

September 7, 2023

**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. **V23014338-A23003751**

DENISE BRUMBAUGH

Animal Services Enforcement Appeal

Activity no.: A23003751

Appellant: **Denise Brumbaugh**

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Federal Way, WA 98023

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

Overview

1. Denise Brumbaugh appeals a Regional Animal Services of King County (Animal Services) notice and order for her dog, Mack, qualifying as vicious and needing to be confined. 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 sustain Mack's viciousness designation, reduce the fine, and provide an avenue for later lifting that designation.

Background

2. Andy Markert filed a complaint for an incident at a winery event involving Mack and his four-year old daughter¹ on June 7. Ex D2. He submitted photographs on the injury. Ex. D3-001-D3-007.
3. Animal Services issued Ms. Brumbaugh a notice and order. Ex. D5. Ms. Brumbaugh timely appealed. Ex. D6. We held a hearing on August 24.

Hearing Testimony

Sally Freni Testimony

4. On June 7, Ms. Freni and her husband were sitting at the table facing the incident location. (There were other people at that table, but their backs were towards Ms. Brumbaugh.) Ms. Brumbaugh's back was also towards Ms. Freni's table. Ms. Brumbaugh was walking around with a tip jar in her left hand, with Mack on a leash on her right hand.
5. The girl, accompanied by her grandfather, started walking up from behind, to the left of Ms. Brumbaugh (tip jar side). The girl then stepped in front of Ms. Brumbaugh to put money in the jar, and Mack came from the right, in front of Ms. Brumbaugh, and bit her chest (though Ms. Freni volunteered that she did not see the actual bite, as her view was partially blocked by Ms. Brumbaugh). The girl began crying. The grandfather started shouting for help. Ms. Brumbaugh started yelling at the grandfather for bringing the girl up near Mack.

Andy Markert Testimony

6. Mr. Markert testified that guests were giving his daughter money throughout the day to put it in the tip jar at the stage. She went to the tip jar about five times, and spent most of her time dancing to the band. There were kids and families at the event.
7. Ms. Brumbaugh was walking around a couple times with the tip jar in her hand and Mack next to her. At one point, Ms. Brumbaugh was facing towards the stage with Mack on her left hand and the tip jar on her right hand. The grandfather was walking the girl to the tip jar side. Mr. Markert was sitting at the table but noticed Mack staring at his daughter when she was about five to eight feet away. As soon as his daughter got to the tip jar, Mack crossed in front of Ms. Brumbaugh, lunged, and knocked his daughter to the ground.
8. Mr. Markert ran to pick up his daughter and brought her back to his wife, who was also getting up from the table. Mr. Markert then went back to confront Ms. Brumbaugh about her having a dog at the event. Ms. Brumbaugh responded that Mack was for her protection.

¹ Unless necessary, we do not name minors in our decisions.

9. Mr. Markert explained his seating arrangement using the diagram provided in exhibit A1. That diagram shows Mr. Brumbaugh and Mack after the bite occurred, when his daughter was on the ground.
10. His daughter had originally had a fear of loud noises, a fear that had disappeared in the months leading up to the bite. Her fear returned after the incident. She is now scared of dogs (other than her own dog).

Adeline Markert Testimony

11. Ms. Markert testified that she and her mother-in-law were taking the girl to dance throughout the day. Guests were giving her daughter money to put in the tip jar. When the band ended, guests began walking to their table to leave. A man handed the girl money to put in the tip jar. Ms. Markert was facing away from Ms. Brumbaugh, so she did not witness the incident, and only seeing Mr. Markert running towards the altercation.
12. Ms. Markert then took her daughter from Mr. Markert and put her on the table. She lifted her dress, which was thicker on the top, and saw that she was bleeding. A waitress brought the venue's first aid kit, and Ms. Markert cleaned her wounds. The bite site developed bruising but no infection. A couple of months after the incident, she took her daughter to the doctor to document the incident.
13. Her daughter has suffered physical and emotional damage. A couple of weeks after the incident, her daughter saw a dog from across the park and asked if the dog would bite her. Prior to the incident, her reaction would be to ask if she could pet the dog. On another occasion, her daughter saw a cat and started crying to go home; she did not want to be around any animal. She still has a scar from her injury.

Karen Fischer Testimony

14. Ms. Fisher was Ms. Brumbaugh's guest at the winery event. Ms. Fisher has been around Mack for four years and Mack often comes to her house to play with her dog.
15. Ms. Fischer did not witness the incident, but when she heard the scuffle, she turned around and recalls Mack being on the right side of Ms. Brumbaugh. Mr. Markert then picked up his daughter. Ms. Fisher went to grab Mack to get him away from the table since Ms. Brumbaugh seemed distraught. Ms. Fisher then overheard the girl's grandfather and Mr. Markert confront Ms. Brumbaugh.

Denise Brumbaugh Testimony

16. Since 2019, Ms. Brumbaugh has been taking Mack to events and has never had an incident. She also takes him to stores so he can learn to socialize. She usually takes him to places where not many children are expected due to his size (80-pounds). She usually uses a 20-inch leash, which is the leash he had on June 7.

