OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

KATHERINE BENNETT, **Appellant,** **v.** **CITY OF TACOMA, ANIMAL CONTROL AND COMPLIANCE,** **Respondent.**	**HEX2024-014** **FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER**

THIS MATTER came on for hearing on October 24, 2024,[1] before JEFF H. CAPELL, the Hearing Examiner for the City of Tacoma, Washington. Appellant Katherine Bennett ("Appellant" or "Bennett") appeared at the hearing represented by Attorney Leila Arefi-Pour. Deputy City Attorney Jennifer J. Taylor represented the City of Tacoma, Animal Control and Compliance ("Animal Control" or "ACC") at the hearing. Witnesses were sworn and testified. Exhibits were submitted and admitted, and arguments were presented and considered.

The following witnesses testified at the hearing (in order or appearance):[2]

- Robin Bowerman, ACC;
- Joseph Satter-Hunt, ACC; and
- Katherine Bennett.

From the evidence in the hearing record, the Hearing Examiner makes the following:

[1] This hearing was continued once upon the request of Appellant and without any objections from the City. By agreement of the parties the hearing was finally conducted on October 24, 2024, over Zoom with no cost to any participant with video, internet, and telephonic access.

[2] Individuals who participated in the hearing may, at times, be referred to by first or last name only hereafter. No disrespect is intended.

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FINDINGS OF FACT[3]

1. Appellant Katherine Bennett currently resides within the Tacoma city limits at, 4014 Tacoma Avenue South, Tacoma, WA 98418 (the "Bennett Residence"). Bennett is the owner of a nine-year-old, licensed, blackish or brownish brindle, neutered male Mastiff dog named Otis ("Otis" or the "Dog").[4] Both ACC's July 24, 2024 Dangerous Dog Notice and the Humane Society's July 12, 2024 Animal Bite Incident Report describe Otis's coat color as black brindle. Bennett testified that Otis is brown brindle in color, not black.[5] ACC's "HANDWRITTEN STATEMENT FORM" admitted to the hearing record as Exhibit R-3 lists Otis as "Grey." No photographs of Otis were presented by either party at the hearing. Bowerman did see Otis in person when she impounded him. *Bennett Testimony, Ex. R-1, Ex. R-3, Ex. R-6*.

2. Another dog, belonging to William Noble,[6] resides at the Bennett Residence. This dog is black and white in color. ACC identified William Noble as an owner of Otis in Exhibit R-2, but by the time of the hearing, Officer Bowerman indicated that she was aware that Noble was not Otis's owner. Bennett confirmed that Otis in not Noble's dog, but that Othello, the other dog who resides at the Bennett Residence is Noble's. There are four pets

[3] Much of the initial Findings of Fact are rhetorically phrased in a way that indicates a particular witness testified to something. It is a fact that these witnesses testified as they did. Most of this is background rather than elemental to the determination of whether Otis is a Dangerous Dog. Whether that testimony is found actually to be factual in relation to the elements of finding a dog to be dangerous is addressed at Finding of Fact 21, as well as in the Conclusions of Law as appropriate.

[4] In the City's documentary exhibits, Otis is referred to primarily as "Odis," apparently based on Bowerman's inquiry of William Noble as to the correct spelling of the Dog's name. Bennett indicated at the hearing that "Odis" is incorrect and that her dog's name is spelled "Otis." This spelling is used herein. *Bennett Testimony; Ex. R-1, Ex, R-2.*

[5] Interestingly, if one does a Google images search of both "black brindle mastiff" and "brown brindle mastiff" one will see mixed results in both searches of dogs that look more black or more brown.

[6] Exhibit R-2 refers to this person as "William Noble" as well as "Mr. Williams" and "Mr. William." The City was apparently confused about his name as well with counsel even correcting a question during the hearing from referring first to "Mr. Noble" and then to "Mr. Williams."

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total in the Bennett Residence—the two dogs already mentioned and two cats. Neither side offered pictures of Othello at the hearing either. Bowerman testified that she was aware of another dog at the Bennett Residence at the time of the Incident, but she never saw Othello. *Bowerman Testimony, Bennett Testimony; Ex. R-2*.

