OFFICE OF THE HEARING EXAMINER KING COUNTY, WASHINGTON

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REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file nos. V22013600 and V22013601

DAN NOWAK

Animal Services Enforcement Appeal

Activity no.: A22005201

Appellant: **Daniel Nowak**

Fall City, WA 98024

Telephone: Email:

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

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FINDINGS AND CONCLUSIONS:

Overview

1. Dan Nowak challenges an order removing his dog, Marley, from King County. The attack that prompted the removal order was unprovoked, caused major damage, and certainly qualifies Marley as "vicious." Yet after hearing witness testimony and observing demeanor, studying the exhibits admitted into evidence, and considering the arguments and the relevant law, we modify the confinement order and reverse the removal order.

Background

- 2. On September 28, 2022, Animal Services issued a violation notice to Dan Nowak for his dog, Marley, qualifying as vicious and needing to be confined. Ex. D6. On the same day Animal Services issued a removal order. Ex. D8.
- 3. On October 17, Mr. Nowak appealed. Ex. D12. He did not challenge the viciousness designation or confinement order but asked for a reduction in the monetary penalty. We went to hearing on November 30.

Hearing Testimony

Testimony of Ofc. Samantha Moore

- 4. Samantha Moore testified that on March 31, 2022, Animal Services received a call from a third party about an August 24, 2021, incident. Exs. D10, D11. Since Animal Services received the call from a third party, Ofc. Moore was unable to issue a violation notice.
- 5. Ofc. Moore called Mr. Nowak and discussed better securing the dog [Marley] when in public and keeping Marley on a leash when in public. She also informed him about getting a basket muzzle while on public property. With larger dogs that have a bite history, she typically recommends a basket muzzle; these are more comfortable for the dog and allow them to drink water and pant properly. They protect against major damage and are a good tool for a reactive dog. Mr. Nowak admitted that an incident happened, but he seemed somewhat nonchalant.

Testimony of Jean Montague

- 6. Jean Montague testified that on September 23 she went to St. Edwards Park to meet her friend [Karen], and Karen's friend, Mr. Nowak.
- 7. Mr. Nowak told Ms. Montague to not approach Marley, but to let Marley approach her. Ms. Montague stood, and Marley approached her. There was no indication that Marley was not friendly; there was no growling. Mr. Nowak may have loosened the leash.
- 8. Ms. Montague put her hand down, and Marley immediately attacked her left arm. It was the most pain she has felt in her life. Due to the excruciating pain, she went into 'fight or flight,' and all she could do was close her eyes and try to run away. People tried to stop the bleeding with a torniquet. As she could not walk to the car, Karen drove the car to her, got her in the car, and coached her with breathing until they got to the hospital.
- 9. Ms. Montague was at the hospital for five and a half hours. She knew Mr. Nowak was also at the hospital. The wound was on the top and bottom of her arm. The sutures were on the top of the arm in two areas: one with three sutures and the other with one.
- 10. Ms. Montague initially could not move her arm. She could not cook or pack for her move. She has been crying quite a bit from the trauma. She is going to counseling to help manage the PTSD. She is going to physical therapy to help the wound, where they press

