

June 8, 2020

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

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REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file no. **V20010369**

GENEVIEVE HUARD

Animal Services Enforcement Appeal

Activity no.: A20001375

Appellant: Genevieve Huard
represented by **Jessica Johnson**
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FINDINGS AND CONCLUSIONS:

Overview

1. Genevieve Huard's dog, Bear, bit Jonathan Tremblay as he passed by on his board; that is not in dispute. What is hotly disputed is how and precisely where that pass took place, and whether Bear's bite was legally "provoked." Under Mr. Tremblay's version of events, there was no provocation; under Ms. Huard's there was. It is a close call, but we do not find Mr. Tremblay's version of events any more plausible than Ms. Huard's. As Animal Services had the burden to show Bear's bite was not provoked, we reverse.

Testimony

2. Mr. Tremblay is an experienced boarder and season-ticket holder who typically hits the slopes twice a week during the season. On February 9, 2020, he was boarding at Alpentel. On the fateful run, he was following his daughter down the gentle slope as the path neared the base. He testified that he saw a woman (Ms. Huard) with three dogs (including Bear) about 100 feet below him, on his left side, facing downhill as well. He did not initially see Travis Smith walking with Ms. Huard. Bear was six to eight feet from Ms. Huard, in the middle of the trail. He did not recall seeing other pedestrians on the trail that day. In general, that area is not a place where leisure walking happens, and it is fairly uncommon to see dogs there.
3. Mr. Tremblay stated that he announced he and his daughter were coming to Ms. Huard's right. His daughter passed by without incident. Mr. Tremblay skied to his right and was on the right-hand side of the run as he passed them. He estimated the run was 15 feet wide and that it was not possible for him to go further to the right because there was a plastic fence on the right. He thought he had plenty of room to pass, estimating he was six to eight feet away from Ms. Huard when he passed, facing them. However, Bear jumped and bit his back (left) leg.
4. Mr. Tremblay stated that he noticed Bear had torn through his pants, and he stopped and unclipped. Some folks standing nearby offered to watch his daughter while Mr. Tremblay sorted things out. As he walked uphill towards Ms. Huard, he saw Bear trying to jump towards another girl skiing by, but Ms. Huard held Bear back. While Mr. Smith took the dogs to the car, Mr. Tremblay and Ms. Huard walked to the lodge, where Mr. Tremblay got a Band-Aid and exchanged information with Ms. Huard. Later he went to Swedish for a check-in. He had not been scared of, or bitten by dogs before, but he is quite nervous around them since Bear's bite.
5. Ms. Huard testified that she and her significant other, Mr. Smith, had camped in the parking lot. The parking lot was slushy, and they walked to find a place for the dogs to go potty. Traffic on the trail was busy, with ski school kids, pedestrians, and other skiers. She had Bear and her other dog Boo on short leashes. The dogs had a lot of energy, and Bear was leading in front of her, slightly to the right (trailside). She was on the edge of the trail, while Mr. Smith was walking along the snowbank itself.
6. Ms. Huard explained that she holds the ends of her dogs' six-foot leashes in her left hand (here, the snowbank side) with her stronger right hand (here, trailside) halfway down the leash. She later took photographs showing the leash and how she says she normally holds the dogs. Ex. A6. She explained that this is how she was holding Bear on February 9. If anything, she might have held him a little bit closer on February 9, because there were lots of people going by. She disputed that Bear was anywhere near the middle of the trail.
7. Ms. Huard was initially facing downhill and away from approaching skiers. She said she heard someone (Mr. Tremblay) angrily yelling. She turned perpendicular, and saw him waving his arms and aggressively shouting about the dogs getting out of his way. He was skiing two or three times as fast as anyone else. She tried to step aside, but she could not

move over much because of the snowbank. Mr. Tremblay’s daughter passed like everybody else. Mr. Tremblay had plenty of trail to avoid them. However, he was angling towards, not away from them.