3. Animal Control issued a Dangerous Dog Notice for Otis dated July 24, 2024, which is the subject of this appeal (the "DDN"). *Ex. R-1.*

4. ACC's decision to issue the DDN to Appellant Bennett for Otis resulted from an incident alleged to have occurred on July 12, 2024, at the Bennett Residence (these events are sometimes referred to below collectively as the "Incident"). *Bennett Testimony, Bowerman Testimony; Exs. R-1~R-7.*

5. On July 12, 2024, Officer Bowerman was dispatched to the Bennett Residence on a call indicating that someone had been bit by a dog and was receiving treatment from Tacoma Fire Department ("TFD") personnel. When Bowerman arrived at the Bennett Residence, TFD personnel were still present, but preparing to leave. The victim of the Incident had already left the Bennett Residence. TFD personnel told Bowerman that they had treated someone, and that the patient was headed to the hospital. *Bowerman Testimony*.

6. Officer Bowerman indicated that she contacted William Noble at the Bennett Residence on July 12, 2024, and ascertained that he did not witness the alleged Incident. Bowerman obtained this information apparently while Noble was taking a phone call during Officer Bowerman's contact.[7] Bowerman testified that someone identified Kenauna Allen as the bite victim in the Incident, but Bowerman did not indicate initially in her testimony who made

[7] The phone call may have been from Bennett, but that is not entirely clear. Bowerman testified she spoke with Bennett, perhaps over William Noble's phone, before she left the Bennett Residence. Bennett testified that she did not speak with Bowerman until later that day or the next day.

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that identification. Kenauna Allen was no longer at the Bennett Residence at that time. Bowerman later testified that "she understood" Kenauna Allen to have been attacked and bitten by Otis.[8] This understanding appears to have come from Bowerman having spoken with Caydence Noble[9] who appears to have indicated to Bowerman that she was present during the Incident. *Bowerman Testimony, Ex. R-2.*

7. Bennett herself was also not present to witness the Incident. Again, Bowerman testified that she spoke with Bennett over the phone while present at the Bennett Residence on July 12, 2024. Bowerman testified that she explained to Bennett that there had been "a situation" with her dog and that the dog would have to be impounded. Bowerman testified that Bennett was upset and crying. Bowerman testified that Bennett said, "that is why she keeps the dog in a crate because he will attack people he doesn't know." Bennett denies having said this. *Bowerman Testimony, Bennett Testimony*.

8. Bowerman impounded Otis on the day of the Incident and took him to be confined at The Humane Society for Tacoma & Pierce County ("HSTPC") where he has been since. Bowerman testified again that she impounded Otis because it was her understanding that Otis had attacked Kenauna Allen from having spoken with "Ms. Noble." *Bowerman Testimony*.

9. Bowerman testified that Otis is a large dog. Bowerman testified that she determined Otis to be a Dangerous Dog, "as that term is defined under the code" on the basis of "pictures, witness statements and medical records." *Id*.

[8] When Bowerman testified as to her understanding of the Incident, Appellant's counsel objected to the testimony as hearsay, which it was. The City's case was predominately hearsay, which will be addressed below.
[9] Officer Bowerman referred to this person as "Candace Noble" at the outset of her testimony regarding this interaction. Written exhibits indicate her name as "Caydence Noble." *Ex. R-2, Ex. R-3*.

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10. When Officer Bowerman was later picking up statements[10] and medical records "from the residence," she saw "Ms. Allen" and saw that she had a wound to her face. Bowerman was shown the photographs comprising Exhibit R-4 at the hearing and confirmed that these photos were obtained on her visit. She testified that the pictures are of "Ms. Allen" and that the picture showing a part of Ms. Allen's face appeared consistent with the wound(s) she saw on Ms. Allen in person on her visit. *Id*.

11. On this visit, Officer Bowerman picked up the "HANDWRITTEN STATEMENT FORM" that is now Exhibit R-3 (the "Declaration."). A prior version of the Declaration had been delivered to ACC, but it was lost. As a result, a new Declaration was produced. This is the version now in the hearing record. Bowerman testified that the Declaration supported her conclusion that Otis is a Dangerous Dog and that she relied on the Declaration in issuing the DDN. *Id*.

12. Officer Bowerman was told on her visit that Ms. Allen had received treatment for her injuries on the day of the Incident and on one subsequent doctor's visit because of infection. Officer Bowerman has no firsthand knowledge of Ms. Allen's treatment other than what she says she was told and what is in the documents comprising Exhibit R-5. *Id*.

