

February 1, 2022

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

King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
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REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file nos. **V21012696 and V21012688**

CATHY AND BRANDON SWART
Animal Services Enforcement Appeal

Activity no.: A21005718

Appellants: **Cathy and Brandon Swart**

[REDACTED]
Kent, WA 98042

Telephone: [REDACTED]

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King County: Regional Animal Services of King County
represented by **Rebecca Smokoska**
Regional Animal Services of King County
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FINDINGS AND CONCLUSIONS:

Overview

1. Kathy and Brandon Swart appeal two Regional Animal Services of King County orders. 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 uphold the violations and the removal order, but we reduce the monetary penalties and extend the deadline to get Jack out of King County to April 1, 2022.

Background

2. On November 15, 2021, Animal Services issued a violation notice to Cathy Swart for her dog, Jack, being unlicensed, qualifying as vicious, and needing to be confined. Ex. D4. Two days later Animal Services issued an order to remove Jack from King County. Ex. D6. Brandon and Cathy Swart filed an appeal on December 1, 2021. Ex. D10. We went to hearing on January 19, 2022.

Hearing Testimony

Testimony of Kathy Barry

3. Kathy Barry testified that on November 10 she was leaving her house to get into her car. She saw Ms. Swart walking her dog [Jack] on a leash. Jack looked friendly and curious. Ms. Barry thought the issue between her and Jack was because they had not been introduced to each other before. Ms. Barry said hello to Jack and started walking towards him. She was about fifteen feet from Jack. Ms. Barry asked Ms. Swart if she could pet Jack.
4. Before she could get any closer, Jack lunged and jerked the leash out of Ms. Swart's hands. Jack came at her twice and bit her. Ms. Swart had given no indication that Ms. Barry should stop or not approach Jack, because Jack broke loose very quickly. Exhibit D18 is a video of the incident. Jack chomped through a lot of her nerves in her arm. Exhibit D13 shows injury Jack inflicted.
5. The injury continued to profusely bleed for a month. She has had a debridement bandage on the wound, which is very painful to remove. She still cannot remove the bandage without the wound bleeding. She lost a large chunk of feeling in her arm. She has a bone bruise, which is extremely painful. She also experiences shooting pain that runs through her fingers. The surgeon does not know if the shooting pain will go away or not. The nerves and blood vessels are still regenerating. If she bumps her arm she gets a black bruise.
6. Ms. Barry has not been doing well psychologically since the incident. She was scared to take her own dogs back from her neighbor when she returned from the hospital. She gets really scared and her heart races when she sees a big dog, even if she knows the dog is friendly. Ms. Barry carries a baseball bat when she goes into her backyard. She is afraid to let her dogs out. She is not the same person, and as long as Jack is at the Swarts, she cannot feel safe. There is no way to tell with Jack if he will attack or not, because he looks so normal.
7. Jack has broken through the fence and into her backyard at least four times. He has broken fence boards and he has also pushed the boards off the fence. Before he breaks through the fence, Jack will be barking and growling; however, once he gets inside Ms. Barry's backyard, he just runs around as Ms. Barry grabs her dogs and runs inside. These interactions with Jack encouraged her to introduce herself to Jack, so Jack would calm down in the future.

8. When people come near the house, Jack will fling himself towards the window, hard enough that the glass bends. Ms. Barry has been scared that Jack will break through the window and hurt himself or Ms. Barry.

Testimony of Brandon Swart

9. Brandon Swart testified that the Swarts got Jack from a shelter. Jack had not shown any aggression before that day. The Swarts have had small children and elderly people over to their house, and Jack has never shown aggression. Jack has not been the type of dog to run out the front door.
10. Jack has barked towards neighbors' dogs. Mr. Swart and the neighbors have been able to work together to fix the fence, which is old and needs to be replaced. Mr. Swart plans on replacing the fence and securing the backyard, and Jack is currently living in the house. The Swarts have started training Jack to not break the fence. They are also looking at muzzle training, and they have picked out a trainer to work with Jack, should they be allowed to keep Jack. Mr. Swart would never take Jack outside without the choker collar on. The Swarts take this seriously. Jack is part of their family.
11. The Swarts got Jack for emotional support for Ms. Swart, who has mental health challenges. She has had a huge improvement in her mental health since Jack arrived. If Jack were removed, it would be a major setback for her.
12. Mr. Swart testified that because Jack has been deemed vicious, vets will no longer see him for his rabies shot. Jack was already microchipped prior to the incident.
13. Crime has been an issue in the neighborhood. The Swarts do not have the money to pay the fines and are going through bankruptcy. The Swarts are getting a divorce, and Ms. Swart will take Jack with her when she moves.

