rhino before any more violence occurred.
3. Vincent explained that he only became aware of the protocol for reporting bites after the August 20 incident (described below). Thus, he only described the May 29 attack to Animal Services during the investigation into the August 20 incident.
4. On August 20, Vincent arrived at the house on another call related to Ms. King's tenants. Because Rhino had previously bitten him, he waited for another officer to arrive. After Deputy Thomas Zielinski arrived, Vincent went up to the gate, rattled it, and announced it was the police. Vincent heard a female voice advise him to come on in, so he unlatched the gate, and he and Zielinski walked inside.
5. When Vincent got 20 feet or so inside the gate, the same dog that bit him on May 29 (Rhino) charged at him. As Rhino quickly closed the distance, Vincent put out his foot to try to keep Rhino back. Rhino bit through his boot and latched onto his foot. As Zielinski started pepper spraying Rhino, Vincent was able to shake his foot free. Rhino went around him to go after Zielinski. Vincent did not recall whether Zielinski started spraying Rhino before, during, or after Rhino bit Vincent's foot.
6. Vincent described Zielinski falling and Rhino clamping onto the back of Zielinski's knee. Vincent grabbed and applied pressure to Rhino to try to get him off Zielinski. Ms. King came out yelling and was eventually able to get Rhino inside. Vincent was shocked how ineffective Zielinski emptying almost an entire pepper spray canister onto Rhino was in getting Rhino to cease the attack.
7. On yet another visit to the house responding to another complaint involving Ms. King's tenants, Vincent remembered talking to Ms. King. Ms. King wanted to show him Rhino, who was in Ms. King's Prius. When he walked to the Prius, Rhino was not reactive, but simply lifted, then lowered, his head.

Deputy Thomas Zielinski's Testimony

8. On August 20, Zielinski was working in a different precinct, when he got called to the King property. There he met Vincent. Vincent started hailing "Sheriff...Police" a few times. Zielinski heard a female voice ask who it was, and after Vincent repeated the information, the voice said to come in. As Rhino bit Vincent's foot, Zielinski deployed

his pepper spray, eventually emptying most of the can onto Rhino. Zielinski also was shocked that Rhino seemed to “eat [the pepper spray] like Binaca.”

9. As Rhino attacked, Zielinski fell. Rhino bit him on the back of his right knee. Doctors had to flush everything and cut a flap of flesh out. Exs. 9-10. The wound was right on the crease, so it would later open repeatedly when Zielinski moved his knee. He still has a two-inch by one-inch scar. Worse, as Zielinski fell, he tore ligaments in his left knee. The tear required surgery. Surgery and his subsequent physical therapy have not been too much to help for that knee.

Ms. King's Testimony

10. On May 29, Ms. King did not know the police were there until after she heard the tenants yelling. By the time she came out, Rhino had already bitten Vincent.
11. On August 20, she did not initially hear Vincent calling. After she heard her tenant tell someone to come on in, Ms. King assumed the visitors were there for the barbecue she and her tenants were hosting that day. So, when Ms. King responded, “We’re in back,” she was not aware the deputies were there. By the time she came around front to the altercation, Vincent was pinning down Rhino. She was able to get Rhino into the house. She noted the deputies were shocked that Rhino had not responded to the pepper spray. She could see where Rhino had bitten the back of Zielinski’s knee.
12. On the later date, when Vincent came out to discuss yet another issue involving her tenants, Ms. King wanted to show Vincent that Rhino was not in protective mode because Rhino was outside his yard. She described another visit from two female officers, and a successful experiment where Rhino came to the gate with her and was fine with the officers.
13. Ms. King noted that she had other documents showing Rhino is not reactive in Ms. King’s presence, but that these had been stolen. We noted at hearing that, especially with Vincent’s corroboration of Rhino’s nonreactive state when Ms. King brought Vincent to the Prius, we would accept for the record that Rhino is not reactive when he is with Ms. King.
14. Ms. King clarified that Rhino is not a pit bull but an American bulldog/Corso Italian mastiff and can be very protective of people. She has had Rhino for a dozen years, and he has never bitten anyone beyond May 29 and August 20. She intends to have Rhino replace her previous emotional support animal. She agreed the cops have been called out dozens of times, and would not be surprised if they had been called 45 times between May and August. (She had calling cards for something like 48 deputies.)
15. Since August 20, she has padlocked the fence, and closed the sliding door. Rhino always has a harness and leash. She now secures him in the house and keeps him under a microscope, with her at all times. He is a nice calm dog. The neighbors have volunteered to install a cedar fence. The downstairs tenants have been removed, and officers are no longer being called to the house.

Analysis

16. The procedural posture here is a little circuitous. Animal Services' first Notice of Violation and Order to Comply (NVOC) declared Rhino vicious in connection with the May 29 altercation; Ms. King did not appeal that. Animal Services' second NVOC and its order to remove Rhino from the County related to an August 20 altercation; Ms. King did appeal those. However, the removal order was procedurally invalid, an unsigned version having been served on Ms. King. We thus dismissed those without prejudice. Animal Services refiled, and Ms. King appealed. We thus have jurisdiction over the second NVOC (V19009873)¹ and the revised removal order (V19010142).
17. 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.