13. Officer Bowerman testified that ACC has not received any prior complaints about Otis. There is no evidence that provocation played a part in the Incident.[11] Bowerman testified that ACC is seeking to have Otis euthanized as a result of the DDN. *Id*.

14. The Declaration states that two dogs were present during the Incident. The

[10] Officer Bowerman testified regarding plural "statements" more than once during the hearing. The only statement or declaration on the hearing record is found at Exhibit R-3. Later she referred to statement in the singular.
[11] It is also impossible to inquire further from a first-hand witness (possibly Caydence Noble), or the alleged victim, Kenauna Allen, because neither one was present at the hearing. Counsel for the City made a comment that they were probably in school, but the City made no argument that being in school made them unavailable for purposes of hearsay/evidentiary analysis in this matter.

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Declaration states "The big dog [unreadable but appears to be "Otis"][12] started sniffing my arm and started biting me. Both dogs starting [sic] biting me, but the black dog started first." Bowerman testified that "Ms. Johnson"[13] told her (Officer Bowerman) that Ms. Allen had told Ms. Johnson that "the other dog was biting at her but did not bite her" contrary to the written Declaration."[14] *Bowerman Testimony; Ex. R-3*.

15. On cross examination, Officer Bowerman was asked how she can be sure the other dog (not Otis) did not do any damage. Officer Bowerman replied that she was going by what she was told.[15] On additional questioning from the Examiner, Officer Bowerman indicated that she did not know for certain who wrote the Declaration. The Declaration's first signature is from "Latrice Johnson" with a slash and then "Kenauna Allen" also written in. *Id*.

16. Bowerman concluded her testimony by answering "yes" to the leading question "are you satisfied that Otis is the dog that allegedly caused the injuries to Ms. Allen." Otis is certainly the dog alleged to have caused Ms. Allen's injuries, but whether he actually did cause them is another question from an evidentiary standpoint. *Bowerman Testimony*.

17. Officer Joe Satter-Hunt also testified at the hearing. Officer Satter-Hunt is the ACC's supervising officer. Officer Satter-Hunt has no first-hand knowledge of the Incident.[16] From his testimony, it appears that Officer Satter-Hunt signed off on issuing the DDN because

[12] Because the author of the Declaration, whoever that was, was not present at the hearing, no confirmation was possible.
[13] Ms. Johnson, or Latrice Johnson, is apparently Kenauna Allen's aunt, and may be her legal guardian.
[14] "Her" in this case presumably means Ms. Allen and not Ms. Johnson, but that was not made clear from the wording of testimony. This sentence is a perfect example of double hearsay, and it exemplifies the evidentiary problems with the City's case here.
[15] This testimony is also representative of the pervasive problems with the City's case, as will be addressed further below.
[16] Particularly in answering questions on cross-examination, Officer Satter-Hunt began answers with "I imagine," or "I'd imagine." These answers are not evidence. They are suppositions.

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of the severity of the injuries sustained by Kenauna Allen. Beyond the injuries presented, Officer Satter-Hunt appeared to also rely on the statement relayed to him from Officer Bowerman as allegedly made to her by Bennett about Otis having a propensity to attack strangers. Again, Bennett denies having made this statement.[17] *Satter-Hunt Testimony; Ex. R-5*.

18. Bennett testified that 9-year-old Otis has hip dysplasia on his left side.[18] She testified that Otis does not jump due to his hip dysplasia and his weight and build. Otis also has vision impairment due to cherry eye in his right eye.[19] Bennett testified that Exhibit R-3's description of a black dog that "jumped up" to bite Kenauna Allen in the face does not match to Otis because he is not black and cannot jump. *Bennett Testimony; Ex. R-3*.

19. Bowerman and Bennett disagree with each other over many points of their interactions. These include the following:

(a) Bowerman said she spoke with Bennett over the phone on July 12, 2024, while Bowerman was still at the Bennett Residence. Bennett stated that she was on the phone with William Noble and could hear what was going on, but that she did not speak directly with Bowerman on July 12, 2024, at or near the time of the Incident.

(b) Bennett claims Bowerman denied that Otis would be euthanized. Bowerman denies making this statement.

