March 23, 2018

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
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REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file no. **V18007741**

SUSAN BESS BURNETT-CORP
Animal Services Enforcement Appeal

Activity no.: A17009963

Appellant: **Suzi Burnett**
273 145th Place SE
Bellevue, WA 98007
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King County: Regional Animal Services of King County
represented by **Chelsea Eykel**
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal

EXAMINER PROCEEDINGS:

Hearing Opened:	March 21, 2018
Hearing Closed:	March 21, 2018

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

After hearing the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, the examiner hereby makes the following findings, conclusions, and decision.

FINDINGS AND CONCLUSIONS:

1. In December 2014, Animal Services responded to a complaint from Linda Duer that Susan Burnett's dog, Oliver, was running free, aggressively approaching the Duer family, jumping on cars, and terrorizing the neighborhood. Ex. 2. Animal Services issued a verbal warning and a temporary dog license. Ex. 3. A warning is not an appealable order, so we draw no factual conclusions about what Oliver did or did not do in 2014, although it does show that Ms. Burnett knew then that (a) there were concerns about Oliver's aggression and getting loose off her property, (b) she had a legal duty to keep Oliver from running at large, and (c) she had a legal duty to license Oliver.

2. In March 2015, Ms. Duer filed another complaint that Oliver was still being allowed to roam free on the street, unsupervised and unrestrained, barking and charging anyone nearby on foot or in a car, and behaving aggressively and threateningly. Ex. 4. The responding Animal Services officer spoke to Ms. Burnett for 30 to 40 minutes, but declined to issue a violation, because Ms. Duer had not given specific-enough information about the incidents. Ex. 5 at 002. Again, we draw no factual conclusions about what Oliver did or did not do in March 2015, but it does show that Ms. Burnett had been reminded both that there were concerns about Oliver's aggression and getting loose off her property and that she had a legal duty not to let Oliver run at large.

3. In June 2015, neighbor Genessa Rose filed a complaint that Oliver charged at her and bit her on her thigh, then snarled and chased her sister back home. Ex. 6. She noted a "fear for my children being outside…. He aggressively barks at my children ages 3 and 12. He has backed to my son age 12 to the end of my driveway" while her son waited for the school bus. *Id.* This time, Animal Services served Ms. Burnett with a Notice of Violation and Order to Comply (NVOC) declaring Oliver vicious, because while still in Ms. Rose's driveway, Oliver charged Ms. Rose; as Ms. Rose began walking backward, Oliver bit her thigh; Oliver charged a second time but did not bite; and Oliver began chasing Ms. Rose's sister and backed her to the Roses front door. Ex. 7 at 001.

4. The NVOC also required Ms. Burnett to secure Oliver in a fenced area when unattended outside her home and restrain Oliver with a leash or harness when off her property, with Oliver being handled by a competent and capable person at all times when outside. *Id.* Ms. Burnett signed for the NVOC at the end of July. Ex. 8 at 003. She elected not to appeal. Thus, unlike the warnings, by the time the NVOC's appeal deadline ran out in August 2015, the unchallengeable facts were those stated in the NVOC, including Oliver being vicious and Ms. Burnett having a duty to contain him.

5. The gravity of that seemed to bypass Ms. Burnett, because in September 2015 Mr. (James) Duer filed a complaint that Oliver ran into the street barking growling, acting

very aggressively, and getting within two feet of his daughter walking home from the bus stop. Ex. 9. Animal Services served another NVOC for a second vicious animal violation. Ex. 11.[1] By the time the appeal deadline for this second NVOC ran out in October 2015, this NVOC as well became unchallengeable.

6. On December 19, 2017, Ms. Duer filed a complaint that as she walked the street to her mailbox, Oliver came off the Burnett property, charged her, and bit her thigh. Ex. 13A. Animal Services served a third NVOC on Ms. Burnett, asserting that Oliver was unlicensed, a vicious animal running at large, and on December 19 performed an additional vicious act. Ex. 16. Mr. Burnett timely appealed. Ex. 18. We went to hearing on Wednesday.

7. Unless directed to by law—and no special directive applies to today's case—the examiner does 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.

8. The first violation under review is that, as of December 19, Oliver was unlicensed, in violation of KCC 11.04.030.A, which requires:

> All dogs and cats eight weeks old and older that are harbored, kept or maintained in King County shall be licensed and registered. Licenses shall be renewed on or before the date of expiration.

