

Dep't of Health & Mental Hygiene v. McNamara

OATH Index No. 2610/11 (Oct. 11, 2011)

Department of Health and Mental Hygiene seeks to take control of up to six to eight allegedly dangerous dogs based upon evidence that the animals have attacked or bitten five victims in the last two years and that the owner has failed to control and train the animals despite promising to do so. Administrative law judge found that hearing evidence established that the dogs were dangerous and, in an amended report, recommended that the owner should surrender the animals for evaluation, confinement, or permanent removal from New York City, as provided by the Health Code and deemed necessary by the Commissioner.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HEALTH and MENTAL HYGIENE
Petitioner
- against -
PHILOMENA MCNAMARA
Respondent

AMENDED REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This case concerns a petition by the Department of Health and Mental Hygiene (the “Department”) against respondent Philomena McNamara, of the Bronx, New York, who owns six to eight dogs. The petition alleges that the dogs have bitten five neighborhood residents since 2009 and that, based upon these facts, the dogs are “vicious or dangerous,” pursuant to section 161.07 of the New York City Health Code (the “Health Code”), title 24, Rules of the City of New York (“RCNY”) (Lexis 2011). The Department seeks to take possession of the animals for evaluation and appropriate disposition pursuant to the Health Code.

The case was scheduled for a conference on July 18, 2011, and for a hearing at 9:30 a.m. on July 25, 2011. Respondent failed to appear at the conference and then also failed to appear at the hearing before me. After offering proof that the petition and notice of hearing were properly served by certified mail upon respondent at her residence and at a post office box, respondent

was found to be in default. The hearing then went forward as an inquest, during which petitioner presented evidence in support of the allegations in the petition. Two neighborhood residents, including one who was bitten by one of the animals, and the deputy director of the Department's office of veterinary public health services described the past attacks by respondent's dogs.

Following the hearing, I issued a report on August 24, 2011, finding that the evidence established that respondent's dogs were "dangerous" within the meaning of the Health Code and recommending that respondent's dogs, except for a white poodle, "be surrendered immediately to the Department for evaluation." On September 6, 2011, the attorney for the Department sent me an e-mail requesting that the report be modified to recommend that, after taking custody of the dogs, the Department may make "such disposition as may be authorized by applicable law." Upon receiving this e-mail, I requested that the attorney mail respondent a letter explaining her request and also enclosing copies of the two post-hearing e-mails exchanged by the Department attorney and myself. The Department attorney mailed this letter to respondent on September 9, 2011, urging her to contact OATH upon receipt if she had objections to the Department request.

On September 12, 2011, I mailed to respondent and the Department attorney another letter summarizing the post-hearing communications and indicating that respondent should object or comment upon the Department request "no later than 5:00 p.m. on September 26, 2011." I further requested that the Department attorney explain whether, should the report be modified as requested, the Department would permit any further hearings before the dogs were destroyed. On September 15, the Department attorney wrote a letter to respondent and to me indicating that the Department would schedule no further hearings if it determined the dogs should be destroyed. To date, respondent has not communicated with OATH concerning the post-hearing request from petitioner. All of the letters and e-mails are included in the record as ALJ Exhibit 2.

Upon consideration of the hearing evidence and the post-hearing request made by petitioner, I am issuing this amended report, finding that the dogs are "dangerous" and recommending that respondent be required to surrender the animals to the Department for evaluation, confinement, or removal from New York City, as the Commissioner deems appropriate.

ANALYSIS

The hearing here concerns some six to eight German shepherd and husky dogs being kept by respondent at her residence in Bronx, New York. Pursuant to section 161.07(f)(1) of the Health Code, the purpose of the hearing is two-fold: for the Department to “show cause” as to why the dogs should not be found to be “dangerous” and “why conditions should not be imposed on the dog and owner to protect the public’s health and safety.” The issue of whether the dogs are “dangerous” is considered under this section, while the issue of conditions to protect the public is considered under the following Recommendation section.

At the hearing, several witnesses testified about the repeated attacks by respondent’s dogs. Catherine O’Brien lives next door to the McNamara residence in the north Bronx. She stated that, since Ms. McNamara moved into the house after the death of her father, there have been problems with respondent’s dogs. By June 2006, respondent had four to six large dogs living with her. Ms. O’Brien stated that on June 17, 2006, two of Ms. McNamara’s dogs ran on to Ms. O’Brien’s property and attacked Ms. O’Brien’s small Jack Russell dog. Ms. O’Brien believed her dog would have been killed if she had not intervened and forced the McNamara dogs to leave (Tr. 36).

In 2009 and 2010, as many as eight dogs lived with respondent. Ms. O’Brien testified that the McNamara dogs were regularly in Ms. O’Brien’s yard and chased her son and other neighbors (Tr. 37). Curlina Edwards, the deputy director of the Department office of veterinary public health services, testified that the Department began receiving complaints about the McNamara dogs beginning in 2009 (Tr. 9). Jerome Henkin complained that he was bitten in the right thigh by one of the dogs while walking past the property on December 20, 2009. Mr. Henkin reported that the injury required stitches, a tetanus shot, and antibiotic treatment. In a letter (Pet. Ex. 1(9)), Mr. Henkin stated that, following the attack, he had problems obtaining information from the owner.