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[17] Were it not allegedly a statement against interest made by a party opponent, this statement would be another example of double hearsay when used by Satter-Hunt to approve issuing the DDN.

[18] The Examiner being somewhat of a dog aficionado was aware that hip dysplasia is common in mastiffs. The website www.mastiff.org states this about this condition:

> **Canine Hip Dysplasia (CHD)** is an orthopedic problem which can result in remodeling of the femur, wearing away of the acetabulum, and cause arthritic changes in the hip joints. Although Canine Hip Dysplasia is primarily an inherited defect, the severity of the disease can be influenced by environmental factors, i.e.; growth rate, diet, and exercise. Based on MCOA Health Surveys, Canine Hip Dysplasia is one of the primary health problems in Mastiffs. Hip Dysplasia can be a very painful condition and the animal can become weak and lame in the hind quarters due to pain associated with the degeneration of the hips.

[19] The American Kennel Club describes cherry eye as a "[p]rolapse of [a dog's] third eyelid gland that occurs when the connective tissue around the gland weakens, leading the gland to fall and protrude out of its normal location. Often, you'll see a pink or reddish mass in the corner of the eye." Cherry eye is more common in mastiffs than some other breeds. https://www.akc.org/expert-advice/health/cherry-eye-in-dogs/.

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(c) Bennett claims that Bowerman tried (at some point, presumably not on July 12, 2024) to persuade Bennett to euthanize Otis. Bowerman denies this.

(d) Again, Bennett denies having stated that Otis has a propensity to attack strangers. Bennett did admit to stating in a later conversation after Otis had been impounded, that Otis "sometimes has a difficult time with males that he is not familiar with."

None of the foregoing have a material bearing on the elements for finding a dog to be a Dangerous Dog in the city of Tacoma under TMC[20] 17.01.010.15. It did appear strongly from City testimony that the statement Bennett denies having made, addressed above at 19.(b), was a factor in the City's determination to issue the DDN. The 19.(b) testimony and all of the disputes set forth in this Finding are addressed (or purposely omitted, as the case may be) as to their legal import below at Conclusion of Law 11.

20. Bennett testified that she has a plan for Otis if he is released that includes possibly moving to another location with no other pets, training him, muzzling and leashing him as appropriate, getting insurance, and even possibly rehoming him. *Bennett Testimony*.

21. Referencing back to footnote 3, the Examiner now makes a list of actual facts, that were proved by a preponderance of the evidence at the hearing, and that relate to the elements for finding a dog to be a Dangerous Dog in the city of Tacoma under TMC 17.01.010.15:

(a) Kenauna Allen was injured by a dog on July 12, 2024, *Bowerman Testimony; Exs. R-1~R-7*.

(b) Otis and Othello were both present at the Bennett Residence on July 12, 2024, when the Incident occurred. *Bowerman Testimony, Bennett Testimony*.

(c) Kenauna Allen received treatment for her injuries, Bowerman

[20] "TMC" is the common abbreviation for the Tacoma Municipal Code. The abbreviation is used throughout this Decision.

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Testimony; *Ex. R-5*.

(d) Kenauna Allen's injuries were severe, under the definition found at TMC 17.01.010.31 in that she had to have sutures. *Bowerman Testimony; Ex. R-5.*

These elemental findings could have been very different if there had been a witness at the hearing who actually witnessed the Incident, and who could clarify and corroborate the predominately hearsay evidence.

22. Any Conclusion of Law below which may be more properly deemed or considered a Finding of Fact, is hereby adopted as such.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction in this matter pursuant to Tacoma Municipal Code ("TMC") 1.23.050.B.8 and TMC 17.04.031.

