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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1427**

Travis Nelson,
Relator,

vs.

City of St. Paul,
Respondent.

**Filed May 11, 2010
Affirmed in part, reversed in part, and remanded
Larkin, Judge**

City of St. Paul Office of Safety & Inspections
File No. 3463

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Considered and decided by Larkin, Presiding Judge; Bjorkman, Judge; and
Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

LARKIN, Judge

Relator challenges a hearing officer's determinations that his dog is a dangerous animal and that its destruction is warranted under respondent-city's dangerous-animal ordinance. We affirm the determination that relator's dog is a dangerous animal. But because the hearing officer failed to make the findings that are required to order the destruction of an animal under the ordinance, we reverse in part and remand.

FACTS

Relator Travis Nelson is a resident of respondent City of St. Paul and the owner of a three-year-old mixed-breed dog. Relator lives with his girlfriend and co-owner of the dog, Brenda Radack, and Radack's two children. On the evening of March 25, 2009, Radack was severely intoxicated. She had been drinking alcohol while taking prescription, antidepressant medication. She began to argue with and yell at relator, which caused the dog to bark. Radack yelled at the dog and then slapped and punched the dog when it continued barking. Relator intervened, grabbed the dog, and placed the dog in its kennel. Radack opened the kennel door and continued to beat the dog. The dog bit Radack on the arm and ran out of the kennel. Radack called the police and argued with the officers upon their arrival. The officer took Radack to a detoxification unit. When Radack was released the following day, she went to a hospital and received medical treatment for the dog bite.

On May 10, Radack again was bitten by the dog after mixing alcohol with prescription medication. The dog began barking, and Radack slapped the dog in an

attempt to quiet the animal. When the barking persisted, Radack started punching the dog, eventually mounting “the dog’s back [and] punching the dog in the head.” The dog bit Radack’s arms, causing multiple puncture wounds, severe bruising, and lacerations. Radack sought treatment at a hospital, and the treating nurse reported the dog bite to the St. Paul Police.

The police prepared a report that noted “several bloody puncture wounds and severe bruising on [Radack’s] forearms” and that this was Radack’s second hospitalization due to bites from the dog, in addition to other incidents where the bites did not require medical treatment. The report was sent to the St. Paul Department of Public Safety and Inspections (DSI). On June 2, 2009, DSI issued a Dangerous Animal Notification and Notice of Animal Seizure and Destruction, declaring the dog to be a dangerous animal under St. Paul, Minn., Legislative Code § 200.12(a)(1)-(2) (2008) and ordering the dog to be destroyed pursuant to St. Paul, Minn., Legislative Code § 200.12(d)(1)-(2) (2008).

Relator timely appealed the determination, and a hearing was held before a DSI hearing officer on June 17, 2009. At the hearing, Radack testified that she had been drinking while taking prescription medication during both incidents, the dog would not have bitten her but for her provocation, and she did not want the dog to be punished for her mistakes. Relator corroborated this testimony. The couple also claimed that Radack’s medication was being altered to avoid further incidents. The hearing officer issued a Notice of Dangerous Animal Seizure/Destruction Hearing Determination (order) on June 30. The officer declared the dog dangerous under section 200.12(a)(4)-(5)

(2008), and ordered that the dog be destroyed under section 200.12(d)(1)-(2). This appeal follows.

DECISION

A municipal agency's action is quasi-judicial and subject to certiorari review "if it is the product or result of discretionary investigation, consideration and evaluation of evidentiary facts." *See Staeheli v. City of St. Paul*, 732 N.W.2d 298, 303 (Minn. App. 2007) (explaining certiorari review applies to quasi-judicial city council action). "A quasi-judicial decision of an agency that does not have statewide jurisdiction will be reversed if the decision is fraudulent, arbitrary, unreasonable, unsupported by substantial evidence, not within its jurisdiction, or based on an error of law." *Axelson v. Minneapolis Teachers' Retirement Fund Ass'n*, 544 N.W.2d 297, 299 (Minn. 1996) (quotation omitted). As a court of review, we will not retry facts, and we will uphold the agency's decision "if the lower tribunal furnished any legal and substantial basis for the action taken." *Staeheli*, 732 N.W.2d at 303 (quotation omitted).

