

June 4, 2020

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

King County Courthouse
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www.kingcounty.gov/independent/hearing-examiner

REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file nos. **V20010503 and V20010504**

TINA BURNS

Animal Services Enforcement Appeal

Activity no.: A20007115

Appellant: **Tina Burns**

[REDACTED]
SeaTac, WA 98188

Telephone: [REDACTED]

Email: [REDACTED]

King County: Regional Animal Services of King County
represented by **Shelby Russell**
Regional Animal Services of King County
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Kent, WA 98032
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FINDINGS AND CONCLUSIONS:

Overview

1. Regional Animal Services of King County cited Tina Burns' dog, Atlas, for running at large and for viciousness on two different dates in March. Ms. Burns appeals. After hearing the witnesses' testimony, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, we uphold the violations and confinement order, but we significantly reduce the fines.

Evidence

2. The March 11 date that is the subject of the first notice was not the first incident involving Atlas and Kurt Hansen's dog, Charlie. Ms. Burns described walking, in December/early January, to the elementary school area where neighbors often let their dogs run in a fenced area. Charlie started barking and running at the other side of the fence, so Ms. Burns walked away with Atlas, without entering the fenced area. However, there was a more intense altercation on January 11.
3. Mr. Hansen testified that on January 11, he brought Charlie to the edge of a fenced area at the school. He did not see anyone, so he opened the fence and took a few steps in with Charlie. Atlas then came into view and charged. Ms. Burns was not able to get control of Atlas. Ms. Burns yelled at Mr. Hansen to get out, and he did, taking Charlie with him.
4. Ms. Burns testified that she was letting Atlas run in that fenced-in area on January 11. No one was there, and she made sure both gates were closed. She agrees that she and Atlas may not have been initially visible to Mr. Hansen, as they were around the corner of a school building. After Mr. Hansen and Charlie entered, the dogs did go to each other, and Atlas was difficult to control. Atlas suffered significant wounds, requiring a trip to the veterinarian. The pictures show gashes on Atlas and a missing ear tip.
5. The January 11 altercation is not the subject of a violation notice, so there is no need to make extensive findings. Our critical walk-away point is that there was bad blood—literally blood—between Atlas and Charlie prior to March 11.
6. Mr. Hansen described the events of March 11. He was taking Charlie on a walk. They turned a corner, and he saw Atlas charging. He kept Charlie leashed the whole time, trying to keep himself between Charlie and Atlas. He kept yelling at Atlas to leave them alone, but nothing he could say or do could make the situation stop. Atlas kept circling and diving in, trying to get at Charlie. The altercation went on and on. It was not some “get out of my neighborhood” show of aggression, but a non-stop attack.
7. Mr. Hansen came close to getting bit himself. Despite Mr. Hansen's efforts to protect Charlie, Atlas jumped on Charlie's back and bite Charlie several times on the shoulder. He thinks the altercation went on for 10 minutes. Eventually a car stopped and gave him and his dog a ride to safety. He clarified that Charlie's wounds were not what he would describe as really serious.
8. Ms. Burns was in her house on March 11. It did not occur to her when she heard barking that Atlas had escaped from their yard. Only when she saw a neighbor walking in front of her house with Atlas did she know Atlas had escaped. She had been unaware that there was a gap in their fence (actually, between fences) through which Atlas could exit. She tried to fix the fence then, but with Covid-related lockdowns, she lacked access to the necessary supplies. Her husband, an essential worker, had their only car.
9. Steven Schutzler testified that on March 16 he was running with his dog, Geller, down the same street. Atlas came out of nowhere, snapping at Charlie and barely missing him.