May 29 Altercation

18. The first NVOC asserted that Rhino qualified as vicious in connection with the May 29 altercation, namely that Rhino:
- 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
- and “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.” KCC 11.04.020.BB; .230.H.
19. Procedurally, Rhino's viciousness related to his May 29 attack has been decided. As the August 23 NVOC noted, any appeal of the first NVOC had to be received by September 17, lest that NVOC become final. Ex. 12 at 002. Thus, by September 18, Rhino's designation as a vicious animal was set in stone. KCC 20.22.080.H. (where “a person fails to timely deliver the appeal statement..., the office of the hearing examiner does not have jurisdiction to consider the appeal and the decision of the department...becomes final and unreviewable”).
20. However, because both parties presented extensive testimony about May 29, there is enough evidence to find that, even had the first NVOC been appealed, we would have sustained it. Rhino “bit[] a human being” without provocation and constitutes a danger to the safety of someone lawfully on Rhino's premises (as deputy Vincent would find out again on August 20). Rhino is by Ms. King's admission protective, but court's

¹ In addition to the vicious-related violation, the second NVOC asserted that, as of August 20, Rhino was not duly licensed. Ms. King did not challenge the licensing issue. Ex. 5. KCC 20.22.080.G.

“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) (citing *Kirkham v. Will*, 311 Ill. App. 3d 787, 792, 724 N.E.2d 1062 (2000)). While Vincent was engaged in a conversation with the tenant, Rhino blindsided him. That is completely disproportionate to any agitation deputy Vincent’s presence created or to how an average dog would have reacted.

August 20 Viciousness Violation

21. The parties spent a significant amount of time about who said what as the deputies knocked at the gate on August 20. We do not find anything inconsistent between their testimonies. The female tenant responded to Vincent announcing the deputies’ presence by inviting the deputies to come on in. Then Ms. King, mistakenly thinking it was barbecue guests, called for them to come to the back. In any event, the deputies were invited in and were lawfully on the property. And they did nothing more provocative than walk a few steps before Rhino charged and attacked Vincent. As with the above analysis, Rhino “bit[] a human being” without provocation and constitutes a danger to the safety of someone lawfully on Rhino’s premises.
22. Rhino’s attack of Zielinski requires a little bit more nuance, because Zielinski started pepper spraying Rhino before Rhino bit him. Where a dog is *already* attacking, the person has a right to defend herself (or her pet), and such defensive actions (where proportionate) do not count as “provocation.” For example, where a person threw sticks and a chair at a trespassing dog and was then bitten by the dog, the question for the court was “whether petitioner began throwing sticks and a chair at the dog, or whether the dog attacked first.” *Giandalone v. Zepieri*, 86 Misc. 2d 79, 80, 381 N.Y.S.2d 621 (1976). Or, where dogs were attacking a plaintiff’s cat, the plaintiff poking and kicking the dogs—which resulted in the dogs biting the person—did not make those dogs’ bites “provoked,” because the “dogs were provoked before plaintiff reacted to their behaviors” and “plaintiff’s response to the dogs’ violent behaviors cannot be considered ‘provocation’” for the dogs biting her. *Koivisto v. Davis*, 277 Mich. App. 492, 493, 497, 745 N.W.2d 824 (2008). Zielinski pepper spraying Rhino after Rhino attacked and bit Vincent cannot be considered provocation for Rhino biting Zielinski.
23. We do, however, reduce the applicable penalty. For a “subsequent [viciousness] violations within one year,” KCC 11.04.035.C.2.a doubles the applicable penalty from \$500 to \$1000. However, as noted above, because Vincent did not report the May 29 incident until just after the August 20 attack, Animal Services did not issue the first NVOC until August 23. We do not think the drafters meant to double the penalty when the subsequent viciousness violation occurred *before* Animal Services issued the first viciousness designation.

Removal

24. We are the most exacting of Animal Services on removal orders, given the interests at stake. On appeal we have overturned more removal orders than we have sustained. There are several subsections in KCC 11.04.290 that provide different grounds for

moving animal from the County. Most of those provide some flexibility. For example, subsection A.2.e removals are discretionary (“may” be removed), meaning we must balance multiple factors. Subsection A.3 removals sound mandatory (“shall not be kept”), but by linking removal to a “failure” to comply and to a misdemeanor (*i.e.*, to an owners’ act being *criminal*), we have found some flexibility there. And outside the viciousness context, subsection B.1 removals sound mandatory (“shall be... removed”), but the text allows reversal upon a “showing that the owner will be able to provide reasonable restraints to protect the public from repetitions of violations.”

25. Here, however, Animal Services seeks removal here under subsection B.2, which holds that:

Any animal that bites, attacks or attempts to bite one or more persons two or more times within a two-year period is declared to be a public nuisance and shall not be kept within unincorporated King County forty-eight hours after receiving written notice from the manager.