2. Pursuant to TMC 17.04.031.B, in appeal proceedings before the Hearing Examiner challenging a Dangerous Dog declaration, Animal Control bears the burden of proving, by a preponderance of the evidence, that the animal(s) in question meet(s) the definition of a Dangerous Dog. This definition is as follows:

> "Dangerous dog" means any dog that, according to the records of the appropriate authority:
>
> a. unprovoked, inflicts severe injury on or kills a human being on public or private property; or
>
> b. unprovoked, inflicts injuries requiring a domestic animal to be euthanized or kills a domestic animal while the dog is off the owner's property; or
>
> c. while under quarantine for rabies bites a person or domestic animal; or
>
> d. was previously declared to be a potentially dangerous dog, the owner having received notice of such declaration, and the dog is

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again found to have engaged in potentially dangerous behavior; or

e. is owned or harbored primarily or in part for the purpose of dog fighting or is a dog trained for dog fighting; or

f. unprovoked, attacks a "dog guide" or "service animal" as defined in Chapter 70.84 RCW and inflicts injuries that render the dog guide or service animal to be permanently unable to perform its guide or service duties. *TMC 17.01.010.15.*

3. The above criteria are disjunctive. As a result, the City must only prove that one of the listed criteria was met for a designation to be upheld on appeal. In the DDN, Animal Control checked subsection a. as the basis for issuance of the DDN on Otis.

4. "Preponderance of the evidence" means that the trier of fact is convinced that it is more probable than not that the fact(s) at issue is/are true.[21]

5. The evidence presented by the City to meet its burden of proof in this appeal was highly problematic. The City presented no witnesses who actually witnessed the Incident. What evidence the City did have detailing the Incident was hearsay, and in some cases, double hearsay.[22] Washington State Rule of Evidence 801(c) defines "Hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[23]

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[21] *Spivey v. City of Bellevue*, 187 Wn.2d 716, 733, 389 P.3d 504, 512 (2017); *State v. Paul,* 64 Wn. App. 801, 807, 828 P.2d 594 (1992).

[22] Hearsay within hearsay (or double hearsay) is something that "occurs when a statement contains another statement, and both are offered as evidence. For example, if a witness testifies about what someone else said, and that person was quoting a third party, both layers of statements are considered hearsay." https://www.rulesofevidence.org/fre/article-viii/rule-805/#:~:text=Definition%3A%20Hearsay%20within%20hearsay%2C%20or,of%20statements%20are%20considered%20hearsay.

[23] *Rule ER 801 - Definitions*, Wash. R. Evid. 801.

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6. Hearing Examiner Rule of Procedure[24] 1.11. titled "Evidence" offers the following on evidence at hearings:

> **1.11 Evidence**
>
> (a) Evidence, including hearsay evidence, may be admissible if in the judgment of the Examiner it is the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs.
>
> (b) The Examiner may exclude evidence that is irrelevant, unreliable, immaterial, or unduly repetitious.
>
> (c) The Examiner shall exclude evidence that is privileged or excludable on constitutional or statutory grounds.
>
> (d) The Examiner may take official notice of enacted provisions of law, of codes or standards adopted by a recognized organization, of matters within his specialized expertise and of notorious or commonly understood facts.
>
> (e) In addition to the foregoing, the Examiner looks to the "Washington State Court Rules: Rules of Evidence" for non-binding guidance on evidentiary issues.[25]

HEXRP 1.11(a) substantially mirrors the first sentence of RCW 34.05.452(1),[26] a section of Washington's Administrative Procedure Act (APA) which applies generally to administrative hearings in Washington, such as the present appeal. HEXRP 11.1(a) states that hearsay evidence "***may*** be admissible if in the judgment of the Examiner it is the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs."[27] [Emphasis added.] This is discretionary to the Examiner. Even if the hearsay evidence "is the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct

[24] Abbreviated as "HEXRP."
[25] HEXRP 11.1(e) follows from RCW 34.05.452(2) which also looks to the Washington State Rules of Evidence as the general baseline for evidentiary issues in an administrative proceeding.
[26] The two provisions are the same except that the APA provision refers to the "presiding officer" rather than the "Examiner."
[27] Even in the APA provision, which state that hearsay evidence ***is*** admissible, the presiding officer can exclude hearsay if it is not reasonable to rely on such evidence.

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of their affairs," the hearsay evidence is not *per se* or mandatorily admissible. The City's case was overwhelmingly hearsay because no witness at the hearing could testify from firsthand experience as to what happened during the Incident. Virtually all City testimony relevant to the elements of finding a dog to be a Dangerous Dog under TMC 17.01.010.15 was from Officer Bowerman relating second hand what someone else told her, not anything she actually witnessed.[28] In other words, the City's evidence consisted of "statement[s], other than one[s] made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[29] Officer Bowerman was essentially the City's sole declarant.