9. In December 2014, Animal Services issued a free, temporary license with an expiration date a month out. Ms. Burnett elected not to purchase a license when the freebie ran out. Unlike the typical case where an appellant offers an explanation like, "I didn't know there was a licensing requirement," or "I thought the person who gave/sold me the dog had licensed it," Ms. Burnett had actual knowledge of the licensing requirement. When asked at hearing why she did not purchase a license, she deflected the blame to her then-husband, saying he did not believe in licensing animals.

10. Her household may not believe in licensing, but licensing laws—and the consequences that flow from willfully ignoring those licensing laws—believe in her. Similarly, the undersigned's belief that the laws of aging do not apply to him, and he should be able to continue playing basketball at the same competitive level he did when he was half his current age, does not prevent the law's bite, as his injuries mount and his abilities. A $125 fine for Ms. Burnett may be less drastic than, say, the basketball-incurred sprained ankle the undersigned is currently hobbling on, but the end result is the same. Actual laws, not preferences for what those laws should be, are what control. Ms. Burnett's appeal on this violation is denied.

[1] In the September 2015 NVOC, Animal Services did not repeat the compliance terms from the July 2015 NVOC. In future cases, it might not hurt to reemphasize the required compliance terms in a second NVOC, but because the July 2015 NVOC terms were still in effect, its absence in the September 2015 NVOC is of no moment

11. Second, Animal Services asserts that Oliver was a vicious dog running at large on December 19, which KCC 11.04.230.I defines as:

> Any vicious animal or animal with vicious propensities that runs at large at any time it is off the owner's premises and not securely leashed on a line or confined and in the control of a person of suitable age and discretion to control or restrain the animal.

"Control" is itself defined in KCC 11.04.020.AA as

> 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.

12. This violation, then, is not dependent on Oliver having exhibited actual vicious behavior on December 19 (the matter analyzed below). Instead, the fact that Oliver was not controlled sufficiently to keep him from leaving the Burnett property, crossing the street, and approaching Ms. Duer, is enough to sustain the violation. Ms. Burnett's appeal on this violation is also denied.

13. The final violation and crux of the dispute is that Oliver bit Ms. Duer on December 19, violating KCC 11.04.230.H, which deems as nuisance:

> 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.

"Vicious" itself 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.

KCC 11.04.020.BB.

14. Ms. Duer's pictures of a wound looks very much like the dog bite marks we have seen in dozens of past cases, yet Ms. Burnett denies that Oliver bit Ms. Duer. This leaves us with three choices: Ms. Duer either engaged in a conspiracy to concoct or doctor photos to look like a dog bite, Ms. Burnett did not see the bite, or Ms. Burnett saw the bite and is actively lying.

15. Ms. Duer's hearing testimony was credible, and we observed nothing about her either in person or from reading the written record that lends any credence to the implausible hypothesis that she perpetrated an elaborate photo-technical hoax. Conversely, Ms. Burnett has exhibited a seemingly constant state of denial at every step of the way:

- denial that a December 2014 warning, stemming from Oliver aggressively charging people, needed to be taken seriously;

- denial that licensing laws applied to Oliver, and that she had a duty to license Oliver after Animal Services' temporary license expired in January 2015;

- denial that a half-hour, March 2015 conversation with Animal Services about the need to keep Oliver from running loose and accosting people needed to be taken seriously;

- denial in July 2015 that Oliver bit a neighbor and was vicious (per the unappealed NVOC);

- denial in September 2015 that Oliver was charging children at a bus stop and was again behaving viciously (per a second, unappealed NVOC);

- denial that the containment requirements in both 2015 NVOCs meant what they said;[2]

- denial that she was responsible for ensuring those terms were complied with;[3]

- denial in expecting that people should respond to an aggressive, 150–175 pound mastiff/German Shepherd mix in the levelheaded way they might respond to a aggressive, five-pound Chihuahua; and

- denial in describing the December 2017 altercation as the last in a "series of unfortunate events," instead of the entirely predictable result when a twice-vicious dog is not contained, by fence and/or via professional training.