- Atlas was trying to bite Geller, not him. Mr. Schutzler tried to run in circles really fast, both to retreat and to block Atlas's path to Geller. He estimates Atlas was attacking for maybe five minutes. Geller was leashed the whole time and trying to get away, but Geller could not retreat. Geller did not snap back. Atlas got within a ¼ inch, lunging, showing his teeth, and trying to continually get at Geller.
10. As to the March 16 incident, Ms. Burns saw Atlas run outside. She tried to grab Atlas but could not stop him from escaping. She had her son get Atlas. She does not think the incident lasted five minutes. Mr. Schutzler told her they were fine and that no one had been bitten. She got Atlas back inside the house.
 11. Andy Devivo was the one person who observed both the March 11 and March 16 incidents.
 12. On March 11, Mr. Devivo heard Mr. Hansen screaming at full volume, along with an especially loud and unusual barking. From his window he saw Atlas lunging at, and attacking, the leashed Charlie. It was serious enough that he called emergency services. While on the phone, he eventually observed a car stop and Mr. Hansen and Charlie get into the car and drive away. From his call log, Mr. Devivo was on the phone with emergency services for 8 ½ minutes. He did not call emergency services right when he first heard the barking, so he thinks the altercation lasted longer than 8 ½ minutes.
 13. On March 16, Mr. Devivo was returning from a walk, and as he neared his house, he observed Mr. Schutzler running in circles, acrobatically trying to protect Geller.
 14. Mr. Devivo characterized the incidents differently. Atlas was trying to get at Geller on March 16, but in a less vicious manner than he went at Charlie on March 11. On March 11, Atlas was lunging at Charlie and Mr. Hansen in a very "violent" manner. If the car had not come, Mr. Devivo was contemplating retrieving a firearm to end Atlas' attack. In contrast, while Mr. Schutzler needed assistance on March 16, Mr. Devivo never contemplated retrieving a firearm to end Atlas' attack. And while on March 11 it looked like Atlas was trying to get at both Mr. Hansen and Charlie, on March 16 it looked like Atlas was only trying to get at Geller. Mr. Devivo submitted short phone videos of the March 16 incident.
 15. Ms. Burns testified that other than the January incident, Atlas had not been involved in other altercations before March. She thinks the January altercation increased Atlas's reactivity and provoked Atlas to go after Charlie. Her explanation for March 16 is that Geller and Charlie look similar, with the same color scheme, so Atlas may have been triggered to go out. It was purely the January incident that caused Atlas's reactions in March; Atlas had seen plenty of other dogs pass by without trying to escape his yard and go after them.
 16. Ms. Burns explained that after the March 11 incident she started calling around to try to get trainers who specialize in reactivity. She signed up for a seven-session plan at \$800. After the March 16 incident, she got to a store and purchased some wire, and used that and some other materials to solidly repair the gap between the fences. Ex. 4 at 22.

Analysis

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.
18. The more minor cited violations for March 11 and March 16 are “running at large,” meaning “off the premises of the owner and not under the control of the owner, or competent person authorized by the owner, either by leash, verbal voice or signal control,” with “under control” itself including “restrained from approaching any bystander or other animal” when “off the premises of the owner.” KCC 11.04.020.W, AA; .230.B. Ms. Burns does not dispute that Atlas met those criteria on both days.
19. The more serious violations are that for both March 11 and March 16, Atlas qualified 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.
20. Atlas’ March 11 attack is one of the longer dog-on-dog incidents we can recall. We initially thought Mr. Hansen was overestimating the duration—not consciously, but because witnesses invariably overestimate the amount of time an activity took.¹ However, Mr. Devivo noted that his phone log showed he was on the line with emergency services for 8 ½ minutes, and that even that did not capture the entire event, because he did not start the call when he first heard the screaming/barking. Thus, Atlas’ rage was impressively sustained, and quite unlike the “it all happened so fast” scenario typical of most of our vicious dog appeals.
21. And Mr. Devivo’s statement that Atlas was so violent that Mr. Devivo contemplated retrieving his gun is no mere overreaction, given that Mr. Devivo was clear that the March 16 attack was not in that category. Mr. Hansen’s efforts largely kept Atlas at bay, but Atlas endangered both Charlie and Mr. Hansen, actually bit Charlie, and constitutes a danger.
22. Ms. Burns asserts that Atlas was provoked; Animal Services has the duty to prove a lack of provocation. There is little support for the proposition that an event two months earlier could legally amount to “provocation.” For example, in *Stroop v. Day*, the court agreed with the owner’s “claim that a dog is capable of remembering specific instances

¹ See, e.g., https://books.google.com/books?id=uBIAU24-qsoC&pg=PA30&lpg=PA30&dq=witnesses+overestimate+time&source=bl&ots=xzT0DFzVu_&sig=ACfU3U3oBGLp6ZKp0dvJiRjiTGeZA2UITQ&hl=en&sa=X&ved=2ahUKewjatsfdq-TpAhVcPn0KHfIICwYQ6AEwCnoECAgQAQ#v=onepage&q=witnesses%20overestimate%20time&f=false

from the past,” and the court accepted that the future bite victim had chased the dog with a fence post four to six weeks prior to the incident in question. 271 Mont. 314, 319, 896 P.2d 439 (1995). Here, we similarly find that Atlas remembered the January 11 altercation that bloodied him. Yet the *Stroop* court ruled that this earlier event could not, as a matter of law, qualify as provocation for a bite four to six weeks later. *Id.* Here our gap is even longer.

