

June 23, 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. **V20010556**

**CARLOS VASQUEZ**

Animal Services Enforcement Appeal

Activity no.: A20010560

Appellant: **Carlos Vasquez**

[REDACTED]  
Tukwila, WA 98188

Telephone: [REDACTED]

Email: [REDACTED]

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

Overview

1. Animal Services asserts that Carlos Vasquez's dog, Konan, trespassed onto a neighbor's property and behaved viciously on April 3, 2020. After hearing the witnesses' testimony, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, we sustain the trespass violation but overturn the viciousness designation.

## Background

2. On April 3, 2019, Konan was observed menacing a person trapped in her car; he then growled at and charged the investigating officer three times. Ex. 8 at 002. Animal Services declared Konan vicious. Ex. 9. That determination was not appealed. Once the appeal window closed, Konan’s status as a vicious dog, along with the compliance order requiring that Konan be microchipped and secured in a fenced area when unattended and outside the home, with all passages padlocked to prevent accidental release, *id.*, were set in stone.
3. Animal Services alleges that, a year later to the day, a still unmicrochipped Konan escaped and trespassed, defined as a “domesticated animal that enters upon a person’s property without the permission of that person,” TMC 7.12.230.10.
4. Animal Services alleges that Konan’s behavior that day qualified him again as vicious, meaning “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.” TMC 7.12.020.29. And TMC 7.12.230.7 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.”
5. We went to hearing on June 10. 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.

## Testimony

6. Keith Novak testified that on April 3, as he was returning from taking the recycling out, he saw his neighbor’s Rottweiler (Konan) at a distance of maybe 30 feet. He yelled at Konan multiple times, but Konan did not retreat. In fact, as Mr. Novak walked toward his house, Konan began advancing on him. Mr. Novak backed around his truck and retrieved his pepper spray from the driver’s side door. Konan was not growling and did not have his ears pinned back, but he was also not wagging his tail or giving any indication that he was friendly. Mr. Novak volunteered that he could not read Konan. Mr. Novak interpreted Konan’s head being down and Konan having closed maybe 20 feet of distance, as being a silent stalk.
7. When Konan advanced to within about six feet, Mr. Novak sprayed Konan. The pepper spray disoriented Konan, who retreated to the Novak backyard and then to a neighbor’s yard. Konan returned to the Vasquez fence, but initially had a tough time getting back into the Vasquez yard, because the adjacent loose board was pointing towards the Novak yard and thus at Konan. As soon as Konan was back in his own yard, Mr. Novak found the first materials he could and tried a make-shift repair. He used a hammer to pop back in the loose board, pounding it into a railroad tie. He then nailed a piece of plywood over

- the cracked board and adjacent boards with a nail gun. Ex. 4 at 002. After that, he called the police.
8. Mr. Vasquez testified that he and his family were home that day, and he heard no commotion. After his dad advised him that Mr. Novak was putting on a board from the Novak side of the fence, Mr. Vasquez fixed his side of the fence. There was only one broken board in the fence; the other boards were secured. He did not notice any pepper spray on Konan or anything unusual about Konan that day.
  9. Vasquez opined that Konan is a big dog who could not get through that hole. He thinks the tree on the Novak side of the fence also would have prevented Konan from getting through. Ex. 3 at 001-02.
  10. When his dogs break a piece of the fence, Mr. Vasquez said he fixes it right away, although he admitted that he had seen the hole in the fence before April 3 but had not previously fixed it. He has since added a chain-link barrier, so his dogs cannot scratch at the wood. Ex. A1 at 002.
  11. Mr. Vasquez described video he took from November 2019, when he heard Mr. Novak yelling at Konan. Ex. A2. He stated that Mr. Novak has a habit of harassing the Vasquez's dogs.
  12. In addition to walking through the physical evidence and the testimony, Animal Services' Sergeant Chelsea Eykel closed by opining that in her experience, while some breeds overtly display aggression like growling or flashing teeth, a handful of breeds such as Rottweilers are difficult to read as far as intent and do not overtly display aggression before attacking. She stated that this information is easily researchable on the web. It was not unreasonable for Mr. Novak to assume that a dog not retreating but instead continuing to approach him posed a threat.

#### Trespass Analysis

13. We found Mr. Vasquez to be forthright. He seems to sincerely believe Konan did not get out on April 3. And he submitted a photograph showing that the hole itself was only 5 ½ inches wide. Ex. A1 at 002, photo 2. We accept his testimony that 5 ½ inches is too narrow for Konan to fit through. We note that 5 ½ inches is the width of one fence board; the broken end of one is laying on the Novak property. Ex. 5 at 001.
14. Mr. Vasquez is missing a pertinent piece of evidence. Mr. Novak did not say that Konan came through the hole created by the broken-off fence board alone. Instead, Mr. Novak testified that Konan came through the hole created by the broken-off bottom of one board *plus* the loose board next to it. Mr. Vasquez would not have seen that loose board because, by the time Mr. Vasquez conducted his repair, Mr. Novak had already reattached the flapping board from the Novak side. Mr. Novak's explanation that the pre-existing hole plus the loose flap created an 11-inch wide gap equates to two 5 ½ inch boards next to each other.