- on the skin to try to release the scar tissue. She is also going to the dermatologist to manage the skin because it has significant bumps from a lot of scar tissue. They use a needle treatment to soften the bumps. She also occasionally takes pills for anxiety now. She is able to use her arm now.
- 11. Ms. Montague had coffee with Mr. Nowak four days after the incident. Mr. Nowak presented her with a letter. Ex. D12-005. She did not know about the letter before the meeting. Ms. Montague signed the letter. At that time, she felt like she had to sign. She was under pain medication. When asked at hearing, Ms. Montague is now uncertain the steps listed in the letter would prevent future encounters. She is uncertain if Mr. Nowak will follow through on the commitments; she does not know him that well. Ms. Montague no longer supports rescinding the removal order.
- 12. Ms. Montague filed an online complaint because she was having a difficult time. Ex. D2. She was crying a lot. She wanted to protect other people, especially children, from being mauled or hurt.
- 13. Mr. Nowak told Ms. Montague that Marley never did anything in the past except nip at men. He told Ms. Montague that he forgot Marley's muzzle the day of the incident. She could not remember the day of that conversation. Ms. Montague is under a lot of emotional stress and pain.
- 14. Ms. Montague told Mr. Nowak that she had filed a complaint with Animal Services. Mr. Nowak told Ms. Montague not to file a complaint. Ms. Montague does not remember when that conversation was. Ms. Montague started to feel like nothing was in her best interest, and that it was all about the dog.
- 15. Insurance was paying for most but not all of the bills. She spoke with Mr. Nowak around November 9. Ms. Montague agrees that an itemized list of bills is not unusual, but it made her feel like she was on the defensive. She felt like she should not have had to do that. Insurance will pay for physical therapy, but they will not pay for counseling or dermatology.

Testimony of Daniel Nowak

- 16. Daniel Nowak acknowledged the trauma his dog caused.
- 17. The description of the August 24, 2021, incident from Mr. Nowak's ex-wife is completely fabricated; she was not even present, and he was the one who told her about it. Ex. D11. There was no off-leash activity, no growling, and no lunging that day. It was a nip on the finger, at most requiring a band-aid, of a dog walker who attempted to pet Marley while he was sniffing the other dog. Mr. Nowak had told the man to not pet Marley while he was sniffing the other dog. Mr. Nowak believes Marley was provoked, and this resulted in just a nip.
- 18. When Ofc. Moore contacted Mr. Nowak regarding this incident, he believed it was a courtesy call; he did not know—until reading his ex-wife's statement months after the call—that his ex-wife's version must have been the version Ofc. Moore had in mind

- when she suggested Marley wear a muzzle. Mr. Nowak did not put much weight on that incident. Apart from this August 2021 incident and the incident with Ms. Montague, Marley has no other history.
- 19. Mr. Nowak agrees with Ms. Montague's testimony regarding the September 23 incident. Because of the previous incident with the dog walker, Mr. Nowak told Ms. Montague to not approach Marley. Mr. Nowak knows the right way to introduce him to people. He knows this based on Marley's general demeanor and when he wags his tail. When Marley gets tense, Mr. Nowak will deescalate the situation and will not let him approach.
- 20. On the day of the incident, Mr. Nowak let Marley release while on the leash. Marley sniffed Ms. Montague, and then bit her. Ms. Montague pulled her arm away, which Mr. Nowak believes is where the damage happened. Mr. Nowak did not pull Marley off Ms. Montague; Marley released himself. Marley stood by Mr. Nowak while they dealt with Ms. Montague.
- 21. When Ofc. Carlson visited Mr. Nowak, Marley had just undergone surgery and had a cone on. Ofc. Carlson just asked for a photograph of Marley for the file, which Mr. Nowak provided. Ex. D3-003 n.2.
- 22. Regarding the letter he presented Ms. Montague, Mr. Nowak had to get an appeal filed, and he believed Ms. Montague could not type due to the injury. He believed the letter was reasonable because it said what she had told him in previous conversation, that she did not want the dog to be taken away but wanted to ensure Marley would not hurt anyone again.
- 23. Mr. Nowak proposes signage and isolation for Marley. He lives on ten acres that back up to timber and a county pit. There is only ³/₄ of an acre cleared, which Mr. Nowak would use to exercise Marley. Mr. Nowak plans on adding an invisible fence in this area as a backup. Marley already has a kennel where he spends a lot of time. The fence for the kennel is five feet tall. He has not gotten out in five years. Marley is either inside the house, in his kennel, or in the car. When Ofc. Carlson visited, he commented on how the property is ideal for a problem dog. Mr. Nowak admits that he has a problem dog.
- 24. Mr. Nowak believes that the removal order kicks the can down the road to another county, while Mr. Nowak is attempting to solve it. Marley is Mr. Nowak's only companion. He is now divorced after a thirty-five-year marriage. Marley's removal would be an emotional hardship on Mr. Nowak. The full fines would also be a hardship for him.
- 25. Mr. Nowak does not recall making a statement about forgetting a muzzle the day of the incident; Mr. Nowak only purchased a muzzle *after* the incident.
- 26. Mr. Nowak agreed he may have downplayed the first incident, based on what he observed to be a nip and not a bite. But he is not downplaying the current incident; Mr. Nowak is not challenging Marley's viciousness designation, though he thinks Marley is at the lower end of "vicious." Mr. Nowak has gotten a wake-up call. Mr. Nowak also agreed that the chain link fence height is easy to increase.

