

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

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|---------------------------------|---|-------------------------|
| ROXANNE M. ROBERTS, |) | C.A. No. CPU5-09-001799 |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | |
| |) | |
| KENT COUNTY SPCA, INC. |) | |
| DELAWARE ANIMAL CARE & CONTROL, |) | |
| |) | |
| Appellees. |) | |

**DECISION ON APPEAL FROM
DEPARTMENT OF NATURAL RESOURCES
& ENVIRONMENTAL CONTROL,
DIVISION OF FISH AND WILDLIFE,
*DOG CONTROL PANEL***

Submitted: October 18, 2009

Decided: October 30, 2009

VACATED AND REMANDED

Roxanne M. Roberts, *pro se*, 121 Wooden Carriage Drive, Hockessin, DE 19707, Appellant.

Robert F. Phillips, Esquire, *Deputy Attorney General*, 820 North French Street, 6th Floor, Wilmington, DE 19801, for Appellees.

Reigle, J.

In this civil appeal from the decision of the Dog Control Panel (“the Panel”) to euthanize a dog owned by Roxanne M. Roberts (“Ms. Roberts”), this Court has determined that the matter is not reviewable because the Panel failed to articulate the basis for its decision. Therefore, the decision of the Panel is vacated and remanded to the Panel for further proceedings consistent with this Opinion.

Procedure on Appeal

On July 2, 2009, the Panel held a hearing following the seizure of Ms. Roberts’ dog by Animal Care & Control. The dog was held to be dangerous and euthanasia was ordered. By statute, if such a determination is made, “the owner may appeal the Panel’s decision to the Court of Common Pleas within 10 days of the receipt of the Panel’s decision.” 7 Del. C. § 1734(d). Ms. Roberts filed a timely Notice of Appeal to this Court, *pro se*, which acted as a stay of the Panel’s decision. § 1734(d). An accompanying letter, dated July 7, 2009, was accepted as her Opening Brief. The State filed an Answering Brief on August 11, 2009. A responsive letter, dated August 18, 2009, was accepted as Ms. Roberts’ Reply Brief. Both parties were advised by the Court, in a letter dated August 25, 2009, that information outside the scope of the Panel hearing would not be considered by the Court and that more time would be given to the State to consider the letter and to respond to the Appellant or the Court. On August 28, 2009, the State submitted a letter to this Court indicating that the matter was unresolved and should proceed. On September 21, 2009, the Court received another letter from Ms. Roberts. Its contents were disregarded. On September 23, 2009, the Court received a print out of an e-mail message from Ms. Roberts to one of the Court’s clerks. On that same date, the Court sent a letter to the parties, with a copy of the e-mail, and directed Ms. Roberts to refrain from *ex parte* contact with the Court. The contents of the e-mail were disregarded.

The Court issued a decision dated October 2, 2009. A Motion to Amend the Court's decision was filed on October 9, 2009 by the Appellee, on legal grounds. A Response was submitted by Ms. Roberts on October 18, 2009 but her factual assertions were disregarded by the Court. The Court concurs with the assertions of the Appellee and issues a new Decision today that vacates and supersedes its prior decision.

Facts and Hearing

The transcript from the Dog Control Panel states that a hearing was held on July 2, 2009. Essentially, the facts regarding two events were uncontested and many of the facts were relayed by the owner herself. On June 14, 2009, Ms. Roberts was visiting her daughter in Lewes, Delaware with Zoe, her seven-year old female American Pit Bull Terrier. While the family was in their unfenced backyard, Ms. Roberts unleashed her dog so that she could play freely with her daughter's puppy. Almost immediately, Zoe ran into the adjoining neighbor's yard and severely attacked the neighbor's seven year-old Toy Poodle, Chloe, that was tethered in the neighbor's yard. The poodle was taken to the Delmarva E-clinic; after it was determined that another closer facility was closed. The poodle was treated but later died from the injuries it sustained in the attack. At the hearing, it was also learned that a prior incident occurred in May of 2008. Zoe bolted from Ms. Roberts' house when her granddaughter inadvertently opened a door. Immediately the dog began to fight with a leashed dog that was walking in the street. When the owner of the leashed dog tried to break up the fight, she was bitten on her leg and hand and required medical attention.

