

STATE OF CONNECTICUT
DEPARTMENT OF AGRICULTURE

IN THE MATTER OF:

APPEAL FROM DISPOSAL ORDERS
ISSUED BY THE TOWN OF PLAINFIELD

“Phoenix and “Malaki”
Dogs owned by Jenna Allen

September 16 and October 1, 2015

PROPOSED FINAL DECISION

I, Dr. Bruce A. Sherman, the designated Hearing Officer in the Appeal of Disposal Orders issued by the Town of Plainfield, in the Matter of dogs named “Phoenix” and “Malaki” owned by Ms. Jenna Allen, hereby issue the Proposed Final Decision in this matter. I have thoroughly reviewed the entire record, including the transcript of the hearing, all of the admitted exhibits, and all other related submissions of the parties. The Proposed Final Decision affirms the Disposal Orders as follows:

FINDINGS OF FACT:

1. Commissioner Steven K. Reviczky appointed Dr. Bruce Sherman to act as Hearing Officer in this matter and to issue to him a Proposed Final Decision. Connecticut General Statute (C.G.S.) § 4-179. Hearing Officer (“HO”) Exhibit (“Ex.”) 3. An August 26, 2015 Notice of Hearing was sent via certified mail to the Town of Plainfield (the Town) and its representatives, the owner of the animals subject to this appeal, Ms. Jenna Allen, and her attorney, and attorneys representing Ms. Lynne Denning, the victim of a December 3, 2014 dog bite attack, for a hearing that was scheduled for and was held on September 16, 2015. Ex. HO 5. The hearing was not concluded on September 16, 2015 and was continued on October 1, 2015¹. Transcript 1 (“Tr. 1”)² at pages 40-41. A September 25, 2015 Notice of Hearing was sent via certified mail for the continuation of the September 16, 2015 hearing, which was scheduled for and held on October 1, 2015. Ex. HO 7.

¹ The Hearing Officer continued the September 16, 2015 hearing to provide adequate time to file briefs and objections and to consider: (1) a *JOINT MOTION FOR PERMISSION TO FILE RECORD UNDER SEAL, FOR THE HEARING TO BE CLOSED, AND FOR THE RECORD IN THE INSTANT MATTER TO BE MAINTAINED UNDER SEAL* (filed on the day before, September 15, 2015 by the Town and the victim) and (2) an oral motion made at the hearing by counsel for Lynne Denning to designate her as a party to the matter.

² In this Proposed Final Decision, the transcript of the September 16, 2015 hearing proceeding is cited as “Transcript 1 (Tr. 1)” and that of the October 1, 2015 hearing proceeding as “Transcript 2 (Tr.2.)”

2. At issue is the appeal of Disposal Orders issued by the Town of Plainfield on December 4, 2014, to Ms. Allen concerning her dogs named Phoenix and Malaki. Ex. HO 1 and 4; Town Ex. J. Phoenix is described as a male, three year old Rottweiler and Malaki is described as a male, two year old Rottweiler. Ex. J.
3. On October 1, 2015, a continuation of the September 16, 2015 hearing was held and concluded. There was no request by the parties or the intervenor³ to continue the hearing, to call additional witnesses, or for any other reason. *See* transcript in its entirety.
4. The Hearing Officer's rulings on *Lynne Denning's Status as a Party* and on the *Joint Motion For Permission To File Record Under Seal, For The Hearing To Be Closed, And For The Record In The Instant Matter To Be Maintained Under Seal* were admitted into the record without objection. Tr. 2 pages 5-6. Ex. HO 8 and HO 9.
5. The Town offered the testimony of Plainfield Police Officer Daniel Wolfburg, Plainfield Police Detective Paul Gadue and Plainfield Animal Control Officer (ACO) Karen Stone and exhibits A through Q-2 were admitted into the record. The Town was represented by Attorney Kristan Maccini. The dogs' owner, Ms. Allen, represented by Attorney Anthony Spinella Jr., offered no testimony and no exhibits for admission into the record. Both Ms. Allen and Mr. Corey Beakey (a witness to a significant portion of the dog bite attack) were present on both hearing dates. Both Ms. Allen and Mr. Beakey sat at the hearing table during the entire hearing, but neither individual was called to testify by either party. During the identification of exhibits, Attorney Spinella mentioned that Ms. Allen was going to assert her Fifth Amendment privilege, but she was nevertheless not called to testify in either the Town or the dog owner's presentation of evidence. Tr.2 at pages 21, 24, 25, 103, and 104. Attorney Spinella stated that he would cross examine Mr. Beakey only if the Town called him as a witness. Tr.2 at page 25. Since Attorney Spinella brought up issues involving hearsay evidence, the Hearing Officer asked if the dog owner intended to call either Lynne Denning or Mr. Beakey as witnesses and the answer was "no." Tr.2 at pages 103-104. The victim, Lynne Denning, represented by Attorney Richard S. Cody and Attorney Jack Collins, offered no testimony and no exhibits for admission into the record.