15. Mr. Vasquez acknowledges that his father saw Mr. Novak patching the side of the fence on April 3. Why in the world would Mr. Novak choose that moment to randomly patch a fence, unless the hole had just created a problem? In looking at the photo of the tree in the vicinity of the patchwork, there is enough space for Konan to fit through, if there was an 11-inch gap in the fence earlier that day. Ex. 4 at 001-03.
16. So, the trespass case boils down to whether we include that, more likely than not, Mr. Novak created an entire fictional account of a lengthy encounter with Konan, when Konan never left the Vasquez yard. It is possible that Mr. Novak would go through all that trouble to fabricate a trespass, then commit a gross criminal misdemeanor by filing a false police report. There appears to be a ton of animosity and hostility between the two gentlemen, as shown in the cell phone video Mr. Vasquez submitted. Ex. A2.
17. However, why, if one is going to concoct an entire story, would one not make the encounter a little more dramatic? Spice it up by describing a snarling, menacing dog, ears pinned back, charging, bared teeth, etc.? Instead, Mr. Novak described a very measured scene—as Konan approached, Konan was not growling or pinning back his ears or charging. Mr. Novak was candid that he was not able to read Konan. That plays in, below, to the viciousness designation, but we found nothing embellished about Mr. Novak’s account. More likely than not, Konan was trespassing on the Novak property on April 3. We sustain the trespass violation.

#### Viciousness Analysis

18. We agree with Animal Services that it was not unreasonable for Mr. Novak to assume that a dog not retreating but instead continuing to approach him, in his own property, posed a threat. We do not question Mr. Novak’s response. A property owner on his own property is entitled to enjoy his yard free of interference from an approaching, trespassing dog. *Giandalone v. Zepieri*, 86 Misc.2d 79, 79-80, 381 N.Y.S.2d 621 (1976). And a “person need not wait till he or she is injured or maimed before taking defensive action against a menacing animal.” *Matter of Brooks v. Hemingway*, 107 Misc. 2d 190, 193, 433 N.Y.S.2d 551 (1980). Menacing is defined as “suggesting the presence of danger,”<sup>1</sup> and Konan’s approach certainly *suggested* the presence of danger.
19. Thus, Mr. Novak was wise to preventively pepper spray Konan. Doing so not only avoided potential harm to Mr. Novak but also to *Mr. Vasquez* and to *Konan*. If Konan had actually attacked Mr. Novak, Animal Services almost certainly would have ordered Konan removed from the County. Instead, Animal Services served only a removal *warning* here.
20. However, that does not answer our question. By virtue of his 2019 viciousness designation, we know that Konan constitutes a danger to people’s safety, meeting one element of the test spelled out in paragraph 4. Yet to uphold the viciousness designation for the 2020 altercation, we must find that Konan exhibited some new behavior endangering the safety of a person. This is not so clear. That Mr. Novak felt threatened and took proper defensive measures does not tell us what Konan most likely would have

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<sup>1</sup> <https://www.lexico.com/en/definition/menacing>.

done if Mr. Novak had not acted proactively. If it was hard for Mr. Novak to read Konan, when he was standing right there, it is even harder for us to read Konan based only on Mr. Novak's description.