17. At the event, Mack was well-behaved throughout the day. Towards the end of the day, Ms. Brumbaugh grabbed the tip jar in her right hand and held a leashed Mack in her left hand, while walking around the tables asking for final tips. She typically does not do this, but the tables were far from where the tip jar was originally located. Most of the tables were empty, and Ms. Brumbaugh stayed closer to the center of the large walkway, with Mack away from the tables. When Ms. Brumbaugh got to the Markerts' table, they stated that they had tipped numerous times, which Ms. Brumbaugh understood because she had seen the girl dancing with her mother.
18. She then walked to the other side, with Mack still on her left and the tip jar on her right. Then, someone asked to pet Mack, so she switched the tip jar to her left hand and Mack to her right hand, since she has better right hand control. They started talking while petting Mack.
19. Suddenly, Ms. Brumbaugh heard a commotion, and when she turned around, she saw Mr. Markert holding the girl. Mr. Markert confronted Ms. Brumbaugh. Ms. Brumbaugh went back to her table to sit down. The grandfather then confronted her, so she walked over to Mr. Markert's table, but was turned away. She returned to her table still in shock. Ms. Brumbaugh did not feel the leash tug, so she does not believe that Mack lunged. She also did not notice Mack walking across her.
20. Mack has been around many children before without incidents. Ms. Brumbaugh believes that with Mack being a German shepherd, he got startled by the girl's sudden movements coming up from behind, and was provoked to nip the girl by instinct. Mack has since then completed a training class.

Matt Brumbaugh Testimony

21. Ms. Brumbaugh's son testified that he had originally obtained Mack from a dog trainer in California. The trainer determined that Mack lacked the aggressive drive to be enrolled in a guard dog program. Mack is a big dog, but he has never been trained to protect people, only for agility.

Allison Wilcox Testimony

22. Ms. Brumbaugh asked Ofc. Wilcox about the severity of the bite. Ofc. Wilcox classified it as minor.

Stassja Oederud Testimony

23. Ms. Oederud is Ms. Brumbaugh's niece. She testified about her, and her kids', uniformly positive experiences around Mack.

Legal Standards

24. Does Mack qualify as vicious, 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,” with the violation framed as, “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.

25. 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.

Analysis

26. The irony was thick. Ms. Brumbaugh claimed Mack had no history or aggression, has been successfully taken to events without incident, has been around many children without incident, and has never been reactive, and thus she had no reason to think Mack would pose a danger among people... yet Mr. Markert should have been clairvoyant and suspected that a dog whose owner felt it was safe enough to interact in a crowd actually posed a danger? That is rich. Ms. Brumbaugh’s attempted blame-shifting was not well-received.
27. Similarly, Ms. Brumbaugh’s claim that the girl provoked Mack to bite well-misses the mark. The “provocation” inquiry in animal jurisprudence focuses on how an *average* dog, neither unusually aggressive nor unusually docile, would react to an inciting act.² And a key touchstone of courts’ analyses is that “provocation” requires the dog’s reaction to be roughly proportional to the victim’s act.³ Even if the girl had tried to pet Mack, that would likely not be provocation.⁴ Yet the unrefuted testimony (Ms. Brumbaugh did not notice the girl until she was on the ground) is that the girl was not even attempting to touch Mack, only to walk around to Ms. Brumbaugh’s front to put money in the tip jar. She did not run at Ms. Brumbaugh or Mack, nor did she startle Mack, who saw her coming from several feet away. Mack did not growl or make any “back off” warning sounds. An average dog would not react to a four-year-old approaching its owner by biting the child. Max’s reaction was grossly disproportionate. Mack committed an endangering act, namely biting a child without provocation, thus meeting KCC 11.04.020.B’s definition of “vicious.”
28. That is not definitive, because in addition to the past tense “exhibited vicious propensities” (which Mack did on June 6), Animal Service must show that Mack “constitutes a danger” to people’s or their pets’ safety. KCC 11.04.230.H. 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 legal provocation, a dog will bite a person, especially a child. However, in a

² *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)).

³ *Stroop v. Day*, 271 Mont. 314, 319, 896 P.2d 439 (1995); *Bradacs* at 273–75; *Kirkham* at 792.

⁴ *State v. Ruizi*, 9 Neb. App. 435, 443, 616 N.W.2d 19, 26 (2000) (reaching one’s hand out to pet a dog typically does not constitute legal “provocation.”)

select minority of appeals we have overturned a viciousness designation even in the face of an unprovoked endangering act.