Testimony of Cathy Swart

14. Cathy Swart testified that it had been raining for a week when she decided to bring Jack with her to the mailbox. Ms. Swart did not put the choker collar on Jack. They got the mail and were almost back inside the house when Ms. Barry came out and asked if she could pet Jack. Ms. Swart asked Ms. Barry why. Ms. Barry continued to walk towards them. Ms. Swart was turning to have Jack sit, because that is what Ms. Swart normally does when someone is approaching.
15. However, Jack pulled his neck out of his collar. They were about ten feet away from Ms. Barry at that point. Jack ran and bit Ms. Barry. Ms. Swart did not see the second bite. She thinks that if Jack was vicious, he would have kept biting her. Ms. Swart chased Jack into the house, and she grabbed a first aid kit. Ms. Barry called 911. Ms. Swart did not give Ms. Barry permission to pet Jack. Ms. Barry has told Ms. Swart that she is terrified of Jack. Ms. Barry is also constantly trying to interact with Jack. Ms. Swart takes full responsibility for what happened and she will never take the dog out without the correct collar.

16. Jack is a registered emotional support animal for Ms. Swart. She described a history of mental health challenges and high anxiety.¹ Her counselor thought a companion animal would be helpful.
17. Ms. Swart agrees that the fence needs to be replaced. She is looking into training. Jack has high anxiety, which Ms. Swart believes caused this issue. When Jack is scared, he will hide. She thinks only a professional can help Jack with training.
18. Jack does respond when people come onto the property. There have been break-ins in the neighborhood, and Ms. Swart does not want people coming to the door. Jack does not run out the door. Even at Halloween, Jack barked at trick-or-treaters but he did not want to go out the open front door. Two days before the incident Jack was pet by seven kids waiting for the bus, with no issues. Ms. Swart had Jack sit and he was wearing his choker collar then.
19. Ms. Swart is moving out of King County in June. Ms. Swart was bit by a dog before on the arm.

Legal Standards

20. In V21012688, Animal Services asserts that Jack:
 - A. was unlicensed as of November 10, in violation of KCC 11.04.030.A, which requires all dogs eight weeks old and older be licensed and registered; and
 - B. that Jack 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.
21. In V21012696, Animal Services seeks Jack’s removal under KCC 11.04.290.A.1, which states that, in determining what to do with a dog deemed vicious, Animal Services must take into consideration various factors, including the extent of injury or injuries caused.
22. 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.

¹ Her testimony was more vulnerable than that, but we typically do not list such items in a decision that will become part of public record. A recording of the hearing testimony is available through our office.

Analysis

Viciousness

23. The video of the attack is partially obscured by a leafless tree, but the contours are fairly easy to piece together. Ex. D18. As Ms. Swart and Jack pass Ms. Barry, Jack does not even take notice of, or show interest in, Ms. Barry. As Ms. Barry slowly walks over towards Ms. Swart and Jack, Jack still gives off no warning sign. Then, when Ms. Barry is 10-15 feet away from Ms. Swart, Jack pulls Ms. Swart to get at Ms. Barry. Even at that point Jack emits no growl or other obvious signal that he is about to inflict severe violence on Ms. Barry. Ms. Barry takes no aggressive, or even defensive, action. Yet as soon as Jack gets to her, he bites. Not content with that, even after Ms. Swart pulls him back, Jack breaks free and charges Ms. Barry again.
24. In no sense were Jack’s actions legally provoked. 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)). An average dog would not have reacted to Ms. Barry engaging in conversation with Ms. Swart as she slowly walked up to within 10-15 feet by going at her and tearing into her arm.
25. Even reaching one’s hand out intending to pet a dog typically does not constitute “provocation.” *State v. Ruisi*, 9 Neb. App. 435, 443, 616 N.W.2d 19, 26 (2000). It is not clear that Ms. Barry did that, but even if she had, and even if the circumstances were such that some sort of “back-off” nip were defensible, 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. Here, Jack wreaked the second-most gruesome injury we have seen a dog inflict on a human in our almost 900 animal appeals. Ex. D13. Animal Services easily meets its burden of showing that Jack performed an act endangering the safety of a person, including biting a human being without provocation, and constitutes a danger (a serious danger) to people’s safety.