Dangerous-Animal Determination

The St. Paul Legislative Code defines a "dangerous animal" as one which has:

- (1) [w]ithout provocation caused substantial bodily harm to any person on public or private property; or
- (2) [w]ithout provocation engaged in any attack on any person under circumstances which would indicate danger to personal safety; or
- (3) [e]xhibited unusually aggressive behavior, such as an attack on another animal causing serious injury or death; or
- (4) [b]itten one . . . or more persons on two . . . or more occasions; or

(5) [b]een found to be potentially dangerous and/or the owner has personal knowledge of the same, and the animal aggressively bites, attacks, or endangers the safety of humans or domestic animals[.]

St. Paul, Minn., Legislative Code § 200.01(2009)¹; *see also* St. Paul, Minn., Legislative Code § 200.12(a) (2009) (requiring a hearing officer to designate an animal that meets one or more of the criteria as a dangerous animal).

The hearing officer determined that relator's dog qualified as a dangerous animal under the fourth and fifth criteria. Respondent concedes that the hearing officer's determination that the dog is dangerous under the fifth criterion is not supported by the evidence and is therefore erroneous. The first issue is thus confined to whether the hearing officer erred by concluding that the dog is a dangerous animal under the fourth criterion. The dog indisputably bit Radack on two or more occasions, and relator does not contest this fact. Instead, relator argues that we should interpret the dangerous-animal definition to require a finding that the bites were unprovoked by virtue of the language in other provisions of section 200.01.

We construe ordinances according to the plain and ordinary meaning of the language used. *Clear Channel Outdoor Adver., Inc. v. City of St. Paul*, 675 N.W.2d 343, 346 (Minn. App. 2004), *review denied* (Minn. May 18, 2004); *see also* Minn. Stat. § 645.16 (2008) (providing that when the language of a statute is "clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the

¹ The St. Paul Legislative Code was amended in October 2009, after DSI's determination but before this appeal. While there were some substantive changes to the ordinance, none is relevant here. We therefore conduct our analysis under the new code provisions.

spirit”). The fourth provision of the dangerous-animal definition is clear and unambiguous. Thus, there is no need to, and we are not permitted to, interpret the ordinance. See *Hamline-Midway Neighborhood Stability Coalition v. City of St. Paul*, 547 N.W.2d 396, 399 (Minn. App. 1996) (stating that interpretation of an ordinance is only permitted when the language is ambiguous and requiring courts to otherwise enforce the plain meaning), *review denied* (Minn. Sept. 20, 1996). An animal that has “bitten one . . . or more persons on two . . . or more occasions” is unambiguously defined as a dangerous animal, without regard to the presence of provocation. St. Paul, Minn., Legislative Code § 200.01. Because the definition expressly applies to a dog that has bitten one person on two occasions, the hearing officer did not err by determining that relator’s dog is a dangerous animal under this section. We therefore affirm this determination.

Destruction Order

The St. Paul Legislative Code provides that:

The hearing officer, upon finding that an animal is dangerous hereunder, is authorized to order, as part of the disposition of the case, that the animal be destroyed based on a written order containing one . . . or more of the following findings of fact:

- (1) The animal is dangerous as demonstrated by a vicious attack, an unprovoked attack, an attack without warning or multiple attacks; or
- (2) The owner of the animal has demonstrated an inability or unwillingness to control the animal in order to prevent injury to persons or other animals.

St. Paul, Minn., Legislative Code § 200.12(c) (2009). A hearing officer must support a destruction order with specific findings of fact regarding the destruction criteria. See *id.*

(providing that the hearing officer may order destruction “based on a written order containing one . . . or more of the following findings of fact”).