29. Today's case is not one of those. June 6 was not a scenario where, for instance, the person approaching from behind Ms. Brumbaugh was a 6'4" man who might understandably have caused a dog's protective instincts to kick in. The victim here was a four-year-old girl. Mack may normally be a good dog, but that is not our standard. Animal Services has proven that Mack constitutes a danger. We uphold Mack's viciousness designation.
30. Where an owner shows that (on the front end) the animal did something despite—not due to a lack of—their responsible behavior and/or (on the back end) they have taken steps after the violation to avoid a recurrence, we often reduce the otherwise applicable penalty.
31. On the front end, we accept Mr. Brumbaugh's explanation that Mack was never trained for any aggressive work, and his, Ms. Brumbaugh's, and Ms. Oederud's testimony (along with various written testimonials) that Mack had never exhibited any violent tendencies before. She had Mack on a very short leash, and mere seconds before Mack was interacting nicely with other children in the crowd. For the same reason Ms. Brumbaugh's attempt to shift blame to the Markerts was so ludicrous—that no one, not even Ms. Brumbaugh, would reasonably have suspected that Mack would not be safe around children—Mack bit the girl despite the care Ms. Brumbaugh was exercising on June 7.
32. On the backend, after June 7 Ms. Brumbaugh quickly enrolled Mack in a six-week, adult level two training course, which he completed. Exs. A3, A7. And she is pursuing Good Canine Citizenship certification for Mack. Ms. Brumbaugh has taken steps to avoid a repeat occurrence.
33. We reduce the \$500 penalty to \$150.
34. That brings us to the toughest question in today's appeal. Ms. Brumbaugh, who obviously did her homework, points out that in a few past decisions we have, after upholding a viciousness designation, provided an avenue for lifting the designation where the animal later earns his Canine Good Citizenship (CGC) training certificate. She requests that we do so today. It is a remedy not typically requested and not one for which we have developed the same robust and consistent jurisprudence that we have for other vicious-related issues.
35. So, what are our facts today? While any violence against a child doing nothing more than walking up to the owner is serious and grossly unacceptable, the altercation was—within the whole gamut of least to most egregious behavior triggering a viciousness designation—towards the milder end. It is more of a tooth scrape than a real engagement of the jaws. Ex. D2 & D3. And there is no evidence in our record of other aggressive, let alone violent, behavior from Mack (a position Animal Services accepts). We have an owner who, despite her unfortunate hearing strategy of blame-shifting and excuse-making, had Mack secured on June 7 by a two-foot leash, a much shorter rein than the

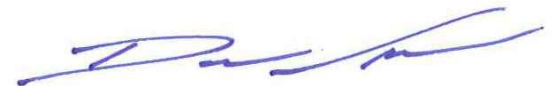
eight-foot leash even a dog previously declared vicious is allowed to walk with. Exs. A9, D5 at 001 (second bullet).

36. So, if Mack can successfully train for and then pass the CGC test, should that be sufficient to lift Mack's viciousness designation, or should the designation be permanent? Again, Animal Services bears the burden of proving by a preponderance of the evidence the appropriateness of the remedy it has imposed (here a permanent viciousness designation). KCC 20.22.210.B. It is a close call, but ultimately we find that, given our facts today, if Mack obtains his CGC certificate, his viciousness designation will no longer be appropriate.

DECISION:

1. We uphold the June 10 viciousness violation and compliance order, except that we reduce the penalty from \$500 to \$150.
2. If, by **March 7, 2024**, Ms. Brumbaugh submits proof of Mack's Canine Good Citizenship training certificate, Mack's viciousness designation should lift.

ORDERED September 7, 2023.



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 *October 9, 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 AUGUST 24, 2023, HEARING IN THE APPEAL OF DENISE BRUMBAUGH, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NO. V23014338-A23003751

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Denise Brumbaugh, Matt Brumbaugh, Chelsea Eykel, Sally Freni, Andy Markert, Stassja Oederud, and Alison Wilcox. 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	Staff report to the Hearing Examiner
Exhibit no. D2	Online Complaint form of date June 7 incident by Andy Markert, dated June 8, 2023
Exhibit no. D3	Photographs of bite; days 1-7
Exhibit no. D4	RASKC investigation report no. A23003751
Exhibit no. D5	Notice of violation no. V23014338-A23003751, issued June 10, 2023
Exhibit no. D6	Proof of Service
Exhibit no. D7	Appeal, received June 27, 2023
Exhibit no. D8	Map of subject area

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

Exhibit no. A1	Winery patio diagram
Exhibit no. A2	Letter from Steve Kenzler
Exhibit no. A3	Letter from Nikki, certified dog trainer at Petco
Exhibit no. A4	Letter from Karen Fisher
Exhibit no. A5	Letter from Chuck Hamilton
Exhibit no. A6	Letter from Annette Hargett
Exhibit no. A7	Training Certificate of Completion
Exhibit no. A8	Winery patio diagram, incident location
Exhibit no. A9	Photograph of leash and collar
Exhibit no. A10	Letter, follow-up from Steve Kenzler
Exhibit no. A11	Letter from Matt Brumbaugh
Exhibit no. A12	Letter from Stassja Oederud
Exhibit no. A13	Januik incident report

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file no. **V23014338-A23003751**

DENISE BRUMBAUGH

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, through Quadient-Impress, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED September 7, 2023.



Jessica Oscoy
Office Manager

Brumbaugh, Denise

Hardcopy

Brumbaugh, Matt

Eykel, Chelsea

Regional Animal Services of King County

Fischer, Karen

Freni, Sally

Markert, Andy/Adeline

Hardcopy

Oederud, Stassja

Wilcox, Allison

Regional Animal Services of King County