

January 6, 2022

**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 no. **V21012470-A21004083**

DAVID EAMES

Animal Services Enforcement Appeal

Activity no.: A21004083

Appellants: **David and Kelly Eames**

[REDACTED]
Carnation, WA 98014

Telephone: [REDACTED]

Email: [REDACTED]
[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. David Eames appeals a Regional Animal Services of King County notice and order. 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 reverse the viciousness designation and the confinement order, and we reduce the penalty related to the licensing violation.

Background

2. On August 29, 2021 Animal Services issued a violation notice to Mr. Eames for his dog, Scout, being unlicensed and unaltered, qualifying as vicious, and needing to be confined. Ex. D6. Mr. Eames' daughter filed an appeal on his behalf. Ex. D7. The appeal did not challenge that Scout was unlicensed at the time, but noted that Scout had since been licensed. The appeal did challenge Scout's viciousness designation and confinement order.
3. At our scheduled November 18 hearing, Mr. Eames was unable to participate, having trouble dialing in. We rescheduled the hearing to December 2 and suggested that, to avoid any technical difficulties, Mr. Eames go to a relative's house to join the hearing.
4. At our December 2 hearing, when Mr. Eames again failed to join, we announced we would dismiss his appeal. However, soon after we ended the proceeding, Mr. Eames called our office line, noted that he had earlier enlisted his grandson for help, and explained that together they had followed the Zoom link and thought they were connected and simply waiting for us to prompt him to talk.
5. We rescheduled the hearing for December 22. Mr. Eames and his grandson were able to successfully sign into the Zoom hearing early, with our assistance.

Hearing Testimony

Testimony of Kayla Gehrke

6. Kayla Gehrke testified that on August 16 she brought her black lab, Kona (12 years old), and her cattle dog, Pepper (11 years old), on a walk heading west on W. Morrison Street. Ms. Gehrke and her two dogs were on the sidewalk in front of a home across the street from the Eames residence. Two unleashed dogs—a black German shepherd [Scout] and a black lab—jumped down from that front yard onto the sidewalk. She turned to her right and saw Scout lunge onto Kona. Kona and Pepper went into defense mode and started attacking back. Kona and Scout were going at it; both their mouths were open and they were using their paws.
7. Ms. Gehrke disputed Mr. Eames' account that Scout started things with a play bow. Instead, Scout immediately lunged at and started attacking Kona. Scout did not bite once and then go away; it was continuous. Pepper and the black lab did not get involved; they were just standing by. Ms. Gehrke could not give an accurate time estimate, but the altercation might have taken about twenty seconds.
8. As Ms. Gehrke tried to get Kona away from Scout, Kona slipped out of his collar. Ms. Gehrke was calling her dogs' names, trying to get Kona's collar back on, and keeping Pepper away from the altercation. Kona was trying to protect them.
9. Two grown men were in the front yard of the property, calling their dogs. There was nothing to obstruct the men's view of the altercation, yet neither man tried to physically intervene to stop the altercation or to apologize afterward.

10. The dogs disengaged, and Ms. Gehrke got Kona's collar back on. The black lab followed Kona and Ms. Gehrke for about five to ten feet before that owner came down and called the lab back. The lab never made contact with Ms. Gehrke's dogs.
11. As Ms. Gehrke was walking towards Stephens Avenue, she looked over her shoulder and saw Mr. Eames and Scout walk across the street. After crossing Stephens, she saw that Kona had a bloody eye with a cut on her lower eyelid. Ms. Gehrke slowly walked her dogs' home. She called 911 and was directed to Animal Services. Kona has healed since the incident.
12. Ms. Gehrke has seen the dog that attacked Kona before; Scout looks to her like a black German shepherd. Ms. Gehrke and her husband used to frequently walk the same route she took on August 16. In the past, she had seen Scout roped up to a post in Mr. Eames' front yard, barking at them as they passed. That was fine because they were across the street. She had seen Mr. Eames' in his front yard telling Scout to stop barking.

Testimony of David Eames

13. David Eames testified that on the day of the incident he was returning from a walk with Scout. They had walked west on Morrison to visit a black lab/border collie mix two blocks up. They returned home and were standing in Mr. Eames' front yard when he took off Scout's leash, which was a mistake. Mr. Eames turned to walk into the house and he called for Scout. Scout was not responding; he was not by Mr. Eames left side.
14. Mr. Eames turned around to see Scout loping across the street, tail wagging, almost to Ms. Gehrke's two dogs. Scout walked up, did a play bow, and sniffed [Kona]. Kona did not like that, because there was a snap, and the dogs engaged. Mr. Eames disputed that he ever crossed the street; instead, he called Scout, and Scout returned to him on the second call. The whole thing took less than twenty seconds.
15. Mr. Eames observed Ms. Gehrke continuing to walk west on Morrison. Mr. Eames saw the other black dog—the lab—and wondered where it came from. He did not know who the lab belonged to, as he had not seen it in the neighborhood before. Scout had a nick on his nose after the incident that was not there before.
16. Mr. Eames testified that the Animal Services officer who came to his property said Animal Services had been to the property before for a dog incident. In 2017, his black lab was attacked, not the attacker; his dog died in 2018. Mr. Eames has had Scout since March 2019. On the day Animal Services came to his property, he did not deny the attack happened.
17. Scout was up to date on his shots at the time of the incident. Mr. Eames licensed Scout the Sunday following the visit from Animal Services. Mr. Eames' daughter filed the appeal for him because he has cataracts and could not see the computer form. Mr. Eames has impaired vision for close up things like a laptop or cellphone, but distance is okay.