8. Ms. Huard testified that Mr. Tremblay passed at least five to six feet closer to her than anyone else had, less than a full arm’s length away. As he passed, he waved his arms in a sweeping downward motion. She saw Bear bite Mr. Tremblay. She reasoned that, as she was holding a six-foot leash halfway down, Bear could not have reached Mr. Tremblay unless Mr. Tremblay were within three feet of her.
9. After Mr. Tremblay stopped, she wanted to make sure he was okay. Mr. Tremblay followed them back to their truck. The pictures of Mr. Tremblay’s leg came from near the truck. Ex. D16 & D17. She returned on February 28 and photo documented that the groomed trail was 26 ½ feet wide at the spot where the bite occurred. Ex. A3 at 019-22.
10. Travis Smith, Ms. Huard’s partner, was walking by her, maybe a step or two behind her and a little bit more on top of the snowbank. He estimated that 20 or 30 people passed them without incident or without Bear responding. Bear was never more than three feet away from Ms. Huard and was never in the middle the trail.
11. Mr. Smith testified that when Mr. Tremblay yelled, Ms. Huard moved as much as she could to the left. Mr. Tremblay came from behind them at a high rate of speed, two to three times the speed of other boarders and 10 to 15 times the speed of walkers. Mr. Tremblay veered from a straight path and angled his board in their direction, perhaps to intimidate them. Mr. Tremblay passed within arm’s length of them, flailing his arms aggressively and yelling. Mr. Smith missed seeing Bear bite, but he was immediately upset that Mr. Tremblay had passed at such an unsafe distance.
12. As to how Mr. Tremblay could have been going so much faster than other skiers like Mr. Tremblay’s daughter, Mr. Smith explained that when he skis with Ms. Huard, he skis a lot faster than her, then stops and lets her pass, then follows again at a higher speed.

Standard

13. The substantive question we answer is whether Bear qualifies as “vicious,” defined as, “performing the act of... 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,” with “[a]ny 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” qualifying as a nuisance. KCC 11.04.020.BB; KCC 11.04.230.H.
14. In answering that, 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 has “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.dd

Analysis

15. Often, deducing the facts surrounding what was happening just before a bite is relatively straightforward, and the meat of the analysis is whether those facts amount to legal “provocation,” as the jurisprudence has extensively flushed out the nuances of that term supplies in different factual scenarios. Here, in contrast, the relevant legal propositions are straightforward, but the facts are difficult to deduce.
16. Although provocation is typically an affirmative defense, *Patterson v. New York*, 432 U.S. 197, 202-03 (1977), lack of provocation is an element of the violation itself. KCC 11.04.020 (“biting a human being...without provocation”). Thus, where provocation is duly raised in an appeal statement, the appellant does not bear the burden of showing that the bite was provoked; instead, Animal Services has the burden of showing that it was not. *See also Morawek v. City of Bonney Lake*, 184 Wn. App. 487, 495, 337 P.3d 1097, 1101 (2014); KCC 20.22.080.G .
17. “Provocation” does *not* consider the actor’s intent, but focuses instead on the nature of the act itself and the relationship between that act and an outcome. *Koivisto v. Davis*, 277 Mich. App. 492, 496, 745 N.W.2d 824, 827 (2008) (citations omitted).¹ So whether Mr. Tremblay intended to send a message to or brushback the Huard party is not particularly relevant.
18. Mr. Tremblay had a duty to stay in control and be able to avoid other people or objects; people ahead of him had the right-of-way and it was Mr. Tremblay’s responsibility to avoid them. Ex. A3 at 024, 031. While Alpentel has a no-animals-on-ski-terrain prohibition, Alpentel’s manager explained that pedestrians and their dogs are allowed to use the route the Huard party was on, so long as dogs are leashed and not roaming the middle of the traverse. Ex. A3 at 026, 029.
19. The scenario Mr. Tremblay described of Bear jumping towards a subsequent skier does not seem legally relevant. As Ms. Huard and Mr. Smith were focused down the hill at Mr. Tremblay, one would not have expected them to remember a girl passing; it is not a credibility issue. And Bear being reactive to a second skier folds back into the Bear-Tremblay altercation. If Bear’s encounter with Mr. Tremblay occurred as Ms. Huard and Mr. Smith described it, then Bear was in a legally provoked state and might reasonably be expected to be more reactive than normal in the moments right after that provocation.² Conversely, if Bear’s encounter with Mr. Tremblay occurred as Mr. Tremblay described