³ On September 29, 2015, the Hearing Officer issued a ruling granting Lynne Denning intervenor status in the matter as provided in C.G.S. § 4-176(d) and 4-177a(b). Ex. HO 8.

6. On December 4, 2014, ACO Stone issued Disposal Orders on six dogs that were present during the dog bite attack, including the two dogs named Phoenix and Malaki. One dog, named Bailey, was stated to be owned by Richard Allen. However, at the hearing it was established that Jenna Allen was the owner of all six of the dogs named in the six disposal orders issued on December 4, 2014 and that Richard Allen was not the owner of the dog Bailey or of any of the other dogs named in the disposal orders. Tr.2 at pages 11–12. ACO Stone issued a letter, dated December 4, 2014, to Richard and Jenna Allen, with an explanation of the issuance of the disposal orders on all six dogs. Ex. J. Issuance of the Disposal Orders was made pursuant to C.G.S. § 22-358(c). The Disposal Orders were based on a December 3, 2014 incident whereby Lynne Denning sustained dog bite injuries while employed as a health care provider at Jenna Allen’s residence at 379 Putnam Rd., Plainfield, CT.⁴
7. On August 4, 2015, ACO Stone issued a letter addressed to Richard and Jenna Allen informing them that she was rescinding four of the Disposal Orders issued on December 4, 2014, for the dogs named Bailey, Cheyenne, Ella, and Dakota, but that the Disposal Orders on the dogs named Phoenix and Malaki remained in place. Ex. HO 4.
8. At approximately 10:56 a.m. on December 3, 2014, Plainfield Police Officer Daniel Wolfburg was dispatched to 379 Putnam Rd.⁵ to respond to what dispatch described as a severe dog bite to the face, and he was the first Plainfield Police Officer to arrive on the scene. Officer Wolfburg observed the victim, Lynne Denning, lying in the living room, surrounded by medical personnel, with severe life threatening injuries to her face and upper body. Mr. Corey Beakey, Ms. Allen and Phyllis McClerk, who is Jenna Allen’s grandmother, were also present. Tr.2 at page 28.
9. Officer Wolfburg interviewed Ms. Allen at the scene and she told him that Lynne Denning was a caretaker for her grandmother and that she (Jenna Allen) owned six dogs, one of which attacked Lynne Denning. Officer Wolfburg testified that Ms. Allen told him that she did not witness the attack but that Corey Beakey was a witness to the attack, and that Corey Beakey had pulled the dogs off of Lynne Denning. Tr.2 at pages 28-30 inclusive.

⁴ Although the street address for the Allen residence is 379 Putnam Rd., Plainfield, CT, the mailing address is 379 Putnam Rd., Danielson CT 06239.

⁵ Officer Wolfburg testified that he was dispatched to 379 Putnam Rd., Wauregan, CT. Tr.2 page 28. The Town of Plainfield Police Department serves the village of Wauregan. Tr.2 at page 27.

10. While at the scene, Officer Wolfburg took a sworn written statement from Ms. Allen in which Ms. Allen stated, in part, that, at the time of the attack, Phoenix and Malaki were upstairs with Lynne Denning and her grandmother Phyllis and that she and Mr. Beakey were downstairs. The sworn statement provides: "Corey said that he pulled Phoenix off of Lynne." Tr.2 at pages 30–32 inclusive and Ex. K.

11. Officer Wolfburg testified that he interviewed Mr. Beakey while at the scene and also took a sworn written statement from him. Mr. Beakey's verbal account of what happened on December 3, 2014 and Mr. Beakey's sworn written statement, taken at the scene within an hour of the incident, are consistent.

In his interview with Officer Wolfburg, Mr. Beakey stated that "[h]e was downstairs and heard the victim yell. He went upstairs, found Phoenix attacking the victim's face, Malaki attacking the lower portion of the victim's body. He pulled Phoenix off the victim, got the dog outside. Then he pulled Malaki off. The victim said, "Call 911. She's dying." Tr.2 at page 32. In his sworn written statement, Mr. Beakey writes that "Lynne came down and said that Dakota and Phoenix were trying to breed and hump each other. I went upstairs and moved Dakota and Cheyanne downstairs and Bailey upstairs. I was downstairs moments later I heard Lynne yelling for me "Corey help!" Moments prior Lynne was on the floor playing with Phoenix, Malaki, Ella and Bailey. I ran upstairs. Lynne was on her left side. Phoenix and Malaki the Rottweilers were attacking her. Phoenix was on her face and hair biting her and Malaki was biting her leg tearing up her pants. I grabbed Phoenix and put him outside. I went back inside to grab Malaki. As I brought him outside Lynne said "dial 911, I'm Dying." I called 911. Neither dog was aggressive to me." Ex. L.