Legal Standards

- 27. Does Marley qualify as vicious, defined as "[h]aving 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," with the violation itself framed as "[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"? KCC 11.04.020.BB; .230.H.
- 28. Is Marley's removal from the County appropriate under KCC 11.04.290.A.1, which states that:

An animal, declared by the manager of the regional animal services section to be vicious, may be harbored, kept or maintained in King County only upon compliance with those requirements prescribed by the manager. In prescribing the requirements, the manager must take into consideration the following factors:

- a. the breed of the animal and its characteristics;
- b. the physical size of the animal;
- c. the number of animals in the owner's home;
- d. the zoning involved; size of the lot where the animal resides and the number and proximity of neighbors;
- e. the existing control factors, including, but not limited to, fencing, caging, runs and staking locations; and
- f. the nature of the behavior giving rise to the manager's determination that the animal is vicious, including:
 - (1) extent of injury or injuries;
 - (2) circumstance, such as time of day, if it was on or off the property and provocation instinct; and
 - (3) circumstances surrounding the result and complaint, such as neighborhood disputes, identification, credibility of complainants and witnesses,

while KCC 11.04.290.A.2 states that:

Requirements that may be prescribed include, but are not limited to, the following:

- a. Erection of additional or new fencing adequate to keep the animal within the confines of its property;
- b. Construction of a run within which the animal is to be kept. Dimensions of the run shall be consistent with the size of the animal;
- c. Keeping the animal on a leash adequate to control the animal, the length and location to be determined by the manager. When unattended the leash must be securely fastened to a secure object;
- d. Maintenance of the animal indoors at all times, except when personally controlled on a leash adequate to control the animal by the owner or a competent person at least fifteen years old; and
- e. Removal of the animal from the county within forty-eight hours from receipt of such a notice.
- 29. 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.

<u>Analysis</u>

- 30. Mr. Nowak did not dispute Marley's vicious designation, either in his initial appeal (exhibit D12 at 002) or his testimony. If he had, it would have failed and only undercut his credibility. In September 2022, Marley endangered Ms. Montague's safety, namely (grievously) biting her without provocation and constituting a danger to the safety of persons or property off the animal's premises or lawfully on the animal's premises.
- 31. Turning to the removal order, we step back and start with the August 2021 incident. That incident *could* be important in multiple respects. However, that all turns on what exactly Marley did that day.
- 32. Per his ex-wife's written statement, Mr. Nowak let a dangerous canine loose to bite a bystander in the forearm, with the bystander fleeing holding his wounded forearm. Ex. D11-003. That is apparently the version Ofc. Moore had in mind when she called Mr. Nowak, she felt he sounded nonchalant, and she suggested he muzzle Marley. Under that version of August 2021:
 - Mr. Nowak showed nonchalance bordering on indifference, and not following on Ofc. Moore's March 2022 muzzle suggestion was irresponsible.
 - Marley has twice committed real violence (August 2021 and September 2022).
 - Mr. Nowak already had his chance to control his vicious dog and he did not, meaning overturning the removal order after Marley again lashed out (this time

against Ms. Montague) would be essentially giving Mr. Nowak a third chance, not a second chance.

