

August 18, 2021

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

King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
Telephone (206) 477-0860
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file no. **V21012038-A21002188**

JOSEPH LUCERO

Animal Services Enforcement Appeal

Activity no.: A21002188

Appellant: **Joseph Lucero**

[REDACTED]
Kent, WA 98042

Telephone: [REDACTED]

Email: [REDACTED]

King County: Regional Animal Services of King County
represented by **Chelsea Eykel**
Regional Animal Services of King County
21615 64th Avenue S
Kent, WA 98032
Telephone: (206) 263-5968
Email: raskcappeals@kingcounty.gov

FINDINGS AND CONCLUSIONS:

Overview

1. Joseph Lucero appeals a May 13, 2021, Regional Animal Services of King County (Animal Services) notice and order finding that Mr. Lucero's dog had, the previous day trespassed, run large, and qualified as vicious, requiring containment in the future. After hearing the witnesses' testimony and observing their demeanor, studying the exhibits, and considering the parties' arguments and the relevant law, we deny Lucero's appeal, but we reduce the penalty and amend the compliance order.

Evidence

2. We initially went to hearing on July 14. Because it appeared that there might be more cell phone footage of the seconds leading up to the altercation, we paused the proceeding. We resumed our hearing on August 4. We focus here on the relevant portions of the testimony and exhibits.¹

Frank McDunnah testimony

3. Col. McDunnah testified that on May 13 he was standing in his driveway by his car's driver's side door. Col. McDunnah observed a dog [Rob] coming towards him barking, Rob continued around the other side of the car. Rob did not do anything aggressive to Col. McDunnah at that point. Instead, Rob went between the McDunnah house and another neighbor's house and pooped, then moved locations and pooped an encore.
4. Col. McDunnah followed and started taping Rob pooping. Ex. D23. Col. McDunnah put the distance he was standing from Rob at maybe 50 feet.
5. Unfortunately, there is no video of what happened next, but Col. McDunnah testified that Rob then moved around Mr. Lucero and charged at Col. McDunnah, started barking, and bit Col. McDunnah on the thigh. Ex. D6-D14. Before the bite, Col. McDunnah did not antagonize the dog. Col. McDunnah did not know until later that he had been bitten a second time. Ex. D10. Col. McDunnah fell down. He then called 911. He went to the hospital, where he stayed for approximately four hours.
6. Col. McDunnah had never seen Rob loose before nor seen him loose since.

Joseph Lucero testimony

7. Mr. Lucero testified that they adopted Handsome Rob (Rob) from a shelter in January. Ex. A3. Rob has exhibited no aggressive tendencies, interacting well with kids and at dog parks. Just that week they had consulted with a trainer for Rob.
8. That morning, Mr. Lucero opened his front door and Rob snuck past him. Rob had never gotten past him at the front door before. Rob is a very fast Mastiff-German Shepherd mix.
9. Mr. Lucero followed after. He did not attempt to grab Rob by the collar, because when he had done so in the past Rob had either run away or had managed to wiggle out of the collar. He would have put a leash on Rob if he had one, but he had pursued Rob from the house without first grabbing a leash.
10. Col. McDunnah came from his car, complaining about Rob. Mr. Lucero kept asking Col. McDunnah to go back inside. The situation escalated pretty quickly. Col. McDunnah

¹ In addition to the complainant and appellant, neighbor Cerasella Constantinescu also testified. We appreciate her making time in her day to do so. However, she only became aware of the altercation *after* the biting incident described below. At that point the action relevant to whether the dog qualifies as vicious was essentially over.

pulled the phone out of his pocket and started filming. Col. McDunnah made Mr. Lucero nervous, which Rob picked up on.

11. Rob did not continue the attack or continue to go after Col. McDunnah. Afterwards, Rob just cowered down. Rob was not in attack mode. If Rob truly qualified as vicious, Rob would have gone after Col. McDunnah as soon as he saw Col. McDunnah by his car.
12. Since the incident, Mr. Lucero has been abiding by the terms of the confinement order. The training has helped to calm Rob.

Legal Standards

13. Running at large in Kent means “a dog who is either under competent voice control or competent signal control, or both, so as to be restrained from approaching any bystander or other animal and from causing or being the cause of physical property damage when off a leash or off the premises of the owner. Evidence that a bystander or other animal was approached by the dog, or evidence that the dog caused physical property damage, is prima facie evidence that the dog was not under control.” KCC 8.03.030.G

14. Trespassing is defined as a “domesticated animal that enters upon a person’s property without the permission of that person.” KCC 11.04.230.K.

15. “Vicious” is defined as:

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,

while the nuisance is, “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.” KCC 11.04.020.BB; KCC 11.04.230.H.

16. Mr. Lucero asserts that Col. McDunnah provoked Rob. The “provocation” inquiry in animal jurisprudence “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 a key touchstone of courts’ analyses is that “provocation” requires the dog’s reaction to be proportional to the victim’s act. *Stroop v. Day*, 271 Mont. 314, 319, 896 P.2d 439 (1995); *Bradacs* at 273–75; *Kirkham* at 792. And although provocation is typically an affirmative defense, *Patterson v. New York*, 432 U.S. 197, 202–03 (1977), because lack of provocation is part of the definition (KCC 11.04.020), Animal Services bears the burden of showing, by a preponderance of the evidence, the lack of legal provocation.

