



CITY OF
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Hearings Office

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HEARINGS OFFICER'S ORDER

APPEAL OF THEODORE A. DODENHOFF

CASE NO. 3100122

PROPERTY: 534 SW 3rd Avenue

DATE OF HEARING: April 7, 2010

APPEARANCES:

Theodore Dodenhoff, Appellant

Thurl Stalnaker, Jr., Attorney for Appellant

Shane Abma, Deputy City Attorney, for the City

HEARINGS OFFICER: Mr. Gregory J. Frank

Mr. Shane Abma, Deputy City Attorney for the City of Portland, appeared and acted as the legal representative for the City. Mr. Thurl Stalnaker, Jr., Attorney, appeared and acted as the legal representative for Appellant Theodore Dodenhoff. Anne Holm, Sgt. Troy King and Appellant Dodenhoff appeared as witnesses during the hearing. The Hearings Officer makes this decision based upon the testimony of Ms. Holm, Sgt. King and Appellant Dodenhoff, the arguments presented by Mr. Abma and Mr. Stalnaker, Jr., and the documents admitted into the evidentiary record (Exhibits 1 through and including 14).

Background: The following history is not disputed by the City or Appellant Dodenhoff.

Appellant Dodenhoff filed, on or about February 9, 2009, an application for a Second Hand Dealer Permit (Exhibits 9 and 10). Appellant Dodenhoff submitted an "explanation" letter related to his "criminal history (Exhibit 11). Ms. Holm is the City of Portland Revenue Bureau Regulatory Program Administrator in charge of overseeing the City of Portland Second Hand Dealer regulation. Sgt. King, a City of Portland Police Officer (Special Property Investigations), was involved in reviewing the criminal history aspects of Appellant Dodenhoff's application and he directed a memorandum to Ms. Holm, on or about March 5, 2009, with a letter recommending denial of the requested permit (Exhibit 12). Ms. Holm sent a letter, dated March 9, 2009, to Appellant Dodenhoff recommending denial (Exhibit 8). Appellant

Dodenhoff responded to Exhibit 8 in a letter to Ms. Holm (Exhibit 7). Ms. Holm requested Sgt. King to consider Exhibit 7 and thereafter, Sgt. King provided a summary of his additional review in a letter (Exhibit 6). On February 10, 2010, Ms. Holm "reached a decision to deny" Appellant Dodenhoff's Second Hand Dealer permit (Exhibit 2). Mr. Stalnaker, Jr., on behalf of Appellant Dodenhoff, submitted a letter formally requesting a Code Hearings Office appeal hearing.

Facts Not in Dispute: The following facts are not in dispute.

Exhibits 2, 6, 8, 9, 10, 11 and 12 represent true and accurate copies of documents submitted and/or exchanged as part of Appellant Dodenhoff's application process. Appellant Dodenhoff admits that "the failure to list the April 2006 arrest for felon in possession of a firearm was an admitted oversight on my part" (Exhibit 7). Appellant Dodenhoff, in Exhibit 7, did provide an explanation for the oversight. Appellant Dodenhoff admitted that he was arrested and convicted "for the unlawful cultivation of marijuana" (Exhibit 7). The unlawful cultivation convictions are felony offenses. Exhibit 2 represents the "Determination" by the City, which acted to deny Appellant Dodenhoff a Second Hand Dealer Permit and is the basis of this appeal.

Laws/Code Applicable to this Case: There is no dispute between the City and Appellant Dodenhoff that the applicable law/Code in this case is found in Portland City Code ("PCC") 14B.90.

PCC 14B.90.020 G. defines 'Director,' for the purposes of PCC 14B.90, as "the Director of the Portland Revenue Bureau or his or her designee."

PCC 14B.90.020 D. defines 'Chief of Police' as "the Chief of Portland Police Bureau or his or her designee."

PCC 14B.90.050, in relevant part, states the following:

PCC 14B.90.050 A. Upon the filing of an application for a Dealer permit and payment of the required fee, the Chief of Police shall conduct an investigation of the applicant and all principals and employees listed according to the requirements in Section 14B.90.040 A. The Director shall issue the permit within 90 days of receiving the application if no cause for denial exists.

PCC 14B.90.050 B. Except as provided in Section 14B.90.050 C. the Director shall deny an application for a Dealer Permit if any of the following apply:

2. Any person listed on the initial application or renewal application has been convicted of one or more of the offenses listed below or has violated any section of 14B.90. The offenses include:
 - a. Any felony.
 - b. Any misdemeanor or violation involving either bribery, controlled substances, deception, dishonesty, forgery, fraud, or theft, or any attempt or conspiracy to commit any of the listed offenses.

PCC 14B.90.050 C. Notwithstanding Section 14B.90.050 B., the Director may grant a permit after consulting with the Chief of Police despite the presence of one or more of the enumerated factors if the applicant establishes to the Director's reasonable satisfaction that:

1. The behavior evidenced by such factor is not likely to recur; or,
2. The behavior evidenced by such factor is remote in time; or,

3. The behavior evidenced by such factor occurred under such circumstances that diminish the seriousness of the factor as it relates to the purpose of Chapter 14B.90.