Another resident named Pagan Ezequiel filed a complaint (Pet. Ex. 1(1)) indicating that he was attacked by a white shepherd on December 30, 2009, outside respondent’s residence on Riverdale Avenue. William Sheehan was bitten by a German shepherd on April 10, 2010, while walking a dog by respondent’s residence. He wrote on his complaint (Pet. Ex. 1(9)) that the dog’s name was “Stallion.”

Ms. O'Brien recalled that, on August 26, 2010, she and other neighbors called the police when a pack of the dogs broke loose and began "rampaging" through the streets and yards in the area. Multiple police officers responded to the location and were held at bay by the dogs. The police shot one particularly vicious dog with a tranquilizer gun (Tr. 38-39). Ms. O'Brien testified that, only a few days after the August 26 incident, Mr. Avgush, another neighbor, was attacked by two of the McNamara dogs and was taken to the emergency room (Tr. 41). Mr. Avgush filed a complaint with the Department and submitted medical records indicating that, on August 29, 2010, while gardening at home, he was bitten in the hand by a Siberian husky owned by respondent (Pet. Ex. 1(1) and (2)). The records indicate the Mr. Avgush lost a fingernail and had an "avulsion fracture" to his hand as a result of the attack.

Mary Moss recalled walking by the McNamara residence on the morning of February 16, 2011, when she was attacked by a pack of five dogs who pushed through the gate. The dogs slashed her down coat and one bit her in the thigh. She defended herself by swinging her pocket book at the dogs and they finally ran off (Tr. 28-29). The day after the incident she returned in her car to take photographs (Pet. Ex. 3) of the gate, of one of the dogs, and of Ms. McNamara. Ms. Moss also offered a photograph of her ripped coat and the puncture wound to her leg (Tr. 29-31).

On October 29, 2010, the Commissioner of the Department issued an order (Pet. Ex. 1(3)) directing respondent to submit the dogs for evaluation by a Department behaviorist, enroll the dogs in training, leash and muzzle the dogs whenever they are in any public place, submit proof that the dogs will be secured at the premises by means of a fence and secured gates, obtain licenses, and provide proof of immunization. The Department gave respondent permission to keep a white poodle, against which no complaints have ever been lodged (Tr. 15).

Since then, respondent has partially complied with the Department's demands. She submitted proof that all of the dogs were fully licensed and vaccinated (Tr. 11). She submitted a contractor's proposal to erect a new fence. In March 2011, respondent had six dogs taken to the Westchester Animal Hospital (Tr. 13). She took two of the dogs, a white German shepherd named Stallion and a white Siberian husky, to one obedience class. The trainer wrote a report indicating that Stallion was "very nervous and reactive" while the white husky was "calmer" but a leader "aloof to commands." The trainer indicated that both dogs should attend a training class for at least six weeks. After a class on March 15, 2011, respondent never returned (Pet Ex. 1(4)).

Since March respondent's cooperation has continued to wane. On June 21, 2011, respondent telephoned Ms. Edwards and had an extended discussion about the dogs. Respondent insisted that she was being harassed by the police. She stated that she could not replace the fence because she was out of work and could not afford it. She stated that the larger dogs were upstate with a friend and that only the white poodle was still with her. She promised to comply with the Commissioner's order in its entirety. Ms. Edwards asked that respondent supply additional records as to her finances, which respondent promised to do. According to a letter (Pet. Ex. 1(5)) filed the following day by respondent's attorney, he no longer represents respondent.

During the month preceding the hearing, Ms. O'Brien heard barking from the McNamara house day and night, suggesting that some or all of the dogs are still staying there (Tr. 44).

I found the testimony of Ms. O'Brien and Ms. Moss, corroborated by their notes, complaints, and photographs, entirely credible. I also found credible the hearsay complaints from the other victims, including Mr. Henkin, Mr. Ezequiel, Mr. Avgush, and Mr. Sheehan, that they had been attacked by several dogs and bitten. Based upon this credible proof, I find that six to eight German shepherds or huskies, residing with respondent in Bronx, New York, have attacked, as a pack, five neighborhood residents since 2009. In each attack, one of the dogs bit and caused physical injury to the victim.

I further find that, despite partial compliance by respondent in March 2011, she has still failed to obey Department orders that she submit all of the dogs for evaluation and training and erect a new fence and gate on her property to ensure that the dogs cannot escape. Similar proof has been found sufficient in past cases to establish that dogs were "dangerous" within the meaning of Health Code section 161.07. *Dep't of Health & Mental Hygiene v. Yuastella*, OATH Index No. 2694/09 (June 17, 2009); *Dep't of Health v. Stallone*, OATH Index No. 1486/97 (July 16, 1997).

FINDING AND CONCLUSION

The Department proved by a preponderance of the credible evidence that, pursuant to Article 161 of the New York City Health Code, the German shepherds and husky dogs residing with Ms. McNamara on Riverdale Avenue are vicious or dangerous animals.