17. More generally, 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.B. And we do not grant substantial weight or otherwise accord deference to agency determinations. Exam. R. XV.F.3.

Viciousness Analysis

18. The trespass and running at large items are easy. Rob entered onto Col. McDunnah's property without his permission, then did the same with a neighbor. And Rob was not restrained enough to be prevented from approaching Col. McDunnah.
19. The viciousness designation is more nuanced. Mr. Lucero feels that Rob was provoked to bite because there was a verbal altercation between Mr. Lucero and Col. McDunnah, because Mr. Lucero several times asked Col. McDunnah to go inside during their argument, and because Handsome Rob must have picked up on Mr. Lucero being nervous.
20. Mr. Lucero asking Col. McDunnah to go inside might have been pertinent if, for example, Col. McDunnah had come to Mr. Lucero's door to complain about something. If Mr. Lucero had asked Col. McDunnah to leave the Lucero property and Col. McDunnah refused, then Col. McDunnah would have become (at the point he refused to leave) a trespasser. If Rob had *then* bit a trespassing Col. McDunnah, the bite-a-trespasser angle would open up a more nuanced analysis. But here, Rob was the one trespassing at the time he bit. Mr. Lucero asking Col. McDunnah to leave someone *else's* property is not relevant to our analysis.
21. Ours is also not a scenario where Col. McDunnah charged up to Mr. Lucero, got in Mr. Lucero and Rob's personal space, and started berating Lucero, with Rob having to make a split-second decision on how to react to an intruder. To the contrary, the video shows Col. McDunnah standing a fair distance away from both Rob and Mr. Lucero, a distance we would peg at maybe 40-50 feet. Ex. D23. Nor was there any testimony or even inference that Col. McDunnah came at Rob or Mr. Lucero or did anything other than stand there and video while the two men exchanged unpleasantries.
22. Mr. Lucero is probably correct that Rob picked up on the tension between the two men. That would have justified, say, Rob barking or snarling in a defensive posture to keep Col. McDunnah from coming closer. But that is not what happened. Instead, Rob went around Mr. Lucero, closed the distance with Col. McDunnah, and bit Col. McDunnah at least once and likely twice.² That is not how an average dog would react to a heated conversation, and it was grossly disproportionate to any incitement Col. McDunnah created. Rob was not legally provoked to bite Col. McDunnah.

² Exs. D8-D14. The wound Col. Frank suffered to his glute is not as obviously a bite as the one to the hamstring, but it is not inconsistent with a bite. Ex. D10. Having reviewed hundreds of photos in animal cases, we find it more likely than not to be a second bite, though this issue is not determinative of the outcome. (Our ruling here would be the same if there was only one bite.)

23. Thus, on May 12, Rob performed an act endangering the safety of a person, specifically by biting Col. McDunnah without provocation, thus meeting the definition of “vicious.” KCC 11.04.020.BB. However, the violation itself has both a past, “exhibited” vicious behavior requirement (which Rob satisfied on May 12), and an additional “constitutes a danger” requirement. KCC 11.04.230.H. Because a dog can meet the .020.BB definition without actually biting (the touchstone being behavior “endangering” people’s or other animal’s safety, “including, but not limited to” biting), .230.H’s “and constitutes a danger” inquiry should arguably be relevant only in scenarios where the vicious behavior was something less than an actual bite.
24. However, we have given .230.H a broader reading. While an unprovoked bite is *typically* enough to satisfy .230.H—after all, what is better evidence that a dog constitutes a danger than evidence that, given some set of circumstances not arising to “provocation,” a dog will bite a person—in some appeals we have found extenuating circumstances such that we have overturned a viciousness designation, even after an unprovoked bite. To give a simple hypothetical, suppose it is the evening of July 4. A dog has been exposed all day to loud firework explosions and is freaked out. A visitor slowly approaches the cowering dog to provide comfort. She gently extends her hand as she speaks soothingly to the dog. The dog, however, lashes out and bites the extended hand. Her actions would not qualify as legal provocation, yet, depending on the totality of the other facts in that case, we might find that the dog does not constitute a danger and overturn the viciousness designation.
25. We do not find any such extenuating circumstances here. Even with an expansive reading of .230.H, we find that Animal Services has met its burden of proving that, more likely than not, Rob constitutes a danger. We uphold Rob’s viciousness designation.

Other Items

26. A viciousness designation carries with it a confinement order. Ex. D2 (four bullet points). The most impactful of those is the prohibition against taking the dog off the property except while on a leash. Left to stand, that would essentially operate as a lifetime ban from ever letting the dog run loose in a sanctioned off leash dog park, which means the most that dog will ever be able to run off energy is in a fenced yard. It is a harsh remedy.
27. Dog parks are not a pressing concern now. As Mr. Lucero explained, in the week before the altercation, the trainer had advised Mr. Lucero that dog parks should be off limits for Rob. However, circumstances may change. And frankly, Mr. Lucero voluntarily pulling Rob from dog parks *before* the May 12 incident shows that he is actually the type of responsible owner who likely would not put other people or animals at dog park risk before Rob was ready to return. So, we will amend the confinement order to allow, if a professional trainer later finds it prudent to do so, Rob’s eventual return to dog parks.
28. Finally, that leaves the penalty. There is no evidence of any past aggression issues that would have put Mr. Lucero on notice of a heightened duty to contain Rob. Nor is there any evidence that Rob had ever gotten loose before or since May 12. On one level, Mr.