12. Both Ms. Allen and Mr. Beakey read their respective sworn written statements before Officer Wolfburg before signing them. Tr.2 at page 40. Officer Wolfburg does not have personal knowledge of what was represented in the sworn statements given by Ms. Allen and Mr. Beakey. Tr.2 at pages 41–46 inclusive. Ex. K and L.

13. On December 3, 2014, Officer Wolfburg took photographs of the dogs Phoenix and Malaki when they were in the Plainfield Animal Control facility after being moved from the scene of the dog bite attack. Officer Wolfburg testified that name tags identifying the dogs appearing in the photographs were placed on the dogs by the Plainfield ACO while in the presence of Ms. Allen and that Ms. Allen identified the dogs for the animal control officer. From that identification,

the animal control officer made a label for the dogs. Officer Wolfburg observed the label process of the dogs' identification. Officer Wolfburg did not otherwise have firsthand knowledge of the identity of the two dogs that he photographed. Tr.2 at pages 33-40 inclusive and Ex. P, Q1 and Q2.

14. Detective Paul Gadue of the Plainfield Police Department testified that, at approximately 11:10 a.m. on December 3, 2014, he was dispatched to 379 Putnam Rd., Plainfield, CT in response to what dispatch described as a serious dog bite attack. When Detective Gadue arrived, Plainfield Police Captain Arriaga advised Detective Gadue that a home healthcare worker within the residence was viciously attacked by dogs and asked Detective Gadue to photograph and obtain any evidence at the scene. Detective Gadue testified that he observed that the area of the attack was in the living room where he observed a large pool of blood, hair that appeared to be ripped out with a red tint, blood drag marks and a large clump of tissue that appeared to be a nose. Detective Gadue took photographs of the scene, four of which were admitted as Town Exhibits A through D inclusive into the record. Based on his observations of the scene, he identified each photograph and described what each depicted as follows:
 - Ex. A. – Photograph showing a large clump of hair; blood smear marks on the carpet and clothing with blood on it.
 - Ex. B. (under seal) – Photograph showing a large chunk of skin located on the floor that appeared to be the victim's (Lynne Denning's) nose.
 - Ex. C. – Photograph showing a large pool of blood on the carpet.
 - Ex. D. – Photograph showing blood splatter on the couch.Tr.2 at pages 46–50 inclusive and Ex. A, B, C and D.

15. Detective Gadue testified that he responded to Hartford Hospital where Lynne Denning had been previously transported and he arrived between 1:00 and 1:30 p.m. and he transported the nose that had been left at the scene of the attack and turned it over to emergency personnel at Hartford Hospital. As part of his investigation and with a physician's permission, he observed Lynne Denning. Detective Gadue described his observations of Ms. Denning as the most horrific non-fatal injuries he had ever seen– on a person in his 15 years (employed as a police officer). He testified that he observed Lynne Denning's face with the skin removed from the middle of her forehead, her left eye and then from cheek to cheek, and then to her upper lip exposing the tissue and her gums and teeth. Tr.2 at pages 50-52 inclusive.

16. While at Hartford Hospital Detective Gadue obtained photographs of Lynne Denning's injuries. Detective Gadue identified each of the photographs, admitted as Town Exhibits E through I inclusive as follows:⁶

Ex. E. (under seal) – Photograph showing injuries to Lynne Denning’s face.

Ex. F. – Photograph of Lynne Denning’s left arm depicting a large chunk removed exposing the fat and muscle tissue and some punctures and scratch marks.

Ex. G. – Two photographs of Lynne Denning’s left leg showing a large laceration exposing muscle and fatty tissue and scratches and puncture wounds.⁷

Ex. H. – Photograph of Lynne Denning’s right leg depicting a large laceration also exposing fatty tissue and muscle tissue.

Ex. I. (under seal) – Photograph of the upper torso of Lynne Denning showing her face and a large chunk removed from her right arm exposing muscle tissue and a laceration to her right breast.

Tr.2 at pages 52–56 inclusive and Ex. E, F, G, H and I.

17. On December 17, 2014, Detective Gadue conducted an interview with Lynne Denning at Hartford Hospital. He and Plainfield Police Sargent James Solar, independently made digital recordings of the interview. Lynne Denning’s husband, daughter, their attorney, and some medical personnel were also present at the interview. Detective Gadue identified the DVD of the recording he made of his interview with Lynne Denning. The DVD voice recording of Lynne Denning’s interview was then played into the record.⁸ Tr. 2 at pages 56 – 59. After Lynne Denning’s recorded interview was played at the hearing, Officer Gadue testified that what was heard on the recording was a fair and accurate representation of the interview he took with Lynne Denning and that the voice heard on the recording was that of Lynne Denning. Tr.2 at page 91. There was no objection made to the recorded interview being played for and becoming part of the record.⁹

⁶ On direct examination, Detective Gadue correctly identified and described each of two photographs depicting Lynne Denning’s injuries, marked as exhibits F and G, even though the photographs’ corresponding exhibit identification was incorrectly stated by counsel when presented to him. Tr.2 at pages 53–56 inclusive.