16. Denial does not mean Ms. Burnett is lying. Yet existing in a constant state of denial reality tends to warp one's perspective of objective fact. Moreover, given what the pictures illustrate, even the most objective and astute observer might not have seen the bite happen. The photos do not show the violent aftermath of a massive dog inflicting a crushing seizure, followed by a violent head twist; if that had happened, given Oliver's power, Ms. Duer might be missing a chunk of thigh. Instead the pictures evidence more of a quick in-and-out, a lunge-and-snap. Exs. 14, 20. In several past cases we had no problem believing that appellants truly did not see that their dog had delivered a single bite, despite finding that the dog did in fact bite the victim. So while we do not find that Ms. Burnett is manufacturing a story, we do find that Oliver bit Ms. Duer on December 19.

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[2] Although there were no incidents between September 2015 and December 2017 significant enough for the Duers to file an additional complaint, we accept her testimony that Oliver came off the property during this period numerous times. The July 2015 NVOC instructed Ms. Burnett that a "competent and capable person must handle the animal at all times when attended outside." Ex. 7 at 001.

[3] Ms. Burnett argued at one point that she was only in the house for certain hours, presumably meaning she was not responsible to insure that Oliver was contained when only her minor children were home. Conversely, the July 2015 NVOC instructed Ms. Burnett that a "competent and capable person must handle the animal at all times when attended outside." Ex. 7 at 001.

17. Ms. Burnett raises provocation. If truly provoked, that would be a winning argument because "biting a human being" only qualifies if it is "without provocation." KCC 11.04.020.BB. Her theory of provocation is twofold.

18. First, Ms. Burnett asserts that several years ago Ms. Duer was involved in an interaction with Oliver at the edge of the Burnett property that resulted in Ms. Duer hitting Oliver. Ms. Duer refutes this. For the reasons described above, we find Ms. Burnett less credible than Ms. Duer. Yet even if we found that the incident of a few years ago happened the way Ms. Burnett described it, that would not change the legal result. For example, in *Stroop v. Day*, the court did not dispute the owner's "claim that a dog is capable of remembering specific instances from the past," and it accepted that the bite victim had chased the dog with a fence post four to six weeks prior to the incident in question. 271 Mont. 314, 319, 896 P.2d 439 (1995). Yet the court ruled that that past event could not, as a matter of law, qualify as provocation for a bite four to six weeks later. *Id.* Thus, even if Ms. Burnett's memory is correct (and as discussed above, we have reason to doubt its objective accuracy) and a few years ago Ms. Duer smacked Oliver, that was not provocation for Oliver biting Ms. Duer in December 2017.

19. In her written appeal statement, Ms. Burnett said that on December 19, after Oliver ran at Ms. Duer and proceeded to bark at her, Ms. Duer "proceeded to kick and hit Oliver in the face." Ex. 18. Ms. Duer denies this, saying she was too paralyzed with fear to react like that. Again, we find Ms. Duer the more credible. Yet as with the allegation above, under even Ms. Burnett's version of the December 19 event, there was no legally-sufficient provocation for the bite.

20. Viewing events from Ms. Burnett's lens, a twice-over vicious, 150–175 pound dog crossed the street, ran up to Ms. Duer, and started barking at her. In perhaps her soundest moment of the hearing, Ms. Burnett agreed that Ms. Duer's response on December 19 was reasonable. Yet even if Ms. Burnett had not agreed, and even if, contrary to the weight of the evidence, we found that Ms. Duer did kick and hit Oliver in the face on December 19, Ms. Duer's would have been a proportionate response, not "provocation" as the courts interpret that term.[4]

21. Moreover, this is not the situation where, say, Ms. Duer ostensibly punched or kicked Oliver's face, and Oliver grabbed onto the striking hand or foot. Instead, Oliver bit her on the *back* of her thigh, after circling behind her. The scenario, even as Ms. Burnett describes it, comes nowhere close to legal provocation. Ms. Burnett's appeal on the final violation is also denied.

22. Finally, although beyond the scope of our case, as the hearing was wrapping up the parties noted that Animal Services recently served Ms. Burnett with an order to remove Oliver from the County. Apparently, she has already moved Oliver. Without hearing the details or being in a position to rule on that removal, we have observed that:

[4] *See, e.g., Engquist v. Loyas*, 787 N.W.2d 220, 225 (Minn. 2010); *Bradacs v. Jiacobone*, 244 Mich. App. 263, 273–75, 625 N.W.2d 108 (2001); *Stroop v. Day*, 271 Mont. 314, 318, 896 P.2d 439 (1995); *Robinson v. Meadows*, 203 Ill. App.3d 706, 710–11, 561 N.E.2d 111 (1990).