Legal Standards

18. Animal Services asserts that Scout was, as of August 15, unlicensed, in violation of KCC 11.04.030.A, which requires all dogs eight weeks old and older be licensed and registered. Scout has since been licensed.
19. More seriously, Animal Services asserts that Scout 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.
20. We do 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.B.
21. Mr. Eames raised provocation in his appeal. Although provocation is typically an affirmative defense because lack of provocation is part of the definition (KCC 11.04.020), where the issue is raised in an appeal statement, Animal Services bears the burden of showing, by a preponderance of the evidence, the lack of legal provocation. *See also Morawek v. City of Bonney Lake*, 184 Wn. App. 487, 495, 337 P.3d 1097, 1101 (2014). 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 be relatively 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.

Analysis

22. There is something odd about the competing versions of events here. It is *not* the discrepancy between Ms. Gehrke’s account that Scout started things off by lunging straight at Kona versus Mr. Eames’ account that, no, Scout came bounding up to play and Kona took offense. Conflicting accounts over how an altercation started—appellants’ versions that their dogs approached to play v. complainants’ versions that the appellants’ dogs charged hot on the attack—is one we have encountered dozens of times in our 700+ animal appeals. Whether due to outright fabrication, a little spin, or honest recollection—but a recollection forged through the lens of an owner primed to see their beloved dog as a victim and not as an aggressor—that particular incongruity in testimony is almost a cliché.
23. No, what makes this case stand out is the stark discrepancy over where Scout *started* from. Per Ms. Gehrke’s account, Mr. Eames and Scout began on the side of the street

opposite from the Eames residence, in a neighbor's yard, socializing with that neighbor and that neighbor's dog, only for Scout to burst out of that neighbor's yard to get at Kona on the abutting sidewalk. Conversely, per Mr. Eames' account, he and Scout were in front of their own home, on the opposite side of the street, when Scout crossed their sidewalk and then crossed the public street to reach Kona on the distant sidewalk.

24. That is especially odd, because Mr. Eames would have zero incentive to place himself and Scout on the opposite side of the street from Ms. Gehrke and Kona. In fact, doing so would marginally set his cause back: instead of Scout reacting to a dog passing right in front of his nose—were Mr. Eames could have tried to argue that Kona provoked Scout by approaching at such close quarters—Mr. Eames testified that Scout started out on the *opposite* side of the street from Kona, and then crossed the street to travel to a distant Kona, eliminating any argument that maybe Kona had invaded Scout's space. And if Mr. Eames knew the neighbor and the neighbor's dog, repeatedly testifying that he did not know who that lab belonged to and that he had never seen that lab in the neighborhood, he was choosing an irrelevant hill to die on.
25. In the end we find Ms. Gehrke's version of where Scout came from no more likely to be accurate than Mr. Eames'.
26. That would not be critical if the evidence of viciousness were overwhelming. If, for example, Kona had multiple wounds on her back (indicating she was retreating as Scout continued the assault) or Scout's reaction was otherwise grossly disproportional to Kona's response, the did-Scout-approach-in-attack-mode-or-did-things-turn-nasty-only-after-Scout-approached-in-play-mode? question would likely not be so critical. But here, per Ms. Gehrke's testimony, Kona responded to Scout, and the wound to Kona's face indicates a face-to-face encounter. So, our concern over whether Ms. Gehrke is accurately recalling exactly where Scout came from leads to a concern over the accuracy of her version of what precisely occurred, and in what sequence, as Scout drew up to Kona.
27. We have labored back and forth, re-listening to the testimony and comparing that to the documentary evidence. In the end we are not confident that, more likely than not, Scout attacked unprovoked and constitutes a danger. And because Animal Services bears the burden of proof, our being in equipoise means we must overturn Scout's viciousness designation.

DECISION:

1. We grant the appeal as to Scout's viciousness designation and corresponding confinement order.
2. As to the licensing violation, we reduce the penalty from \$125 to \$70.

ORDERED January 6, 2022.



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 *February 7, 2022*. 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 DECEMBER 22, 2021, HEARING IN THE APPEAL OF DAVID EAMES, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NO. V21012470-A21004083

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Chelsea Eykel, Kayla Gehrke, and David Eames. 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	Online Complaint form of August 15, 2021 incident by Kayla Gehrke, dated August 16, 2021
Exhibit no. D3	Photograph of Kona's injuries
Exhibit no. D4	RASKC investigation report no. A21004083
Exhibit no. D5	Photograph of Mr. Eames and Scout
Exhibit no. D6	Notice of violation no. V21012470-A21004083, issued August 29, 2021
Exhibit no. D7	Appeal, received September 17, 2021
Exhibit no. D8	Map of subject area

DS/lo

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file no. **V21012470-A21004083**

DAVID EAMES

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 January 6, 2022.



Lauren Olson
Legislative Secretary

Eames, David/Kelly

Hardcopy

Eykel, Chelsea

Regional Animal Services of King County

Gehrke, Kayla

Hardcopy