Removal

26. We are the most exacting of Animal Services on removal orders, given what is at stake. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (nature of private interest impacted is factor in determining how much process is due); Exam. R. XII.B.4 (in proceeding involving divestiture of legally cognizable rights, examiner may require adherence to court rules to “assure that due process of law is afforded”); *Repin v. State*, 198 Wn. App. 243, 284, 392 P.3d 1174 (2017) (Fearing, C.J., concurring) (analyzing court decisions recognizing “the bond between animal and human and the intrinsic and an estimable value a companion animal”). We have overturned more removal orders than we have sustained.
27. King County only employs a single designation for a hazardous animal, “vicious,” so that is what Animal Services cited Jack for, and is the designation we uphold today on appeal. Most other Washington jurisdictions follow the state’s two-tiered system of “potentially

dangerous” (a standard lower than “vicious,” with merely approaching a person in a “menacing fashion,” without even an attempted bite, qualifying) and “dangerous” (a standard higher than “vicious,” where the dog has to inflict “severe injury,” such as disfiguring lacerations requiring multiple sutures or cosmetic surgery, to qualify). RCW 16.08.070(1)-(3). Today’s is the rare case on our docket where the animal not only qualifies as “vicious,” but would qualify as “dangerous,” were we operating under a two-tier system.

28. We rarely uphold a removal order for a first-time bite, but, again, today’s is the second-worst dog-on-human attack we can recall in our almost 900 animal appeals. Ex. D13. Jack poses an extreme risk and must be removed from King County or turned over to Animal Services.

Compliance

29. The Swarts’ request that they be allowed to keep Jack in King County until Ms. Swart leaves in June is not an outlandish one: warning signs could be placed; Jack could be leashed, on a choker collar, and muzzled when taken outside; and Jack does not have a history of running out of accidentally-opened doors. We are sympathetic to Ms. Swart’s fragile mental condition and recognize that Jack appears to be helping her. However, Ms. Barry has a fragile mental condition of her own—a condition caused by Jack. Ours is not the scenario where, say, Jack brutalized a visitor from outside the neighborhood and so, if Jack stayed contained during his remaining days in King County, he would not be actively harming anyone. Here, Ms. Barry has to be re-traumatized and live in fear so long as Jack continues to reside next door. And while Ms. Swart has the option of surrendering Jack to Animal Services and selecting a new emotional support animal, Ms. Barry does not have the option of selecting a new emotional state.
30. Ms. Swart certainly can try to arrange for Jack to live outside the county with a new owner. But it is hard to see how anyone, knowing Jack’s history and the risks, would voluntarily agree even temporarily to hold onto Jack while Ms. Swart finds other living accommodations. Assuming no one else puts their neck on the line, if Ms. Swart is determined to keep Jack, she will need to move somewhere with him. And given that it is already February, rentals generally start filling up 30 days out, most leases start on the first of the month, and the limited options Ms. Swart will likely encounter trying to find a landlord who will accept a vicious dog on their property, it is difficult to see how she could get her affairs in order and be ensconced somewhere else prior to April 1.
31. Thus, we will extend the deadline to April 1 for Ms. Swart to either remove Jack from the County or to surrender him to Animal Services. Starting immediately, Jack is only allowed outside the house if leashed, on a choker collar, and muzzled, or if he is kept within a proper enclosure such as a kennel. And within a week the Swarts must install warning signs (including a sign with a warning symbol) to inform visitors that there is a vicious or dangerous dog on the property.
32. Contrary to what Animal Services appeared to imply in closing, to comply with Animal Services’ November 17 removal order (and with our amendments to those conditions)