> The code provides second chances for a vicious dog, that is, a dog declared vicious may typically be kept in the County so long as the owner complies with the NVOC terms [here, the terms set forth in the 2015 NVOC Ms. Burnett signed for]. But those are the "only" conditions under which such a vicious dog can remain in the County, and the code does not provide third chances: where an owner fails "to comply with any [such] requirement," the "animal shall not be kept in unincorporated King County." KCC 11.04.290.A.1 & 3.[5]

23. As to the penalties associated with a removal order, we offer the following thoughts. Animal Services typically levies a $1,000 penalty with a removal. Certainly, Ms. Burnett violated the 2015 NVOC for failing to keep Oliver contained, but she is already being fined for this via the $500 penalty for allowing a vicious animal to run at large. She would only be in violation of the removal order itself if she fails to abide by the removal order's is terms.

24. We have not seen the removal order here, but past removal orders have typically required (a) microchipping the dog, (b) notifying Animal Services of the microchip number, (c) removing the dog from King County, (d) providing proof to Animal Services that the new owner lives outside King County, and (e) verifying disclosure to the new owner that the dog was ordered removed from King County as a public nuisance or threat to public safety. So simply shipping Oliver out of the County would not get Ms. Burnett out of the $1,000 penalty associated with the removal order. But if she can provide Animal Services with proof of microchipping, the microchip number, removal, new owner residence, and disclosures to the new owner, she will not have violated the removal order. And although removal orders typically require that this be finished in 48 hours, we have ruled in past cases that accomplishing all of those steps in two days is unrealistic. Two *weeks* (which here would be April 6) seems more realistic.

DECISION:

1. Ms. Burnett's appeal is DENIED.

2. The corresponding $1,125 penalty is due to Animal Services by **May 23, 2018**.

ORDERED March 23, 2018.

David Spohr
Hearing Examiner

[5] https://www.kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/animal%20enforcement/2017/2017%20october/V17007257_Sharteer_V17007259_Ramirez_Report.ashx?la=en at ¶ 21.

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 *April 23, 2018.* 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 MARCH 21, 2018, HEARING IN THE APPEAL OF SUSAN BESS BURNETT-CORP, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NO. V18007741

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Sgt. Chelsea Eykel, Linda Duer, Susan Burnett, and Logan Hovey.

The following exhibits were offered and entered into the record:

Exhibit no. 1	Regional Animal Services of King County staff report to the Hearing Examiner for file no. V18007741
Exhibit no. 2	Complaint form by Linda Duer, dated November 28, 2014
Exhibit no. 3	RASKC investigation report no. A14007407
Exhibit no. 4	Complaint form by Linda Duer, dated March 9, 2015
Exhibit no. 5	RASKC investigation report no. A15001021
Exhibit no. 6	Email with complaint of June 21, 2015 incident by Genessa Rose, dated June 25, 2015
Exhibit no. 7	Notice of violation no. V1500 5068, issued July 29, 2015
Exhibit no. 8	United States Postal Service certified mail receipt no. 70130600000026479276
Exhibit no. 9	Complaint form of September 14, 2015 incident by James Duer, dated September 14, 2015
Exhibit no. 10	RASKC investigation report no. A15006161
Exhibit no. 11	Notice of violation no. V15005326, issued October 19, 2015
Exhibit no. 12	USPS certified mail receipt no. 70131710000126154946
Exhibit no. 13	
	A. Online complaint form of December 19, 2017 incident by Linda Duer, dated December 19, 2017
	B. Online complaint form of December 19, 2017 incident by James Duer, dated December 19, 2017
Exhibit no. 14	Photograph of injury
Exhibit no. 15	RASKC investigation report no. A17009963
Exhibit no. 16	Notice of violation no. V18007741, issued January 8, 2018
Exhibit no. 17	USPS certified mail receipt no. 70160750000032248478
Exhibit no. 18	Appeal, received February 13, 2018
Exhibit no. 19	Map of neighborhood
Exhibit no. 20	Photograph of injury

DS/ed

March 23, 2018

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file no. **V18007741**

SUSAN BESS BURNETT-CORP
Animal Services Enforcement Appeal

I, Elizabeth Dop, 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.

☒ caused to be 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 March 23, 2018.

Elizabeth Dop
Legislative Secretary

Burnett, Suzi
Hardcopy

Duer, Linda
Hardcopy

Eykel, Chelsea
Regional Animal Services of King County