The destruction order in this case states:

The animal is ordered Destroyed Under Code Sec. 200.12(d)(1)&(2)²: The animal is dangerous as demonstrated by a vicious attack, an unprovoked attack, an attack without warning or multiple attacks; and/or the owner of the animal has demonstrated an inability or unwillingness to control the animal in order to prevent injury to persons or other animals.

(Emphasis omitted) (footnote added). Relator contends that this determination was erroneous because the record does not support the hearing officer’s finding that the dog committed an “attack” or that the owner was unable or unwilling to control the animal.

We note that the destruction order simply restates the destruction criteria under the ordinance; it does not include specific findings regarding the criteria. Noticeably absent from the order is a finding that the dog “attacked” Radack or anyone else. While the hearing officer made findings regarding Radack’s conduct and the dog’s behavior on March 25 and May 10, the findings do not specifically address whether the dog’s behavior constitutes an “attack” or whether relator is unable or unwilling to control the animal.

With regard to the “attack” criteria, the plain language of the ordinance requires a finding that the animal is dangerous as demonstrated by one or more types of “attacks.” “Attack” is not defined in the ordinance. *See* St. Paul, Minn., Legislative Code § 200.01 (defining terms used within the ordinance). And the terms “attack” and “bite(s)” or

² Now codified at St. Paul, Minn., Legislative Code § 200.12(c)(1)-(2).

“bitten” are used in the alternative throughout the ordinance. *See, e.g.*, St. Paul, Minn., Legislative Code §§ 200.01 (“bites, attacks or endangers”), .06(d) (2009) (“attack or bite”), .12(b)(1)(c) (2009) (“attack or bite”). Because the plain language of the ordinance does not use the terms “attack” and “bite” synonymously, we are unable to equate the dog bites in this case with an “attack.”

Given the unusual circumstances in this case—it is undisputed that the dog bit Radack while she was beating the dog—it was incumbent on the hearing officer to support the destruction order with specific findings that demonstrate that one or both of the dog-bite incidents constituted an “attack,” as that term is used in section 200.12(c)(1). *See* St. Paul, Minn., Legislative Code § 200.12(c) (requiring supportive findings for a destruction order); *Morey v. Sch. Bd. of Indep. Sch. Dist. No. 492, Austin Pub. Schs.*, 268 Minn. 110, 115-16, 128 N.W.2d 302, 307 (1964) (explaining that findings are necessary—even when not statutorily required—to guard against a court trying a matter *de novo* and substituting its findings for those of the agency). Similarly, the hearing officer was required to make findings regarding relator’s “demonstrated . . . inability or unwillingness to control the animal.” St. Paul, Minn., Legislative Code § 200.12(c)(2).

Because the hearing officer did not make the necessary findings of fact, the determination that the dog should be destroyed is arbitrary. *See Curtis Oil v. City of North Branch*, 364 N.W.2d 880, 883 (Minn. App. 1985) (concluding that a failure to make mandatory findings required by an ordinance constituted an arbitrary municipal decision warranting reversal). We therefore reverse the destruction order. However, because the hearing officer properly determined that the dog is dangerous, a dispositional

order is necessary. *See* St. Paul, Minn., Legislative Code §§ 200.12(c) (authorizing a hearing officer, upon finding that an animal is dangerous, to order that the animal be destroyed as part of the disposition of the case); .121(a) (2009) (requiring an alternative order, imposing conditions for keeping a dangerous dog, if the hearing officer does not order destruction). We therefore remand for further proceedings consistent with this opinion.

Relator sets forth a constitutional challenge to the ordinance on appeal. Because this argument was not raised below, it is not properly before this court, and we do not consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that appellate courts only review issues presented to and considered by the district court).

Affirmed in part, reversed in part, and remanded.

Dated:

Judge Michelle A. Larkin