¹ There is some disagreement among states on the relevance of a victim’s mindset. *Compare, e.g., Toney v. Bouthillier*, 129 Ariz. 402, 405, 631 P.2d 557, 560 (1981) (provocation inquiry disregards whether the actor intended to provoke) *and Nelson v. Lewis*, 36 Ill. App. 3d 130, 133, 344 N.E.2d 268, 272 (1976) (determination of “provocation” made independently of considerations regarding person’s intent) *with Engquist v. Loyas*, 803 N.W.2d 400 (Minn. 2011) (provocation requires both victim’s direct knowledge of danger and victim voluntarily exposing self to that danger). The victim’s intent might be relevant where a plaintiff is attempting to recover damages from a bite, but it seems far less relevant to whether a dog qualifies as “vicious.”

² If Bear had actually bit the girl, that likely would have warranted its own viciousness designation, regardless of what had just happened with Mr. Tremblay. But that is not our scenario.

it, Bear had already overreacted enough to warrant a viciousness designation *before* another skier passed.

20. What is legally relevant is relatively basic. 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) (*citing Kirkham v. Will*, 311 Ill. App. 3d 787, 792, 724 N.E.2d 1062 (2000)). And provocation requires the dog’s reaction to be proportional to the victim’s act. *Bradacs*, 244 Mich. App. at 273–75; *Kirkham*, 311 Ill. App.3d at 792; *Stroop v. Day*, 271 Mont. 314, 319, 896 P.2d 439 (1995).
21. Those legal standards apply, without much need for further analysis, to our scenario.
22. Under Mr. Tremblay’s version of events, Bear was in the middle of the run, six to eight feet from Ms. Huard. After Mr. Tremblay announced himself, he skied to the right and was on the right-hand side of the run as he passed them. The run was only 15 feet wide, and it was not possible for him to go further to the right, because of a plastic fence on the right-hand side. He had plenty of room to pass, being six to eight feet away from Ms. Huard when he passed. Ex. D16 & D17. If the facts are more or less as Mr. Tremblay presented them, he did nothing legally provocative, and Bear’s bite went far beyond an average dog’s and was not proportional to any incitement.
23. Conversely, under Ms. Huard’s and Mr. Smith’s version of events, Bear had a right to be where he was, leashed and not roaming the middle of the trail. Mr. Tremblay yelled aggressively at them, used threatening body language, had 20-something feet to pass to his right, but instead came within arm’s-length of Ms. Huard, invading her and Bear’s space, swinging his arm as he did. If the facts are more or less as they presented them, Mr. Tremblay provoked Bear and, as a “back off” nip not even breaking the skin, Bear’s reaction was proportional to that provocation.
24. Thus, this case turns almost entirely on whose version of events we find more accurate.
25. Ms. Huard and Mr. Smith testified that Mr. Tremblay was skiing two or three times as fast as anyone else. As counsel pointed out, this was the relatively flat end of the run. Their speed estimate seems embellished. There are additional problems specifically with Ms. Huard’s story.
26. In her initial statement to the investigating officer, she noted that Mr. Tremblay yelled as he came by quickly and that Bear, an Australian shepherd, wanted to “herd” Mr. Tremblay. Ex. D3 at 003, n.2. It is possible something got lost in the translation, but herding does not sound consistent with the version she later presented that Bear was reacting to Mr. Tremblay being aggressive and getting in their bubble.
27. At hearing she testified that Bear was in front of her, *slightly to the right* [trailside]. That is consistent with Mr. Smith’s declaration that Roo was the middle dog and Bear was on the right. Ex. A4 at 002. However, Ms. Huard’s earlier declaration was that Roo and Bear were “on my *left side* [i.e. bankside] or in [front] of me at all times.” Ex. A3 at 003. So, her