26. Applying a rule of lenity and interpreting that section in the light most favorable to an appellant, we have required that any bite/attack/attempted bite be legally unprovoked. *See* KCC 11.04.020.BB (“without provocation”). Additionally, while a decent argument could be made that biting multiple people during the same altercation (as Rhino did to deputies Vincent and Zielinski on August 20) could qualify as “two or more times,” we have required that the altercations be truly separate. And given that the steps Animal Services requires an owner to undertake to comply with the removal order—find a suitable new home, outside of King County, for a dog the current owner must disclose has been ordered removed as a threat to public safety, and then get the dog microchipped and out of King County, Exhibit 4 at 005—seem near impossible to meet within 48 hours, we have extended the compliance period beyond 48 hours.
27. However, that is as far as we can stretch the language of B.2, even applying a rule of lenity. Rhino bit Vincent on May 29 before biting Vincent again (along with Zielinski) on August 20. All bites were unprovoked, as courts analyze that term. Rhino bit one or more persons, two or more times, within a two-year period. And unlike the subsection B.1 removals discussed above, where the code drafter elected to include an escape hatch if an owner can demonstrate that reasonable restraints are in place to protect the public from future violations, the drafters elected not to provide owners with that option for subsection B.2. We may not agree that legislative choice, but when we decide cases, we interpret the codes “as they are written, and not as we would like them to be written.” *Brown v. State*, 155 Wn.2d 254, 268, 119 P.3d 341 (2005). We do not discount the steps Ms. King has taken since August 20, but they came too late.
28. Animal Services makes a fair case that Ms. King knew by at least May 29 that Rhino had bitten a deputy, knew deputies were repeatedly having to come to her property for complaints related to her tenants, knew that her tenants had previously let Rhino out, and that Ms. King should have better secured Rhino before August 20. However, a subsection B.2 removal is *not* about owner blame. If Ms. King, for example, had Rhino

on a leash on May 29 in August 23 and Rhino still attacked on both days, the result would be the same.

29. We sustain the removal order. However, we make two caveats. First, we will provide Ms. King two weeks, not two days, to either (a) microchip Rhino (if not microchipped already), find and disclose to a potential new owner that Rhino was ordered removed from King County as a threat to public safety, have that person or entity agree to take Rhino on, actually get Rhino out of King County, and provide Animal Services proof that this new owner lives outside of King County, or (b) surrender Rhino to Animal Services. And, so long as she timely and successfully meets one of those two courses, the \$1,000 penalty applicable to a removal order will not come due.

DECISION:

1. We uphold the NVOC in V19009873, but we eliminate \$500 from the penalty.
2. We uphold the removal order (V19010142) as well. By **May 27, 2020**, Ms. King must either:
 - A. Microchip Rhino, find a potential new owner outside of King County, disclose to that person Rhino was ordered removed from King County as a threat to public safety, have that person agree to take Rhino on, actually get Rhino out of King County, and provide Animal Services proof that this new owner lives outside of King County, or
 - B. Surrender Rhino to Animal Services.
 - C. If Ms. King timely and successfully completes (a) or (b) by May 27, the \$1,000 penalty attached to the removal order is waived. If not, Animal Services may collect the entire amount.

ORDERED May 13, 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 *June 12, 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 APRIL 29, 2020, HEARING IN THE APPEAL OF SAMANTHA KING, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NOS. V19010142 AND V19009873

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Chelsea Eykle, David Vincent, Thomas Zielinski, and Samantha King. 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 and order for removal no. V19010142, issued December 6, 2019 |
| Exhibit no. 3 | Notice of violation no. V19009873, issued September 20, 2019 |
| Exhibit no. 4 | Notice and order for removal no. V19009874, issued September 24, 2019 |
| Exhibit no. 5 | Appeal, received October 15, 2019 |
| Exhibit no. 6 | Appeal, received December 19, 2019 |
| Exhibit no. 7 | Staff Investigation Report no. A9005338 |
| Exhibit no. 8 | Officer witness statement from Deputy Thomas Zielinski |
| Exhibit no. 9 | Photograph of Deputy Zielinski's bite wound |
| Exhibit no. 10 | Photograph of Deputy Zielinski's bite wound |
| Exhibit no. 11 | Officer Witness Statement from Deputy David Vincent |
| Exhibit no. 12 | Notice of Violation and Order to Comply no. V19009766, issued August 23, 2019 |
| Exhibit no. 13 | Investigative Report no. A19005343 |
| Exhibit no. 14 | Deputy Vincent's Statement regarding May 29, 2019 bite wound |
| Exhibit no. 15 | Photograph of Deputy Vincent's May 29, 2019 bite wound |
| Exhibit no. 16 | Photograph of Deputy Vincent's May 29, 2019 bite wound |
| Exhibit no. 17 | King County Parcel Viewer Screen Shot of appellant's address |

DS/jf

May 13, 2020

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file nos. **V19010142 and V19009873**

SAMANTHA KING

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 May 13, 2020.



Jessica Oscoy
Legislative Secretary

Eykel, Chelsea

Regional Animal Services of King County

King County Sherriff Dispatch

Hardcopy

King, Samantha

Hardcopy

Vincent, David

Zielinski, Thomas

Hardcopy