⁷ The first of the two photographs comprising Ex. G is a close-up view of a large laceration on Lynne Denning’s left leg to which Detective Gadue referred. The second photograph is a view of Lynne Denning’s left leg from the ankle to the knee showing that injury in addition to other multiple injuries.

⁸ Lynne Denning’s personal identification information contained in the recorded interview was redacted from the record. Tr.2 at page 59.

⁹ There is nothing in the record to indicate that the dogs' owner objected to Ms. Denning's interview being played into the record and the actual DVD itself, appears to have been entered at the hearing during an exchange between the Hearing Officer and the Town's attorney at page 36 of the Transcript. Even if the DVD itself was not

18. Lynne Denning's recorded interview (Tr.2 at pages 59 – 90 inclusive) provides:

- a) Lynne Denning was at the Allen residence on December 3, 2014 because she was employed as a healthcare worker to provide healthcare services for Phyllis McClerk, mother of Richard Allen and grandmother of Jenna Allen. Ms. Denning had been employed there for almost four months prior to December 3, 2014. Tr.2 at page 68. Phyllis McClerk lived upstairs along with Richard Allen and Jenna Allen and Cory Beakey lived in the basement area. Tr.2 at pages 60-62. Lynne Denning knew each of the seven dogs living at the Allen residence and was able to identify them by name and to describe their locations in the Allen home on December 3, 2014.
- b) Prior to being attacked, Lynne Denning was in the living room with Phyllis McClerk along with the dogs Phoenix, Malaki, Cheyenne, Dakota and Ella. The dogs Nakita and Bailey were downstairs in Jenna Allen's apartment. She observed the male dog Phoenix going after the female dog Dakota, who was in heat, in an effort to breed her. Ms. Denning assumed that Phoenix wanted to breed Dakota. Phoenix was aggressive with Dakota and was growling, barking, trying to mount Dakota. Ms. Denning stated that she could tell instantly from the behavior of Phoenix that the situation would become volatile. The other dogs were rough housing up and over the furniture. Ms. Denning observed that Phyllis McClerk was becoming agitated with the situation even though she was not able to verbalize. Lynne Denning went downstairs and informed Corey Beakey, who was in Jenna Allen's basement apartment, of the situation with the dogs. In response, Mr. Beakey moved the dog named Dakota to the basement and shortly thereafter brought the dog named Bailey up from the basement. Tr.2 at pages 63–68 inclusive.
- c) After returning to the living room, Lynne Denning was sitting watching TV and was not touching the dogs (which were rough housing in front of her). Phoenix nudged, knocked around and pushed Ms. Denning to her knees, mounted her back and was trying to breed Ms. Denning. She identified Phoenix as a massive dog in a state of frenzy. Then Phoenix suddenly bit her in the face and was "ripping" her. Ms. Denning described her face "being gone," hearing crunching sounds as her face was being bitten, swallowing blood and not being able to see once the injuries had occurred to her face. She also described the injuries to the other parts of her body and feeling as if she were being tugged in opposite directions.

entered as a full exhibit, the contents of the DVD, i.e., Ms. Denning's recorded interview, became part of the record.

(Tr.2 p. 88). However, she could not say whether any other dogs were involved in the attack on her. She was definitely sure that Phoenix did attack her and bit her face and shoulder, that he initiated the attack, and that he is the dog that bit her in the face. Ms. Denning definitely knew and saw that Phoenix was wearing a red collar and she knew that all of the dogs in the house had different color collars with Phoenix's being red. (Tr.2 at p. 89).

- d) During the attack Ms. Denning was hollering to Corey Beakey to help her, that she was dying and to call 911. She said that the attack stopped when he came upstairs and that he called 911, after which medical personnel responded. She was initially transported to Backus Hospital and then, due to her injuries, she was transported to Hartford Hospital for further treatment of her injuries.¹⁰

19. Detective Gadue did not view any of the dogs attack Lynne Denning. Tr. 2 at page 91.

20. Plainfield ACO Stone testified that she was dispatched on December 3, 2014 to the Allen home to assist EMS with a severe dog bite incident. Upon her arrival at the scene, police and EMS personnel were present. ACO Stone stated that she was informed that a woman was inside the home who was suffering life threatening injuries. Tr.2 at pages 93 and 94.

21. ACO Stone issued disposal orders on the dogs Phoenix and Malaki the next day (December 4, 2014) based on information she received from the investigating officer and the amount of damage at the scene, e.g., “because the dogs gave the woman life threatening injuries. They tore pieces of her face off. They tore her nose off. They tore chunks of her body off.” Tr.2 at pages 94 and 101 and Ex. J.