7. Appellant objected to the hearsay testimony at the hearing. The Examiner allowed all testimony to be offered throughout the course of the hearing over Appellant's objections, but with the admonition that he would determine what weight to give it on the way to making this Decision. Upon reviewing the video recording of the hearing ***at length,*** the Examiner concludes that if all the City's hearsay and even double hearsay testimony had been excluded (or if it is given no weight now), the City did not make a *prima facie* case meeting its burden of proof. This is so because there is no evidence other than hearsay and double hearsay to establish that Otis, as opposed to Othello, caused Kenauna Allen's injuries. The Appellant had no opportunity to examine anyone who Bowerman testified had identified Otis as the inflictor of Kenauna Allen's injuries.

8. The Declaration, likewise, is incapable of being cross-examined. The Declaration is hearsay. It was offered by Bowerman to prove the truth of the matter asserted (i.e., that Otis bit Kenauna Allen), but its content was made by someone other than Bowerman. The City

[28] *See e.g., FoF 12, 14, 15. "FoF" is an abbreviation for "Finding of Fact.*
[29] *Rule ER 801 - Definitions*, Wash. R. Evid. 801.

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emphasized the language in the Declaration was written "under penalty of perjury" which phrase is notated on the form. The Examiner is unaware of how this phrase cures the hearsay problem especially when the City ended up admitting that it did not know who even authored the Declaration. Bowerman then contradicted the Declaration with double hearsay in an effort to narrow the attack on Kenauna Allen to Otis alone.[30] The Examiner concludes that the Declaration can be given no weight. Its author is not known. It cannot be cross-examined. It is inconsistent with other (albeit hearsay) testimony, and it casts further confusion on which dog bit Kenauna Allen when it identifies Otis as "Grey."

9. Proof of the injuries themselves only eek past the preponderance of evidence threshold because of the Exhibit R-5 medical records, which can be an exception to the hearsay exclusion under ER 803(a)(4).[31] Even then not labelling Exhibit R-5 hearsay requires a somewhat loose reading of ER 803(a)(4). Otherwise, all evidence of Kenauna Allen's injuries and treatment is hearsay from Bowerman.

10. As found in Finding of Fact 19, the City relied on a disputed statement alleging Otis has a propensity to attack strangers. The City clearly relied on this disputed statement as proof that Otis had acted in conformity with this propensity on the occasion of the Incident. The Examiner concludes that this disputed statement has no evidentiary value for two reasons. First, it runs afoul of ER 404 which states that character evidence is not admissible to prove the conduct at issue on a particular occasion. This rule is expressly applicable to persons, but here a dog—Otis—stands in the position of being the accused against whom the statement is aimed

[30] *See FoF 14,* for Bowerman's testimony offering what Ms. Johnson told her that Ms. Allen had told Ms. Johnson.
[31] ER 803(A)(4) titled "*Statements for Purposes of Medical Diagnosis or Treatment, provides that,* "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are and exception to the hearsay rule. *Rule ER 803 - Hearsay Exceptions; Availability Of Declarant Immaterial*, Wash. R. Evid. 803.

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as proof. Because of ER 404, the Examiner has never given much, if any, weight to statements of good character offered by dog owners in an effort to show either that their dog could not have acted in a manner that gets them declared dangerous or potentially dangerous, or at least as mitigation. The Examiner gives no weight to Appellant's Exhibits A-1 and A-2 for that reason. The other side of that coin, presented here, is just as suspect. Second, Bennett denies having made the character/propensity statement in any event. The Examiner gives the statement no weight.

11. This disputed statement raises the overall question of credibility in this hearing. As the trier of fact, the Examiner must make credibility determinations where necessary and appropriate. The Examiner does not find either Bowerman or Bennett to be not credible. Sometimes, actually most times, in a contested hearing evidence conflicts. Sometimes that is due to the lack of veracity, or truthfulness of a witness, other times it is simply due to the faultiness of human perception and memory. The Examiner concludes that the conflicting evidence here is due to the latter, and not the former. The discrepancies in testimony listed at Finding of Fact 19 have little materially to do with a determination on the elements of a Dangerous Dog in any event, especially in the absence of any firsthand testimony regarding the alleged Incident.