Ms. Swart does not need advance permission from another jurisdiction to move Jack. Per the terms of the removal order, Ms. Swart must disclose to any new owner/caretaker that Jack was ordered removed from King County as a threat to public safety and provide Animal Services with the new owner/caretaker's contact information (which presumably would be Ms. Swart's new address). Ex. D6 at 003. And we certainly expect that Animal Services will contact that new jurisdiction and give it a heads up. Then that new jurisdiction may choose to take enforcement action. But neither we nor Animal Services have any authority over animals in other jurisdictions.

33. What that *new* jurisdiction would do, or how they might treat today's decision, is something we can only speculate about. The requirements for keeping a vicious dog are indeed onerous,² but we chose our words carefully above when we wrote that Jack "*would* qualify as 'dangerous,' *were* we operating under a two-tier system." Animal Services did not declare Jack "dangerous" (as it currently does not have that tool in its legal arsenal). Thus, the Animal Services orders we uphold today are only ones declaring Jack "vicious" and removing him from King County.
34. Ms. Swart may want to consider the potential costs and hassles of continued ownership (including the trouble Mr. Swart noted of even finding a vet to treat Jack) as she decides whether to keep Jack or begin afresh with a new support animal carrying far less risk and baggage. And Pierce County makes it a gross misdemeanor to bring into unincorporated Pierce County an animal declared vicious by another animal control authority or examiner. PCC 6.03.040. So, she may want to explore relocation with Pierce County before she moves. But again, our ruling today is limited to viciousness, removal, and the terms under which Jack can be temporarily kept in King County. There is no pre-clearance needed from another jurisdiction in order to satisfy Animal Services' requirements (as modified by our decision).

Penalties

35. Jack was not licensed as of the date of the violation, but has since been licensed. In that scenario we typically reduce the licensing penalty.
36. The penalty for a vicious dog violation is \$500, but where an appellant shows the violation occurred despite (not because of) the appellant's actions and/or steps the appellant has taken since the violation to avoid a repeat, we typically reduce the penalty.
37. Leading up to the attack, Ms. Swart had Jack on a leash. We have reviewed that video maybe a dozen times, and we still see no indication that Jack was even agitated, let alone a risk to commit extreme violence. And we were looking hard, repeatedly, and with the

² For any jurisdiction, state law mandates that a dog declared dangerous can only be kept if the owner installs warning signs (including a sign with a warning symbol) to inform visitors that there is a dangerous dog on the property, installs a proper enclosure, muzzles the dog anytime it is outside that proper enclosure, obtains a \$250,000 surety bond, and keeps a \$250,000 liability insurance policy RCW 16.08.080(6), -.090(1). As an example, Pierce County requires a dangerous animal to be kept indoors or in a proper enclosure while on its property, and allowed off the property only if securely leashed and humanely muzzled or otherwise securely restrained. PCC 6.07.030. And the owner must obtain and annually renew a \$500/year dangerous animal permit, carry at least \$500,000 in liability insurance (for any personal injuries inflicted by the dangerous animal), and meet the other requirements of PCC 6.07.025.

full benefit of hindsight. That lack of signaling is part what we now know makes Jack so dangerous. But that would not have been obvious until a split-second before Jack tore into Ms. Barry's arm. That was true for Ms. Barry, and explains why it objectively appeared safe to gently approach a seemingly calm dog. But it is also true for Ms. Swart, given the lack of evidence in the record that Jack had previously attempted to attack anyone. Jack's attack is not attributable to anything irresponsible Ms. Swart was doing or failing to do on November 10.