22. Initially, ACO Stone issued disposal orders on four other dogs in addition to Phoenix and Malaki that were in the Allen house when Lynne Denning was attacked. ACO Stone issued the disposal orders on the other four dogs because she felt that, due to the amount of damage at the scene, that more than Phoenix and Malaki were involved and that it was in the best interest of public safety to do so. She later rescinded the disposal orders on the other four dogs because as the police investigation went on, including the statements from Mr. Beakey, there was evidence that only Phoenix and Malaki were involved. Tr.2 at pages 94, 95, 97, 101 and 102. Ex. HO 1.

¹⁰ Lynne Denning’s account of the bite attack and description of her resultant injuries although descriptive, do not adequately portray the devastating nature of her injuries or the vicious and brutal nature of the attack. The photographs of her injuries, the descriptions of the photographs, along with the Ambulance Report and the Hartford Hospital Discharge Report, , combine to form an even more accurate and disturbing portrayal of the extent of her injuries.

LEGAL CONCLUSION

Connecticut General Statute §22-358(c)¹¹ provides that “the commissioner, the Chief Animal Control Officer, any municipal animal control officer . . . may make any order concerning the restraint or disposal of any biting dog or other animal as the Commissioner or such officer deems necessary.” It further provides that following a hearing on such order the Commissioner may affirm, modify or revoke such order as the Commissioner deems proper.”

Upon careful consideration of the entire record, including the hearing testimony and exhibits, and, after much reflection, I find that there is substantial evidence in the record that both dogs bit Ms. Denning and therefore, to affirm both of the Disposal Orders on the dogs Phoenix and Malaki.

Substantial evidence in the record establishes that while providing services as a health care worker at the Allen residence, Ms. Denning suffered an unprovoked¹² and vicious dog bite attack. That is not

¹¹ Full text of subsection: “ If such officer finds that the complainant has been bitten or attacked by such dog, cat or other animal when the complainant was not upon the premises of the owner or keeper of such dog, cat or other animal the officer shall quarantine such dog, cat or other animal in a public pound or order the owner or keeper to quarantine it in a veterinary hospital, kennel or other building or enclosure approved by the commissioner for such purpose. When any dog, cat or other animal has bitten a person on the premises of the owner or keeper of such dog, cat or other animal, the Chief Animal Control Officer, any animal control officer, any municipal animal control officer or any regional animal control officer may quarantine such dog, cat or other animal on the premises of the owner or keeper of such dog, cat or other animal. The commissioner, the Chief Animal Control Officer, any animal control officer, any municipal animal control officer or any regional animal control officer may make any order concerning the restraint or disposal of any biting dog, cat or other animal as the commissioner or such officer deems necessary. Notice of any such order shall be given to the person bitten by such dog, cat or other animal within twenty-four hours. The owner of such animal shall pay all fees as set forth in section 22-333. On the fourteenth day of such quarantine the dog, cat or other animal shall be examined by the commissioner or someone designated by the commissioner to determine whether such quarantine shall be continued or removed. Whenever any quarantine is ordered under the provisions of this section, notice thereof shall be given to the commissioner and to the person bitten or attacked by such dog, cat or other animal within twenty-four hours. Any owner or keeper of such dog, cat or other animal who fails to comply with such order shall be guilty of a class D misdemeanor. If an owner or keeper fails to comply with a quarantine or restraining order made pursuant to this subsection, the Chief Animal Control Officer, any animal control officer, any municipal animal control officer or any regional animal control officer may seize the dog, cat or other animal to ensure such compliance and the owner or keeper shall be responsible for any expenses resulting from such seizure. Any person aggrieved by an order of any municipal animal control officer, the Chief Animal Control Officer, any animal control officer or any regional animal control officer may request a hearing before the commissioner within fourteen days of the issuance of such order. Any order issued pursuant to this section that requires the restraint of an animal shall be effective upon its issuance and shall remain in effect during any appeal of such order to the commissioner. After such hearing, the commissioner may affirm, modify or revoke such order as the commissioner deems proper. Any dog owned by a police agency of the state or any of its political subdivisions is exempt from the provisions of this subsection when such dog is under the direct supervision, care and control of an assigned police officer, is currently vaccinated and is subject to routine veterinary care. Any guide dog owned or in the custody and control of a blind person or a person with a mobility impairment is exempt from the provisions of this subsection when such guide dog is under the direct supervision, care and control of such person, is currently vaccinated and is subject to routine veterinary care.”