At the hearing, Ms. Roberts testified that both incidents were unusual for her dog. She also testified that she would never let her off the leash again. An animal control officer testified that Zoe had a strong prey drive and reiterated that there were two incidents with Zoe.

After the hearing, it appears from the record, that the Panel deliberated for approximately twenty-five minutes, in executive session, and found the dog to be dangerous with euthanasia ordered.

The Panel's decision was read and rendered by a typed form with some items circled, other items crossed out and spaces filled in by handwritten entries. It stated, in pertinent part:

Evidence presented to the panel included investigated reports, statements, testimony, written statements, and photographs presented by the Animal Care & Control, witnesses, [and] dog owner(s). A short narrative of the transcribed hearing is as follows: Ms. Roxanne Roberts agreed that Zoe (her dog) entered the property of another while off lead – attacked a small Toy Poodle – Chloe – which resulted in Chloe's death. Ms. Roberts also agreed Zoe attacked an on-lead dog (who was under control of owner) with bits [sic] to the 67 year old owner in May 2008.

Based upon preponderance of evidence and testimony provided to this Panel during the hearing held this day July 2-09 at the Animal Care and Control facility in Camden and under Delaware law, the Panel finds that Zoe, as described above, owned by Roxanne Roberts, to be in violation of § 1735(a) and § 1734(c) - and has been found **Dangerous** with **Euthanasia Ordered**.

See Panel Decision, July 2, 2009. The Panel's decision did not articulate what standard was used to determine that the dog should be classified as "Dangerous with Euthanasia Ordered", as opposed merely to "Dangerous" or "Potentially Dangerous" without euthanasia ordered. Those options were also on the form.

Standard of Review

An appeal from the Dog Control Panel is conducted according to the provisions governing judicial review of case decisions under the Administrative Procedures Act. 7 Del. C. § 1734(d). Under the rules of the Administrative Procedures Act, appeals are *on the record* without a *trial de novo*. 29 Del. C. § 10142(c). (emphasis added).

The standard of review is set forth in the Administrative Procedures Act. It states, "The Court, when factual determinations are at issue, shall take due account of the experience and

specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency." § 10142(d). See also Downs v. Emory, 2007 WL 3231611 (Del. Com. Pl.) at *2 (citing Mooney v. Benson Mgmt. Co., 451 A.2d 839, 840 (Del. Super. 1982).

Substantial evidence is further defined as "such relevant evidence as a legal mind may accept as adequate to support a conclusion." Downs at *2 (citing DiFillippo v. Beck, 567 F. Supp. 110, 113 (D. Del. 1983).

In addition, "[t]he reviewing Court must also determine whether the findings of the Panel are free from legal error and the product of an orderly and logical deductive process." Downs, at *2 (citing In re Surcharge Classification 0133 ex rel. Del. Comp. Rating Bureau, 655 A.2d 295, 299 (Del. Super. 1994).

Discussion

Under Delaware law, when Animal Care & Control has reasonable cause to believe that a dog is dangerous or potentially dangerous, it shall seize and impound it. 7 Del. C. § 1732(a). In this case, Zoe was seized by Animal Care & Control. Subsequently, the owner of such an impounded dog may request a hearing before the Dog Control Panel to secure release of the dog. See § 1732(b)(c)(d).

After the hearing, "[t]he Panel may declare a dog to be dangerous if it finds by a *preponderance of the evidence* that the dog killed or inflicted serious injury upon a domestic animal, provided the domestic animal was on the property of its owner or under the immediate control of its owner." 7 Del. C. § 1735(a)(2). (emphasis added). See also Leech v. Caldwell, 2000 WL 33653457 (Del. Com. Pl.) at *3 citing Hill v. Ginn, 43 A.2d 608 (Del. Super. 1899).

In this case, the poodle that was attacked and died from its injuries was on the property of its owner and under the immediate control of its owner. There is no factual dispute. Therefore, the dog met the definition of “dangerous” by a preponderance of the evidence.