RECOMMENDATION

The final issue concerns the conditions necessary to protect the public from respondent's dangerous dogs. Pursuant to section 161.07, the Commissioner "may order any action necessary to control a dangerous dog and prevent injuries to persons," including humane euthanasia, permanent removal from the City, muzzling, evaluation at the owner's expense, spaying or neutering, microchipping, and confinement in a place with barriers between the dogs and passersby. 24 RCNY § 161.07(g). In this case, the Department seeks to have all of the dogs residing with respondent, except her white poodle, removed and, as made clear by their post-hearing request, disposed of by any of the seven alternatives, including spaying, neutering, or destruction, which the Commissioner deems appropriate.

The hearing evidence showed at least six attacks and multiple injuries inflicted by these dogs, as well as respondent's dilatory efforts to control or contain the dogs. The evidence also demonstrated that respondent's husky and German shepherd dogs attacked the victims as a pack and was vague as to which dog or dogs caused the injuries. Based upon these facts, taking possession of the dogs for evaluation, confining the dogs in a shelter, or removing the dogs permanently from the City seem like necessary and appropriate measures to ensure that the dogs do not attack any more community residents. *See Yuastella*, 2694/09 at 5. The need for prompt and effective Department action in taking control of these animals is made all the more apparent by respondent's failure to appear at the hearing or to reply to two post-hearing letters.

The evidence here was insufficient, however, to demonstrate a need to muzzle, microchip, spay, neuter, or destroy any of the dogs. No evidence was presented at the hearing as to the need for or the probable consequences of any of these measures. As to muzzling and microchipping the dogs, these remedies would only be arguably appropriate if the dogs remained with respondent. Yet respondent's lack of consistent cooperation indicates that, if the dogs were returned to her, she could not be trusted to keep the animals muzzled or under control, just as she has been unable, over the course of several years, to maintain a fence to keep the animals on her property. No evidence was offered that spaying or neutering these dogs would prevent future attacks or that their destruction was necessary due to the failure of other means of controlling their behavior.

Two of the injuries which were inflicted were "severe" within the meaning of the Health Code. Under section 161.02 of the RCNY, an injury inflicted by a dog is "severe" where there is

a broken bone or where there is “a disfiguring laceration requiring either multiple stitches or cosmetic surgery.” Mr. Henkin’s letter indicates that he required stitches for the injury to his right thigh in 2009. Mr. Avgush’s medical records indicate that he suffered an “avulsion fracture” of his hand in 2010. Both of these injuries were “severe” and would warrant immediate confinement of the dog or dogs to a shelter, pending a hearing as to whether the dogs were “dangerous.” 24 RCNY § 161.07 (f) (3). Unfortunately, no identifying information was offered for the dog that attacked Mr. Henkin and the only identifying information as to the animal that attacked Mr. Avgush was that it was a Siberian husky, a description that would seem to fit several of the dogs owned by respondent. Thus, even though it would appear that more severe measures might be appropriate to protect the public from the dogs that injured Mr. Henkin in 2009 and Mr. Avgush in 2010, the record here is inadequate to demonstrate which of respondent’s dogs were responsible for these injuries.

The two prior published OATH cases brought by the Department to control dangerous dogs support the conclusion that, based upon this record, taking control of the dogs for evaluation and possible permanent removal from New York City is warranted, but that muzzling, spaying, and destruction have not been shown to be necessary. In *Stallone*, the only prior case in which destruction of a dog was sought by the Department, the Department presented proof that the dog had bitten eight people, was observed for several months in a shelter, and was so aggressive that it had viciously attacked another dog, forcing it to be put to sleep. Judge Lewis found that relying upon the owner to restrain or muzzle the dog or housing the dog in a shelter either in or outside the City was not feasible. Under these facts, the judge found that the only option left to protect the public was to destroy the dog. *Stallone* strongly suggests that other remedies should be shown to be ineffective before destruction of the animals is deemed necessary.

In *Yuastella*, the Department proved that a dog bit two small children and sought to have the animal taken away for evaluation. In her decision, Judge Salzman noted that, following the evaluation, the Department could seek further findings as to other conditions that might be necessary. *Yuastella* suggests that, following an evaluation, should the owner raise objections to future actions proposed by the Department such as destroying the dogs, another hearing should be held to show that the dogs are still dangerous and that further conditions are needed to protect the public.

The record presented here supports the following recommendations as to the remedies sought: that all of the dogs residing with respondent, with the exception of a white poodle not alleged to be or proven to be dangerous, be surrendered immediately to the Department and evaluated, at respondent's expense. Following the evaluation, the Department may confine the dogs or remove any or all of the dogs from New York City, as the Commissioner deems appropriate.

John B. Spooner
Administrative Law Judge

October 11, 2011

SUBMITTED TO:

THOMAS FARLEY, M.D., M.P.H.
Commissioner

APPEARANCES:

MARTHA ROBINSON, ESQ.
Attorney for Petitioner

No Appearance for Respondent