¹² There is no evidence in the record at all that Ms. Denning provoked this attack.

disputed.¹³ Her injuries were severe and life threatening, and, in the long term also will be, or at a minimum, appear to be, disfiguring and life altering. It is unfortunate that the dogs' owner, who left five of her dogs unsupervised with an elderly woman and her caregiver, did not take responsibility for the actions of her dogs, but instead seeks to shield the identification of the dogs that bit Ms. Denning. The dogs' owner's position is that the Town did not prove which dog(s) bit Ms. Denning. The dog owner cites *Carlson v. Koslowski*, 172 Conn. 163 (1977), for the proposition that the identity of the biting dogs was only made through hearsay evidence that does not meet a standard of being judged as trustworthy in order to be considered substantial evidence in an administrative proceeding. I disagree. I find that there is substantial trustworthy evidence in the record that establishes that Phoenix and Maliki bit Ms. Denning. The issuance of disposal orders on these dogs that committed the attack on Lynne Denning, therefore, was both proper and necessary in the interest of public safety.

There is no specific prohibition against hearsay evidence in the Uniform Administrative Procedures Act: "It is fundamental that administrative tribunals are not strictly bound by the rules of evidence and that they may consider evidence which would normally be incompetent in a judicial proceeding, so long as the evidence is reliable and probative." *Lawrence v. Kozlowski*, 171 Conn. 705, 710, 372 A.2d 110 (1976), *cert. denied*, 431 U.S. 969 (1977). "There is, moreover, no specific prohibition against hearsay evidence in the Uniform Administrative Procedure Act (UAPA), which provides that '[a]ny oral or documentary evidence may be received, but (that) the agency shall, as a matter of policy, provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence.' General Statutes 4-178(1)." *Tomlin v. Personnel Appeal Board*, 177 Conn. 344, 348 (1979). *See also, Gonzalez v. State Elections Enforcement Comm'n*, 145 Conn. App. 458, 483-484 (2013), citing Conn. Gen. Stat. § 4-178(1); *Roy v. Commissioner of Motor Vehicles*, 67 Conn. App. 394, 397 (2001); and RCSA § 22-7-33a(a). The foundation on which the Proposed Final Decision was reached to affirm both Disposal Orders is based on the record in its entirety and the substantial evidence therein. While the dogs' owner argues that certain evidence in the record was hearsay (i.e., the statements of Ms. Allen and Mr. Beakey), and should not be considered, as will be explained, *infra*, even if the evidence at issue is hearsay, it is nevertheless sufficiently trustworthy to be considered substantial evidence and, therefore appropriate for consideration in arriving at the Proposed Final Decision.

Hearsay evidence must be deemed sufficiently trustworthy for it to be considered substantial evidence. "If hearsay evidence is insufficiently trustworthy to be considered "substantial evidence" and it is the only

¹³ See oral argument of Attorney Spinella: "These dogs—a dog in that house did something horrific and maybe it was Phoenix." Tr.2 at page 110. ". . . one of these dogs, whoever did this, should be held responsible. . . ."

evidence probative . . . its use to support the agency decision would be prejudicial to the plaintiff, **absent a showing . . . that the appellant knew it would be used and failed to ask the commissioner to subpoena the declarants.**” *Carlson v. Kozlowski*, 172 Conn. 263, 267 (Conn. 1977) (emphasis added). Moreover, in *Richardson v. Perales*, 402, U.S. 389 (1971), the United States Supreme Court looked to those factors which assured the underlying reliability and probative value of hearsay evidence. As cited by the Connecticut Appellate Court in *Cassella v. Civil Service Commission*,¹⁴ among the pertinent factors establishing the trustworthiness of hearsay evidence and as it relates to the question of due process are (1) the availability of the witness declarant; (2) the lack of bias or interest on the part of the witness declarant; (3) the quality and probative value of the out of court statements; and (4) the nature and atmosphere of the proceeding. I have assessed these facts as well.

Ms. Denning's Recorded Interview for the Police

Lynne Denning's recorded interview provided a clear and unequivocal identification of Phoenix: “Well, for absolutely sure that it was Phoenix that initiated. It was him that bit my face and this shoulder.” Tr.2 at pages 75 and 89. Counsel for the dogs' owner offered no objection to the admission of the recorded interview with Ms. Denning. The dogs' owner knew that the Town might use Ms. Denning's recorded interview as of at least September 16, 2015, the first hearing date, when the parties were all provided copies of the Town's proposed exhibits. Nevertheless, the dogs' owner chose not to call her and, at the hearing, counsel for the dogs' owner responded “No” when asked by the Hearing Officer if he planned on calling Lynne Denning as a witness. Tr.2 at page 103. Ms. Denning could have been made available at the hearing if the dogs' owner had attempted to or chosen to subpoena her. A mechanism to subpoena witnesses is found at C.G.S. § 4-177b, but it appears that the dogs' owner strategically determined not to subpoena Ms. Denning so that an argument could be orchestrated that there was no opportunity to cross-examine her. A party in an administrative hearing cannot claim that reliable and probative hearsay evidence should not be considered if that party itself chooses not to subpoena or even attempt to exercise their right to subpoena that witness. *Richardson v. Perales*, *supra* at 402 (claimant failed to exercise his right to subpoena a witness whose written report was admitted into the record and thus claimant did not provide himself with the opportunity of cross-examination).