21. We have not required an actual bite or attack to sustain a viciousness designation, given the “including, but not limited to” language in the viciousness definition above. However, our viciousness rulings have tracked RCW 9A.28.020, which includes in the definition of “criminal attempt” the requirement that the accused perform some “act which is a substantial step toward the commission of that crime,” some step towards actual contact, not just proximity. Absent more, a dog approaching—not charging—to within six feet, especially the way Mr. Novak described it—not charging, not snarling, not baring teeth—would not qualify. And of course, Mr. Novak wisely shut Konan down before we could learn anything definitive.
22. Sgt. Eykel's opinion that, in her experience, Rottweilers are among a handful of breeds that do not overtly display aggression before attacking, could bridge this gap. However, when an officer's testimony is based not only on her perceptions and observations of the event, but also on her specialized training or education, that raises a yellow flag if we admit what is essentially *expert* testimony under the guise of a *lay* opinion. *See, e.g., People v. Stewart*, 55 P.3d 107, 23-24 (Colo. 2002). An officer can offer an opinion based solely on experience and observation about a specific person's (or presumably, a dog's) physical appearance and activity, *City of Seattle v. Heatley*, 70 Wn. App. 573, 579-80, 854 P.2d 658 (1993), but here her testimony went to characteristics about Rottweilers in general. We exclude her expert testimony about Rottweiler behavior.
23. It may be that, if we researched point, we could confirm her opinion about typical Rottweiler signs (or lack thereof) prior to an attack. However, we are usually limited to facts in the record. We can take judicial notice of certain items, but that is restricted to generally known facts or data beyond reasonable dispute or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Exam. R. XII.C.1; Wash. R. Evid. 201. Researching the literature on Rottweiler behavior, and what if any telltale signs an attacking Rottweiler may present, does not fall within the judicial notice exception. Thus, we decline to undertake outside-the-record research.
24. Making no findings about Rottweiler characteristics, we are left with predictions from Sgt. Eykel and Mr. Novak about what Konan most likely would have done, if Mr. Novak had not cut him short. (Mr. Vasquez steadfastly denied that Konan was even on the Novak property on April 3, and he offered no take on Konan's behavior.) It is a close call, but we find ourselves in the same position Mr. Novak did, having difficulty reading Konan's behavior. Moreover, we know from the officer's account in 2019, where Konan growled at and then charged the investigating officer three times, that a silent, slow-walk approach is not necessarily Konan's attack style. Ex. 8 at 002. While we *suspect* that Konan would have turned violent if Mr. Novak had not sprayed him, that is not the same thing as saying that Animal Services has met its burden of proving that Konan actually endangered Mr. Novak. We grant Mr. Vasquez appeal as to Konan's second viciousness designation.

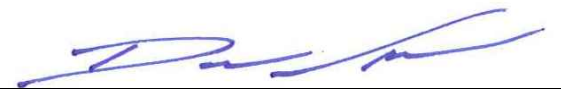
Forward-Looking

25. Mr. Vasquez is catching a break here. Animal Services could have cited Mr. Vasquez for (in addition to trespass) a violation of TMC 7.12.230.8, which declares as a nuisance “Any vicious animal [*which Konan was by virtue of his 2019 viciousness determination*] that runs at large at any time or is off the owner’s premises 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.” A dog earlier declared vicious need not do anything aggressive, if it later gets loose, to qualify for that violation. Konan was a vicious dog running at large on April 3, which would have carried a \$500 penalty, not the \$50 penalty for a normal running at large violation. But Animal Services did not allege that. Mr. Vasquez’s pocketbook should be thankful.
26. We are not sure what to make of the video Mr. Vasquez submitted. Is a little hard to hear Mr. Novak on the recording or to discern exactly who his repeated “come here” comments were aimed at (dogs or people?), but the video is somewhat troubling. Still, at the end of the day Mr. Vasquez owns a vicious dog he is responsible for keeping contained, according to the terms of Konan’s 2019 confinement order. There was a pre-existing hole in the fence that Mr. Vasquez did not fix until after Konan escaped on April 3. He needs to be vigilant and proactively check the fence and redouble his efforts to keep Konan contained, lest something much worse happen in the future.

## DECISION:

1. We deny Mr. Vasquez’s appeal as to the trespass violation.
2. We grant Mr. Vasquez’s appeal as to the April 3, 2020, viciousness designation. Konan’s viciousness designation from the April 3, 2019, altercation, along with the compliance terms from that order, exhibit 9 at 001, remain in effect.

ORDERED June 23, 2020.



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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 23, 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 JUNE 10, 2020, HEARING IN THE APPEAL OF CARLOS VASQUEZ, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NO. V20010556**

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Chelsea Eykel, Keith Novak, and Carlos Vasquez. 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	Complaint form of April 3, 2020 incident, by Keith Novak, dated April 3, 2020
Exhibit no. 3	RASKC investigation report no. A2001056001
Exhibit no. 4	Photograph of fence
Exhibit no. 5	Photograph of fence
Exhibit no. 6	Photograph of yard
Exhibit no. 7	Notice of violation no. V20010556, issued April 4, 2020
Exhibit no. 8	RASKC investigation report no. A1900150701
Exhibit no. 9	Notice of violation no. V19009273
Exhibit no. 10	Appeal, received April 25, 2020
Exhibit no. 11	Map of subject area

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

Exhibit no A1	Photographs and descriptions
Exhibit no A2	Video / Audio recording

DS/jf

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**CERTIFICATE OF SERVICE**

SUBJECT: Regional Animal Services of King County file no. **V20010556**

**CARLOS VASQUEZ**

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 23, 2020.



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Jessica Oscoy  
Legislative Secretary



**Eykel, Chelsea**

Regional Animal Services of King County

**Novak, Keith**

Hardcopy

**Vasquez, Carlos**

Hardcopy