12. Whether Otis is brown brindle or black brindle, or even "Grey" was not established at the hearing by a preponderance of the evidence. Whether Otis is the (black) dog that "jumped up" and caused Kenauna Allen's injuries was also not established by a preponderance at the hearing. No witness could identify Otis and testify as to his part in the

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Incident. Although the Examiner has admitted and even partially relied on hearsay evidence in similar hearings in the past, he has done so where the hearsay evidence corroborated at least some firsthand evidence. The Examiner rejects the overwhelming hearsay evidence offered by the City because it is primary, not corroboration. This is consistent with what little case law is available on this issue in Washington State.[32] Under HEXRP and RCW 34.05.542(1) hearsay evidence may be admissible. The Examiner admitted it all from the standpoint of letting it be said, but after extensive post-hearing review, the Examiner cannot conclude that the City's hearsay-based and otherwise problematic case can establish the threshold element of Otis having been the attacker and the cause of the injuries by a preponderance of the evidence.

13. In closing remarks, the City indicated that it had no problem with reducing the designation here from Dangerous Dog to Potentially Dangerous Dog. Such a reduction does not cure the evidentiary problems with the City's case, however. While the Examiner can, and has concluded that both Otis and Othello were present at the Bennett Residence at the time of the Incident, the conflicting hearsay testimony of Findings of Fact 14 and 15, in which the Examiner puts little to no weight, cannot resolve the issue of which dog committed the attack on Kenauna Allen causing her injuries. Without anything conclusive, at least by a preponderance, as to whether it was Otis, Othello, or both who bit or injured Kenauna Allen, a Potentially Dangerous Dog Declaration is still unsupported under TMC 17.01.010.27. The elements of the lesser designation still have to be proved by a preponderance, which the City's hearsay and other problematic evidence did not do. Given the injuries sustained by Kenauna Allen, it is unfortunate that it could not be established which dog or dogs was responsible. The

[32] *See Pappas v. Emp't Sec. Dep't, 135 Wn. App. 852, 146 P.3d 1208 (2006)(Although hearsay may be admissible in an administrative proceeding, a decision should not be based entirely on hearsay).*

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severity of the injuries does not alter or obviate the burden of proof, however.

14. TMC 17.04.031.C. states that "The owner is responsible for paying all fees owed to the City for the care of the animal." This applies to boarding costs if a dog is "declared to be dangerous" as set forth in the first sentence of this code section. Imposing those costs on Bennett would require the DDN to be upheld in this appeal.

15. Any Finding of Fact, which may be more properly deemed or considered a Conclusion of Law, is hereby adopted as such.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner issues the following:

DECISION AND ORDER

1. Based on the Findings and Conclusions above, the present appeal is GRANTED and the City of Tacoma's Dangerous Dog Notice issued to Otis is RESCINDED because the City did not prove that Otis was the dog that inflicted the injuries to Kenauna Allen by a preponderance of the evidence.

2. Otis shall be released from The Humane Society for Tacoma & Pierce County into Bennett's care.

3. The Examiner cannot order Otis's boarding costs to be borne by Bennett because the DDN is rescinded for failure of proof. The City and the HSTPC can address the matter of costs between themselves.

4. ADVISORY ONLY. While the Examiner cannot order Bennett to take any safety and/or precautionary measure in her care and ownership of Otis, given the rescinding of

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the DDN, Bennett would be wise still to take whatever measures she deems necessary to prevent a new incident with Otis. Were such a new incident to occur, the Examiner would expect the City might have a less hearsay-reliant case the next time, and things might not go as well from Otis's perspective. For Otis's hearing-free future, the Examiner advises taking some or all of the kind of measures Bennett already testified to being ready to take in order to prevent any such new incident.

DATED this 5th day of November, 2024.

JEFF H. CAPELL, Hearing Examiner

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NOTICE

RECONSIDERATION/APPEAL OF EXAMINER'S DECISION

RECONSIDERATION TO THE OFFICE OF THE HEARING EXAMINER:

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner requesting reconsideration of a decision or recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within l4 calendar days of the issuance of the Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole discretion of the Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code 1.23.140.*)

NOTICE

This matter may be appealed to Superior Court under applicable laws. If appealable, the petition for review likely will have to be filed within thirty (30) days after service of the final Order from the Office of the Hearing Examiner.

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