Under such facts, removal here is clear cut.

- 33. However, per Mr. Nowak's testimony, August 2021 was a nip on the finger, something that drew blood but only at the band-aid level, and only after the man tried to pet Marley after Mr. Nowak expressly told him not to. Under that version of August 2021:
 - Not only was the injury minor, but muzzling Marley in response would seem an
 overreaction.¹
 - While Mr. Nowak might have been a little nonchalant or *under*reacted, a back-off nip to an oncoming hand is not particularly violent, somewhat proportional, and does not send up red flags.
 - Not muzzling Marley and instead approaching the September 2022 situation with Ms. Montague as he did—that Marley has nipped before when someone invaded his space, so let Marley come to you first—actually seems an appropriate (not an inappropriate), right-sized approach.

Under those facts, removal here is a much closer call.

- 34. So, which of those two versions is accurate? We have no real way of knowing. Mr. Nowak seemed candid—he readily admitted that the September 2022 altercation happened like Ms. Montague said it did, and he did not hem or haw that Marley had drawn blood in August 2021 (albeit at the band-aid level and only after a person improvidently tried to touch Marley). The unidentified man did not file a complaint and was not available to give his version, and his ex-wife's account was second hand (from Mr. Nowak). And she was not available to testify about Marley's disposition or what precisely Mr. Nowak had told her had happened. On that limited record, we adopt Mr. Nowak's version of August 2021 as basically correct. Thus, we view September 2022 as essentially a first-time incident.
- 35. That does not even come close to resolving the issue. The case for removal is still strong.
- 36. September 2022 was egregious. Ms. Montague did exactly as Mr. Nowak suggested, staying put until Marley came to introduce himself. Yet when she reciprocated by extending her hand, Marley bit her, causing her the most pain she had ever experienced. The gashes required surgery and sutures. Ex. D4 at 001-02. After the surgery, she could not move her arm or perform simple, daily functions. The trauma was not just physical, but also emotional and mental, requiring continuing counseling and some antianxiety

¹ Ofc. Moore had departed the hearing before Mr. Walker provided his testimony, and thus we did not pose the following question, but if we had asked her, "We know you were not there on August 21, but assuming for a moment a stranger put a hand in Marley's face, and Marley responded with a finger nip that drew blood but only at a level requiring a band-aid, would you still have suggested a muzzle was appropriate for Marley?" we expect her answer would have been, "No." *Our* answer to that question would be.

- medication. While she is able to use her arm now, she still requires treatment to release the scar tissue and reduce the bumps. Ex. D4 at 003.
- 37. There were no dramatically extenuating circumstances allowing one to reasonably conclude that Marley's violence was a "one-off." It was a normal walk, in the presence of his owner, and Marley made the decision to approach Ms. Montague. If the public is exposed to Marley again—on a walk or if someone visits the Nowak property or Marley escapes the property—violence easily could reoccur.
- 38. A few items, however, weigh against removal.
- 39. While the results (physically and emotionally) were traumatic, the activity that caused that result was not ultraviolence. Many past removal scenarios have involved a dog that bites down with tremendous force (enough to cause lasting nerve damage and loss of function), delivers multiple bites, seizes and refuses to let go, or yanks down the victim or shakes them. Marley's bite seems a little different from those.
- 40. Both Mr. Nowak and Ms. Montague agreed that she pulled away after Marley clamped down. That observation in no sense casts any responsibility on Ms. Montague—she did what anyone would do in response to a violent and painful bite, and Marley is responsible for the full extent of her injuries. But some of the injury seems the result of Ms. Montague pulling away and not, for example, Marley shaking her or a deep, to-the-bone bite. The facts here are different from others where we have upheld a removal order based on a first-time event.
- 41. While Ms. Montague's sentiment that Mr. Nowak seems "all about the dog" and not necessarily about other people's well-being appears someone on point, the flip side is that Mr. Nowak is committed to doing whatever he needs to do to keep Marley. Since September, Mr. Nowak has had Marley in a muzzle when he takes him off the property. Ex. A1. Mr. Nowak lives on an isolated rural property with little traffic. Exs. A2-A3. On the property he keeps Marley in a secure kennel, and he offered to raise the wall heights, if that was necessary. Exs. A4-A5.
- 42. In the end, Mr. Nowak does not bear the burden of disproving that removal is warranted. Rather, Animal Services bears the burden of proving the appropriateness of the remedy it has imposed. And Animal Services cannot quite do that here. We reverse the removal order, adding a muzzle requirement to the confinement order.
- 43. As to the penalty associated with the viciousness violation, where an owner shows that the animal did something despite (not due to a lack of) the owner's responsible behavior and/or where the owner takes significant steps after the violation to avoid a recurrence, we often reduce the otherwise applicable penalty. As noted above, given the version of August 2021 events we find more plausible, Mr. Nowak's approach to the September 2022 encounter with Ms. Montague was not inappropriate. And he has taken steps afterwards to avoid a repeat. We partially reduce the penalty.