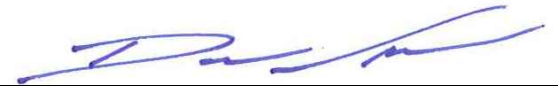
23. Moreover, even if the early January incident provided some explanation, courts are consistent that “provocation” requires the dog’s reaction to be proportional to the victim’s act. *Bradacs v. Jacobone*, 244 Mich. App. 263, 273–75, 625 N.W.2d 108 (2001); *Kirkham v. Will*, 311 Ill. App.3d 787, 792, 724 N.E.2d 1062 (2000); *Stroop*, 271 Mont. at 319. And the “provocation” inquiry “focuses ‘on how an average dog, neither unusually aggressive nor unusually docile, would react to an alleged act of provocation.’” *Bradacs*, 244 Mich. App. At 273 (citing *Kirkham*, 311 Ill. App. 3d at 792). A dog walking, leashed, on a public street is typically not provocation for anything. Even assuming that an event almost nine weeks before was a reasonable prompt for an average dog to charge out of his yard and into the street and try to chase off the other dog, Atlas’ continuing to attack Charlie for upwards of ten minutes, with Charlie at all points leashed and restrained, was grossly disproportionate to any provocation. We uphold Atlas’ first viciousness designation.
24. The March 16 incident is a little different. Mr. Devivo was clear that Atlas was not as violent as March 16 as he was on March 11, and that Atlas was only endangering a dog, not (like on March 11) a dog plus a person. Atlas’ assault was also shorter; given the tendency of witnesses to honestly overestimate the time an activity took, we think it was likely under five minutes. On the other hand, there is no indication that Geller (or Mr. Schutzler) had had any past interaction with Atlas. That Geller might have looked somewhat similar to Charlie is not remotely legal provocation. Indeed, that would set a bizarre precedent to hold that an altercation was “provoked” because a dog running down a public street on a leash resembled a different dog.
25. There is less riding on our decision regarding March 16; having sustained Atlas’ viciousness designation for the March 11 event, Atlas faces the same confinement terms that come with a viciousness designation anyway. There is no additional sanction other than a monetary one. While March 16 does not present the overwhelming facts that March 11 does, March 16 was still a sustained assault on a leashed, stranger dog doing nothing more than minding her own business and then trying to back away and retreat. We sustain the second viciousness designation as well.
26. We do significantly reduce the penalty. While an owner has a duty to ensure that containment is sound, there is no indication that Atlas had escaped before March 11. And while Ms. Burns arguably should have been more assertive in arranging for her husband to pick up supplies to fix the fence on or just after March 11, if there has ever been a time where distraction was a legitimate excuse for not doing something, the period between March 11 and March 16 was it.

27. Covid then was striking unprecedented fear into everyone then, and a variety of closures, cancellations, and shutdowns were being announced and amended almost daily. Between March 11 (a Wednesday) and March 16 (a Monday), our office was frantically scrambling to do anything we needed to complete in the courthouse, shut down those offices, and be ready to reopen for business from home on Monday. While “I couldn’t get around to it” usually does not go very far with us, during that unique window it does.

DECISION:

1. We DENY Ms. Burns’ appeal as to the running at large and viciousness violations. To keep Atlas the County, she will need to meet the four terms of compliance contained in those orders, including locking passages to prevent accidental release. Ex. 2 at 001.
2. We PARTIALLY GRANT her appeal at to \$1300 of the \$1600 in penalties. She shall pay the remaining \$300 to Animal Services.

ORDERED June 4, 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 6, 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 20, 2020, HEARING IN THE APPEAL OF TINA BURNS,
REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NOS. V20010504 AND
V20010503**

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Shelby Russell, Kurt Hansen, Steven Schutzler, Andy Devivo, and Tina Burns. 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	Regional Animal Services of King County staff report to the Hearing Examiner
Exhibit no. 2	Notice of violation no. V20010503, issued March 18, 2020
Exhibit no. 3	Notice of violation no. V20010504, issued March 18, 2020
Exhibit no. 4	Appeal, received April 10, 2020
Exhibit no. 5	RASKC investigation report no. A2000711501
Exhibit no. 6	RASKC investigation report no. A2000852701
Exhibit no. 7	[Online] Complaint form of March 11, 2020 incident by Kurt Hansen, dated March 17, 2020
Exhibit no. 8	[Online] Complaint form of March 11, 2020 incident by Andy Devivo, dated March 11, 2020
Exhibit no. 9	[Online] Complaint form of March 11, 2020 incident by Stephen Schutzler, dated March 17, 2020
Exhibit no. 10	[Online] Complaint form of March 16, 2020 incident by Andy Devivo, dated March 18, 2020
Exhibit no. 11	[Online] Complaint form of March 16, 2020 incident by Hannah Egland, dated March 16, 2020
Exhibit no. 12	Email from Andy Devivo to Steve Nickelson, dated March 16, 2020
Exhibit no. 13	Photograph of two dogs in the street
Exhibit no. 14	Map of subject area

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

Exhibit no A1	Statement from dog trainers, dated May 1, 2020
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DS/jf

June 4, 2020

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file nos. **V20010503 and V20010504**

TINA BURNS

Animal Services Enforcement Appeal

I, Jessica Osoy, 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 4, 2020.

Burns, Tina
Hardcopy

Devivo, Andy
Hardcopy

Hansen, Kurt
Hardcopy

O'Brien, Kathy

Russell, Shelby
Regional Animal Services of King County

Schutzler, Steven
Hardcopy

Young, Andrea
Hardcopy