Here, Ms. Denning interview was made to the police for purposes of a police investigation. Ms. Denning had no reason to fabricate her interview in order to pick one dog over another dog in her identification of the dog that bit her in the face and shoulder and she held no bias or interest in which dog she identified. Despite the attack and her resulting injuries, Ms. Denning held no vendetta against Phoenix or any of the

¹⁴ *Cassella v. Civil Service Commission*, 4 Conn. App. 359 (1985)

other dogs. In fact, surprisingly, Ms. Denning stated that she did not even want the dogs (which would include Phoenix), to be put down (Tr.2 at page 78) and she was careful not to guess to identify by name the other dog that was tugging her in the opposite direction. Ms. Denning's interview took place two weeks after the attack, such that she was fully cognizant of her thoughts and capable of providing trustworthy evidence. Despite the severe attack and her resulting injuries, Ms. Denning's recorded statement made it clear that she was cognizant of Phoenix's role before and during the attack. Her account was credible and the Hearing Officer found it to be reliable. The recorded interview made by Plainfield Police Officers with Lynne Denning is evidence that is trustworthy in identifying Phoenix as one of the biting dogs.

Mr. Beakey's Oral and Sworn Written Statement for the Police

With respect to the oral and sworn written statement of Mr. Beakey, given the nature of the gruesome attack at his residence and the resulting confusion at the scene (medical personnel surrounding Ms. Denning as they dealt with her severe life threatening injuries (Tr. at page 28 and *see* evidentiary photographs), along with Mr. Beakey's own active role in potentially saving Ms. Denning's life, Mr. Beakey's response to the police may be deemed an excited utterance, which is an exception to the hearsay rule. Nevertheless, even if that is not the case, and his statements are hearsay, Mr. Beakey's statements are sufficiently trustworthy to be used as evidence based on the standards set forth in *Richardson* as cited in *Cassella*.

Mr. Beakey's account to the police of the dog bite attack twice identified Phoenix and Malaki as the dogs that bit Ms. Denning and as the dogs that he himself pulled off of Ms. Denning. Mr. Beakey's identification of Phoenix is consistent with Ms. Denning's (and Ms. Allen's) identification of Phoenix. Mr. Beakey's identification of two dogs involved in the attack is consistent with Ms. Denning account whereby she believes that she was being tugged in opposite directions. Although Lynne Denning could not specifically identify a second dog involved in the attack, Mr. Beakey did. His sworn written statement (Ex. L) identifies both Phoenix and Malaki as the dogs that bit Ms. Denning; it establishes that it was only "moments" between the time that Ms. Denning came downstairs to discuss Phoenix's behavior with him that he heard Ms. Denning yelling; and it establishes that he saw Ms. Denning only "moments" prior to the bite attack. He stated in part, ". . . I was downstairs moments later I heard Lynne yelling for me 'Corey help!' Moments prior Lynne was on the floor playing with Phoneix, Malaki, Ella and Bailey. I ran upstairs. Lynne was on her left side Phoenix and Malaki the Rottweilers were attacking her. Phoenix was on her face and hair. Malaki was on her leg tearing up her pants. I grabbed Phoenix and put him outside, I went back in to grab Malaki as I brought him outside Lynne said "dial 911 I'm dying." I called

911. Neither dog was aggressive to me.” Mr. Beakey's sworn written statement is also consistent with Officer Wolfburg's testimony of his conversation with Mr. Beakey at the scene of the attack. Finally, it is more reasonable than not to conclude that at least one other dog in addition to Phoenix was involved in the attack on Lynne Denning, due to the fact that she suffered multiple severe injuries, in a relatively short period of time (the "moments" it took for Mr. Beakey to run upstairs to respond to Ms. Denning's screams for help), to multiple areas of her body, including her face and upper torso as well as her lower extremities.