Once a dog is determined to be “dangerous” by the Panel, the Panel has two options under the law. First, the Panel can order euthanasia. 7 Del. C. § 1734(c). Second, the Panel can order an owner to comply with certain conditions to keep the dog. The conditions are set forth by statute. It states:

If the Panel declares a dog to be dangerous, it shall be unlawful for any person to keep or maintain such dog unless:

- (1) The dog is spayed or neutered;
- (2) The dog owner procures and maintains liability insurance in the amount of at least \$100,000, covering any damage or injury which may be caused by such dog;
- (3) The dog is confined by its owner within a proper enclosure, and whenever outside of the proper enclosure the dog is securely muzzled and restrained by a substantial chain or leash, not exceeding 6 feet, and under the control of a responsible adult, or caged;
- (4) The dog owner displays, in a conspicuous manner, a sign on his/her premises warning that a dangerous dog is on the premises. The sign shall be visible and legible from the public highway or 100 feet, whichever is less; and
- (5) The dog owner immediately notifies the animal control agency when the dog is loose, unconfined, has attacked a human being or another domestic animal, has been moved to another address or dies.

7 Del. C. § 1735(b). It is also a condition that the owner may not sell or give away the dog to any one other than animal control. § 1735(c).

Clearly, when the legislature enacted the statutes, it did not intend every dangerous dog to be euthanized or it would not have included provisions for the Dog Control Panel to require owners of dangerous dogs, who were not ordered to be euthanized, to implement safeguards for their dangerous dogs.

The question becomes which owners of dangerous dogs will have their dogs ordered to be euthanized by the Panel and which owners of dangerous dogs will be allowed to keep their dogs and abide by certain conditions?

While the Court finds that the Panel's classification of Zoe as a dangerous dog was free of legal error, the same cannot be said for its decision to order euthanasia. The Panel did not articulate a specific standard that was applied to the question of whether euthanasia was appropriate in this case, nor did it articulate, in its decision, the reasoning for its determination that euthanasia was appropriate. Although the Panel may deliberate in executive session under 7 Del. C. § 1734(b), the use of such a procedure in this case, prevented the Court from reviewing the Panel's reasoning. The Panel may have had very good reasons for ordering euthanasia and it may have articulated such reasoning during its deliberations; however, the Panel did not put its reasoning on the record and it did not put its reasoning in writing. Therefore, the Court is unable to review the Panel's decision.

Prior to July 2000, the provisions of 7 Del. C. § 1734(c) allowed a dog owner to appeal any ruling of the Panel to this Court for a *de novo* hearing. After a hearing in Leech v. Caldwell, 2000 WL 33653457 (Del. Com. Pl.), the Court articulated a balancing test when it considered the facts of the case and made a determination of the appropriate remedy for a dangerous dog. The Court balanced the safety needs of the community with the property interest of the dog owner. Leech, at *3. After a hearing in Smith v. Caldwell, 200 WL 33653407 (Del. Com. Pl.), the Court articulated factors that it used to determine that a dog was dangerous. They included: the nature of the dog, the reason for the dog's escape, the dogs prior history,¹ the ferocity of the present

¹ In the underlying matter, the Panel seemed to refer to a prior incident report and questioned the dog's owner about the incident, but did not mark the report as an exhibit and make it a part of the record.

attack, the observations of the dog by the animal control officer,² the condition of the dog's pen and whether the dog's neighborhood was populated with children and others who may be exposed if the dog escaped. Smith at 6-7.

If the panel's deliberates and applies the balancing test after a consideration of all of the relevant factors and articulates the Panel's reasoning for its decision, on the record or in writing, the Court will be able to review its decision on appeal and determine whether the decision was supported by substantial evidence, free from legal error and the product of an orderly and logical deductive process.

Decision

For the foregoing reasons, the decision of the Panel is vacated and the case is remanded for further proceedings consistent with this Opinion.

IT IS SO ORDERED, this 30th day of October, 2009.



The Honorable Anne Hartnett Reigel

² While the animal control officer testified regarding his observations of the dog, the officer was not asked by the Panel to render his opinion regarding the appropriate remedy for the dog's dangerousness. If this opinion was known to the Panel, it was not made part of the record.