Lucero not grabbing at Rob seems irresponsible, but he provided a plausible explanation for why past attempts to grab Rob had not turned out so well.

29. And even in the seconds before Rob charged and bit Col. McDunnah, Mr. Lucero would have had no reason to view the situation as anything more serious than a minor nuisance of dog trespassing and defecating. Col. McDunnah basically said the same thing: Rob had passed by him doing nothing more than barking, and Col. McDunnah had no inkling Rob was capable of more, or Col. McDunnah would never have followed and started videotaping. Under such circumstances, we find a penalty reduction in order.

DECISION:

1. We DENY the appeal as to the trespass, running at large, and viciousness violations.
2. We REDUCE the otherwise-applicable penalty from \$600 to \$250.
3. We MODIFY Animal Services' May 13, 2021, compliance order as follows (A. through D. being substantively unchanged, and E. being new):
 - A. Secure Rob in a fenced area suitable for his size when unattended and outside the home. Lock all passages with a padlock to prevent accidental release.
 - B. Restrain Rob using a leash no more than eight feet long, with a collar or harness, when taking Rob off your property. A competent and capable person must handle Rob at all times when attended outside.
 - C. If not already completed, microchip Rob and provide the microchip number to the King County Animal Licensing Office (206) 296–2712 by **September 17, 2021**.
 - D. Keep Rob current on his rabies vaccination.
 - E. Rob is allowed to run in sanctioned off-leash dog parks, provided:
 - i. a professional trainer put in writing that it is likely safe to take Rob back to dog parks;
 - ii. an adult is present with Rob in the dog park; and
 - iii. Rob is leashed at all times when not in the car or in the fenced, off-leash area.

ORDERED August 18, 2021.



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 *September 17, 2021*. 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 JULY 14, 2021, HEARING IN THE APPEAL OF JOSEPH LUCERO, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NO. V21012038-A21002188

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Shelby Russell, Cerasella Constantinescu, Frank McDunnah, and Joseph Lucero. 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 Animal Services:

Exhibit no. D1	Regional Animal Services of King County staff report to the Hearing Examiner
Exhibit no. D2	Notice of violation no. V21012038-A21002188, issued May 13, 2021
Exhibit no. D3	Appeal, received May 27, 2021
Exhibit no. D4	RASKC investigation report no. A20013354
Exhibit no. D5	Statement from Frank McDunnah
Exhibit no. D6	Photograph provided by Frank McDunnah
Exhibit no. D7	Photograph provided by Frank McDunnah
Exhibit no. D8	Photograph provided by Frank McDunnah
Exhibit no. D9	Photograph provided by Frank McDunnah
Exhibit no. D10	Photograph provided by Frank McDunnah
Exhibit no. D11	Photograph provided by Frank McDunnah
Exhibit no. D12	Photograph provided by Frank McDunnah
Exhibit no. D13	Photograph provided by Frank McDunnah
Exhibit no. D14	Photograph provided by Frank McDunnah
Exhibit no. D15	Photograph provided by Frank McDunnah
Exhibit no. D16	Photograph provided by Frank McDunnah
Exhibit no. D17	Photograph provided by Frank McDunnah
Exhibit no. D18	Witness statement from Cerasella Constantinescu
Exhibit no. D19	Map of subject area
Exhibit no. D20	Video from Frank McDunnah

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

Exhibit no. A1	Photograph of front of the house and what the neighbor left shortly after the incident
----------------	--

Exhibit no. A2 Revised appeal statement, dated June 28, 2021
Exhibit no. A3 Closing Disclosure

**MINUTES OF THE AUGUST 4, 2021, HEARING IN THE APPEAL OF JOSEPH
LUCERO, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NO.
V21012038-A21002188**

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Chelsea Eykel, Frank McDunnah, and Joseph Lucero. 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 Animal Services:

Exhibit no. D21 Emails from Sergeant Russell regarding sending videos
Exhibit no. D22 Emails from Kerri Sheehan regarding actual transmission of the videos
Exhibit no. D23 Video - 20210512_191758
Exhibit no. D24 Video - 20210512_191842

DS/lo

August 18, 2021

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

King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
Telephone (206) 477-0860
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file no. **V21012038-A21002188**

JOSEPH LUCERO

Animal Services Enforcement Appeal

I, Lauren Olson, 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 August 18, 2021.



Lauren Olson
Legislative Secretary

Constantinescu, Cerasella

Hardcopy

Eykel, Chelsea

Regional Animal Services of King County

Lucero, Joseph

Hardcopy

McDunnah, Frank

Hardcopy