- story seems to have evolved. She also referred, at various times, to the slope on February 9 as being “very” busy, as “pretty” busy, and as “moderately” busy.
28. Mr. Tremblay’s story has its own problems. He did not remember following Ms. Huard and Mr. Smith back to their car, but then later acknowledged he had taken a picture of the license plate; a walk to the car seems a fairly lengthy and important item not to recall. He also did not recall seeing other pedestrians, yet he left his daughter with some pedestrians while he went back to Ms. Huard. And something is not quite adding up about his testimony that the area in question is not a place where leisure walking happens and that it is fairly uncommon to see dogs, given the Alpental base manager’s statement that it is specifically a dog-friendly area.
29. Mr. Tremblay estimated the run was only 15 feet wide, when a tape measure shows the run was over 26 feet wide, meaning he was likely a little over 40% off on trail width. It is possible a plastic fence was up on February 9 but got taken down in the almost three weeks between the incident and the February 28 photo, and that the trail’s width dramatically expanded, but that seems somewhat unlikely. He said he had no way to get further over to the right, but even under his testimony that Bear was towards the middle of the run, he would have had a dozen feet to move further to the right and stay well away. And he was an experienced boarder for whom navigation would not have been problematic.
30. In addition, his testimony that Bear was near the middle of the run when he first saw Bear seems implausible, because even if Ms. Huard was lying or misremembering about having her right hand midway down the leash, she would have had to have been approximately *seven feet* into the groomed path for Bear to be near the middle of the 26 ½ foot-wide trail. And if Mr. Tremblay passed six to eight to eight feet away from Ms. Huard, then Bear would have had to have been at almost the end of an outstretched leash, perpendicular to Ms. Huard, to reach him.
31. In the end, we have no videotape of what happened on February 9, nor a crystal ball. While there are problems with each witnesses’ accounts, Mr. Smith’s has the fewest trouble spots. In the end we find the version of events Mr. Tremblay provided no more likely objectively accurate than the one Ms. Huard and Mr. Smith presented. Under the version of events we find as likely as any other, Bear’s bite was a proportionate response to a provocative series of events. Thus, Animal Services has not proven, by a preponderance of the evidence, that Bear’s bite was not provoked.

DECISION:

We grant Ms. Huard’s appeal and dismiss Bear’s viciousness designation.

ORDERED June 8, 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 *July 8, 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 MAY 21, 2020, HEARING IN THE APPEAL OF GENEVIEVE
HUARD, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NO.
V20010369**

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Mari Isaacson, Jonathan Tremblay, Jessica Johnson, Genevieve Huard, and Travis Smith. A verbatim recording of the hearing is available in the Hearing Examiner’s Office.

The following exhibits were offered and entered into the record by the Department:

Exhibit no. 1	Agency report, prepared by Mari Isaacson
Exhibit no. 2	Notice of violation no. V20010369, issued February 16, 2020
Exhibit no. 3	RASKC investigation report no. A2000137501
Exhibit no. 4	Online Complaint form of February 9, 2020, incident by Jonathan Tremblay dated February 11, 2020
Exhibit no. 5	Appeal, received March 3, 2020
Exhibit no. 6	Statement from St. Luke’s, received March 3, 2020
Exhibit no. 7	Photograph of a dog
Exhibit no. 8	Map of Alpentel
Exhibit no. 9	Section of a map of Alpentel
Exhibit no. 10	Photographs of parking lot
Exhibit no. 11	Photographs of snow
Exhibit no. 12	Slope safety code
Exhibit no. 13	Pet policy
Exhibit no. 14	Emails between Chris Kerrigan
Exhibit no. 15	Responsibility code
Exhibit no. 16	Photograph of injury
Exhibit no. 17	Photograph of injury

The following exhibits were offered and entered into the record by the Appellant:

Exhibit no. A1	Appeal, received March 3, 2020
Exhibit no. A2	Notice of Violation no. V20010369, issued February 16, 2020
Exhibit no. A3	Appeal, received May 7, 2020
Exhibit no. A4	Statement of Travis Smith, received May 7, 2020
Exhibit no. A5	Text between Jonathan Tremblay and Appellant
Exhibit no. A6	Photographs of leash measurement
Exhibit no. A7	Photographs of holding leash
Exhibit no. A8	Witness List

June 8, 2020

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file no. **V20010369**

GENEVIEVE HUARD
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 June 8, 2020.



Jessica Oscoy
Legislative Secretary

Huard, Genevieve

Hardcopy

Isaacson, Mari

Prosecuting Attorney's Office

Johnson, Jessica

Hardcopy

Tremblay, Jonathan

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