38. And after the attack, the Swarts have kept Jack either inside or on a leash. Animal Services pointed out that the Swarts testified to letting Jack run off-leash in the dog park. Animal Services is correct that there is no off-leash park exception to the confinement term that a vicious dog be leashed at all times when off the property. And that may play into Ms. Swart's decision on whether to keep or relinquish Jack, given that Jack's days of exercising off the property while off-leash are over, at least in King County.³ But the Swarts are not the first appellants to misread an off-leash park exception into the leash requirement. (In fact, to avoid future confusion, Animal Services may want to update its compliance order bullet points to explicitly address sanctioned off leash dog parks.) We do not hold that against the Swarts.
39. In sum, we find a substantial reduction to the viciousness penalty in order.
40. As to the \$1000 penalty for the removal order, we have consistently ruled that this penalty only kicks in when the removal order itself is violated. We set forth amended conditions below, but so long as those conditions are met, there are no penalties associated with the removal order.

DECISION:

1. We deny the appeal as to V21012688, sustaining the licensing and viciousness violations and compliance orders, but reducing the viciousness penalty from \$500 to \$200 and the licensing penalty from \$125 to \$60. The penalty due is \$260, not \$625.
2. We deny the appeal as to V21012696, except that we amend the removal order as follows:
 - A. Starting **immediately**, Jack is only allowed outside the house if leashed, with a choker collar, and wearing a basket-type muzzle, or is kept within a proper enclosure, such as a kennel.
 - B. By **February 8, 2022**, the Swarts must install warning signs (including a sign with a warning symbol) to inform visitors that there is a vicious or dangerous dog on the property.
 - C. By **April 1, 2022**, Ms. Swart shall either:
 - i. Remove Jack from King County and

³ We cannot predict what another jurisdiction might require or not require.

- (1) if Ms. Swart moves with Jack, provide her new street address (and mailing address, if different) along with any updated phone or email; or
- (2) if Ms. Swart houses Jack with someone else, (a) disclose to that person that Jack was ordered removed from King County as a threat to public safety and (b) provide that new caretaker's/owner's street address (and mailing address, if different), along with that person's phone and email.

OR

ii. Surrender Jack to Animal Services.

D. So long as Ms. Swart fulfills these requirements, there is no penalty associated with the removal order. If she does not, the \$1000 penalties will come due.

ORDERED February 1, 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 *March 3, 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 JANUARY 19, 2022, HEARING IN THE APPEAL OF CATHY
AND BRANDON SWART, REGIONAL ANIMAL SERVICES OF KING COUNTY
FILE NOS. V21012696 and V21012688**

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Rebecca Smokoska, Kathy Barry, Brandon Swart, and Cathy Swart. 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	Complaint form of November 10, 2021, incident by Kathy Barry, dated November 12, 2021
Exhibit no. D3	RASKC investigation report no. A21005718
Exhibit no. D4	Notice of violation no. V21012688-A21005718, issued November 15, 2021
Exhibit no. D5	Photograph of envelope given to Brandon Swart
Exhibit no. D6	Notice and order for removal no. V21012696-A21005718, issued November 17, 2021
Exhibit no. D7	NVOC mailing/tracking history
Exhibit no. D8	Notice of violation no. V21012736-A21005718, issued December 4, 2021
Exhibit no. D9	Photograph of Posting for V21012696
Exhibit no. D10	Appeal, received December 1, 2021
Exhibit no. D11	Photograph of bite location
Exhibit no. D12	Photograph of dog, Jack, owned by Cathy Swart
Exhibit no. D13	Photograph of Kathleen Barry’s Injury November 11, 2021
Exhibit no. D14	Photograph of Kathleen Barry’s Injury January 4, 2022
Exhibit no. D15	Map of subject area – Overhead View of Incident Location
Exhibit no. D16	Map of subject area – Street View of Incident Location
Exhibit no. D17	Dunbar Bite Scale
Exhibit no. D18	Video of the incident

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February 1, 2022

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file nos. **V21012696 and V21012688**

CATHY AND BRANDON SWART
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 February 1, 2022.



Lauren Olson
Legislative Secretary

Barry, Kathleen/Kathy

Hardcopy

Smokoska, Rebecca

Regional Animal Services of King County

Swart, Cathy/Brandon

Hardcopy