DECISION:

- 1. We SUSTAIN Marley's viciousness designation but REDUCE the \$500 penalty to \$300.
- 2. We MODIFY Animal Services' September 28, 2022, compliance order as follows:
 - A. When on the property but unattended and outside the home, secure Marley in his kennel with the door <u>padlocked</u> to prevent accidental release.
 - B. When taking Marley off the property, use a leash no more than eight feet long, with a basket muzzle and with a collar or harness. A competent and capable person must handle Marley at all times when attended outside.
 - C. If not already completed, microchip Marley and provide the microchip number to the King County Animal Licensing Office (206) 296–2712.
 - D. Keep Marley current on his rabies vaccination.
- 3. We REVERSE the removal order.

ORDERED December 14, 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 *January 13, 2023*. 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 NOVEMBER 30, 2022, HEARING IN THE APPEAL OF DAN NOWAK, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NO. V22013600 & V22013601

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Chelsea Eykel, Jean Montague, and Daniel Nowak. 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 September 23, 2022, incident by Jean				
	Montague, dated September 27, 2022				
Exhibit no. D3	RASKC investigation report no. A22005201				
Exhibit no. D4	Photographs of Ms. Montague's injuries				
Exhibit no. D5	Medical record, dated September 23, 2022				
Exhibit no. D6	Notice of violation no. V22013600-A22005201, issued September 28,				
	2022				
Exhibit no. D7	Bite Quarantine Notice				
Exhibit no. D8	Notice and order for removal no. V22013601-A22005201, issued				
	September 28, 2022				
Exhibit no. D9	NVOC mailing/tracking history				
Exhibit no. D10	RASKC investigation report no. A22001562				
Exhibit no. D11	Online Complaint form of date x incident by Emilee Cline, dated March				
	31, 2022				
Exhibit no. D12	Appeal, received October 17, 2022				
Exhibit no. D13	Map of subject area				

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

Exhibit no. A1	Photographs of Marley with muzzle
Exhibit no. A2	Photographs of warning signs
Exhibit no. A3	Photographs of warning signs
Exhibit no. A4	Photographs of outdoor kennel area

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file nos. V22013600 and V22013601

DAN NOWAK

Animal Services Enforcement Appeal

I, Lauren Olson,	certify under pe	enalty of perjury	under the laws	of the State of	of Washington that
I transmitted the	REPORT AN	D DECISION	to those listed	on the attach	ed 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 December 14, 2022.

Lauren Olson

Legislative Secretary

Lauren Olson

Eykel, Chelsea

Regional Animal Services of King County

Montague, Jean

Hardcopy

Moore, Samantha

Regional Animal Services of King County

Nowak, Daniel

Hardcopy