Again, the dogs' owner knew that Mr. Beakey's written statement might be used by the Town as of at least September 16, 2015, the first hearing date, when the parties were all provided copies of the Town's proposed exhibits. Counsel for the dogs' owner also made it very clear in his objections to the admission of Mr. Beakey's (and Ms. Allen's) statement into the record that he was aware of the Supreme Court's holdings in *Carlson* and *Richardson*, arguing that if Mr. Beakey (and Ms. Allen's statements) were to be admitted, he would "have no ability to defend Ms. Allen and her dogs because there's no witnesses for me to confront." Tr. at pages 22-25. In this case, the dogs' owner knew that Mr. Beakey's sworn written statement would be used by the Town and failed to call Mr. Beakey as a witness—even though Mr. Beakey attended the entire hearing. The record reflects that Mr. Beakey was at the hearing because he had been subpoenaed by the Town and that the dogs' owner strategically chose not to call Mr. Beakey to probe him about his oral and written statement to the police, even when questioned by the Hearing Officer about whether he would do so.¹⁵ Tr.2 at pages 25 and 103-104. As previously discussed with respect to Ms. Denning's interview, the dogs' owner cannot claim that reliable and probative hearsay evidence should not be considered if she chose not to attempt to exercise her right to confront a witness to this attack who was available and present at the hearing, and instead purposefully decided not call that witness in order to assert or establish a hearsay or due process deficiency. If that were the case, any unsuccessful party to an administrative hearing could always orchestrate a deficiency in that proceeding on appeal by claiming that certain witnesses should have been present, or should have been subject to cross-examination, despite that party's own calculated decision not to call or question an available and present witness.

Here, even though Mr. Beakey lived at the Allen residence, he had no ownership interest in either Phoenix or Malaki and, therefore, would not have a bias or interest in providing inaccurate information to the police about which of the dogs present at the residence were the dogs that he saw biting Ms. Denning and which of the dogs he physically removed from Ms. Denning's body during the attack. It is reasonable

¹⁵ Counsel for the dog owner even made it clear that he would have cross-examined Mr. Beakey if he had been called by the Town. Tr.2 at page 25.

to assume that, if he did have an interest or bias for any reason, he might not have identified two dogs, but only one. However, immediately after the attack, Mr. Beakey, who was familiar with the dogs because he lived with them, identified both Phoenix and Malaki to the police, once verbally, and a second time in his sworn written statement. As stated *supra*, Mr. Beakey's statements are consistent with evidence provided by Ms. Denning, in that they both identified Phoenix as one of the dogs involved in the biting attack. In Ms. Denning's interview, Phoenix is identified as the dog that began the attack by biting her face; in Mr. Beakey's statement, Phoenix is the dog biting her face and hair, but not her legs or lower part of her body. That there were, at a minimum, two dogs involved in this biting attack is consistent with the extent and location of Ms. Denning's injuries as viewed in the exhibit photographs.

Ms. Jenna Allen's Oral and Sworn Written Statement for the Police

Ms. Allen's sworn written statement identifies, through Mr. Beakey, Phoenix as the dog that bit Ms. Denning. Her sworn written statement can properly be deemed an exception to hearsay as an admission against interest because, as owner of all of the dogs at issue, if there was to be any liability surrounding any of her dog's actions, Ms. Allen would be liable for the actions of all of her dogs, including Phoenix. Therefore any statement that Ms. Allen provided identifying any of her dogs would have been a statement made against her interest. Also, as with Mr. Beakey, given the nature of the gruesome attack at her home and the resulting confusion at the scene involving her dogs, Ms. Allen's response to the police, made at the scene, may be deemed an excited utterance, which is also an exception to the hearsay rule.

Again, even if Ms. Allen's statements are hearsay, they are sufficiently trustworthy to be used as evidence, even if it is only used to show consistency with other evidence in the record. In this case the dog owner knew that her written statement would be used by the Town as evidence in the hearing at least as of September 16, 2015, the first hearing date, when the parties were all provided copies of the Town's proposed exhibits. Ms. Allen was at the hearing. While Attorney Spinella represented that Ms. Allen would not be testifying because she was going to assert her Fifth Amendment privilege,¹⁶ that did not actually occur--because neither party called her to testify. While it is clear that at least one of her dogs bit Ms. Denning, it is only speculative whether, had Ms. Allen been called to testify, whether she would have invoked her Fifth Amendment protection specifically for the question of which dog(s) Mr. Beakey stated he pulled off of Ms. Denning. Since all of the dogs at issue belonged to Ms. Allen, and it was evident that at least one of her dogs had bitten Ms. Denning, Ms. Allen would presumably have had no bias or interest in choosing one dog over another dog, when she informed the police that Mr. Beakey told her that he pulled Phoenix off Ms. Denning. Simply put, at the time of the incident, Ms. Allen would have had no

¹⁶ Tr.2 at page 24.

reason to tell the police inaccurate information about what she knew about which dog(s) bit Ms. Denning. Ms. Allen's sworn written statement to the police is consistent with Officer Wolfburg's testimony of her oral account, of Mr. Beakey's account, and of Ms. Denning's account, in the identification of the dog Phoenix as a dog that bit Ms. Denning. Her statements, while duplicative, are nevertheless trustworthy.

Given the totality of the evidence, I find that there is substantial evidence in the record to affirm the Town's disposal orders and therefore provide this recommendation to the Final Decision maker.



Dated:
January 21, 2016

Bruce A. Sherman, DVM, MPH
Hearing Officer