PCC 14B.90.010 Purpose. The Council's purpose in adopting this Chapter is to regulate certain business activities that present an extraordinary risk of being used by criminals to dispose of stolen property. The Council finds that this risk is present despite the best efforts of legitimate secondhand dealer businesses because these businesses process large volumes of good and material that are frequently the subject of theft. This Chapter is intended to reduce this type of criminal activity by providing timely police awareness of such property transactions and by regulating the conduct of persons engaged in this business activity. The Council finds that these regulations are necessary and the need for the regulations outweighs any anti-competitive effect that may result from their adoption.

Appellant Dodenhoff's Arguments:

Mr. Stalnaker, Jr., as attorney for Appellant Dodenhoff, argued:

- (1) Sgt. King had, in previous cases, recommended approval of applications for Second Hand Dealer permits and his action in this case was inconsistent and arbitrary;
 - (a) Sgt. King should not be permitted to make a recommendation of denial solely based upon his experience; and
 - (b) Sgt. King did not rely upon any specific guidelines/rules/City Code provisions in making his recommendation of denial.
- (2) The underlying facts/circumstances in this case should result in a recommendation of approval;
 - (a) Appellant Dodenhoff's life perspective has changed since the birth of his son; and
 - (b) Appellant Dodenhoff's felony convictions are distant in time; and
 - (c) Appellant Dodenhoff is unlikely to reoffend; and
 - (d) Appellant Dodenhoff's felony convictions are unrelated to the operation of a Second Hand Dealer business.

Hearings Officer's Discussion of the Law/Evidence:

The Hearings Officer begins this discussion by reviewing certain fundamental principles of administrative law.

ORS 183.482 (Oregon's Administrative Procedures Act) section (7) states, in part, that a review body, such as the Code Hearings Officer, "shall not substitute its judgment for that of the agency as to any issue of fact or agency discretion." ORS 183.482 (8)(b) states that a review body may remand or set aside an agency's exercise discretion to be "(A) Outside the range of discretion delegated to the agency by law; (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or (C) Otherwise in violation of a constitutional or statutory provision." Finally, ORS 183.482 (8)(c) states that a review body will "set aside or remand the order if the court finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding."

The Oregon Court of Appeals, in *Labor Ready Northwest, Inc. v. BOLI*, 208 Or App 195 (2006) *rev den* 342 Or 473 (2007), discussed ORS 183.482 sections (7) and (8) and reiterated that a review body is barred from substituting its judgment for that of the agency on any issue of agency discretion. The court, in *Labor Ready* also discussed and confirmed that ORS 183.482 (8)(b) sets the parameters of analysis for reviewing a claim of “abuse of discretion.”

The Oregon Supreme Court, in *Dickinson v. Davis*, 277 Or 665 (1977), addressed whether or not an agency must, in all cases, promulgate rules/standards prior to the agency exercising discretion. The court, in *Dickinson* indicated that rules/standards are not necessary in all cases. In the *Dickinson* case the Public Utility Commissioner was granted, by statute, authority to mitigate the amount of a penalty to be assessed to a trucker, “on terms a he considers proper.” ORS 767.470(4), *Dickinson @ 671*. The court, in *Dickinson*, also provides general comments, which are applicable to this case, related to a review body’s consideration of abuse of discretion claims. The court stated that “administrative discretion is not a magic word. It is only a range of responsible choice in pursuing one or several objectives more or less broadly indicated by the legislature.” *Dickinson @ 673*. “Judicial review of agency discretion is not a contest of adjectives.” *Dickinson @ 674*

The Hearings Officer finds the general fact patterns underlying *Labor Ready* and *Dickinson* is similar in nature to that of this case. The statute referenced in the *Dickinson* case states that if there is a violation a specified amount of a penalty shall be assessed against the violator. The statute, then, grants the PUC commissioner the right to lower the amount of the penalty if there are mitigating circumstances. In *Labor Ready* the Bureau of Labor and Industries (“BOLI”) operated under statutes/rules that specified if there was a certain type of violation the violator would suffer “disbarment” (loss of right to conduct regulated business). However, the statutes/rules provided that the violator would be disbarred for a period not to exceed three years, but BOLI had the right to reduce the term. In this case, PCC 14B.050 B.2 states that the Director of the Revenue Bureau (or designee) *shall* deny an application for a Second Hand Dealer permit if the applicant indicates that he/she has been convicted of a felony. However, PCC 14B.050 C grants the City the *right* to grant a permit, irrespective of a conviction for a felony, if in the Director’s reasonable satisfaction certain mitigating factors exist.

The Hearings Officer finds that Mr. Stalnaker, Jr.’s bare assertion that Sgt. King did not rely on any written code/rules/guidelines in making his decision is not persuasive for two reasons. First, as referenced in *Dickinson* above, discretion may be exercised by an agency without “prior promulgation of standards.” *Dickinson @ 672*. Second, PCC 14B.050 C authorizes the Director to “grant a permit after consulting with the Chief of Police despite the presence of one or more of the enumerated factors, if the applicant establishes to the Director’s reasonable satisfaction” that the applicant’s behavior is not likely to recur, the offending behavior is remote in time, or underlying facts of the applicant’s offense(s) diminish the seriousness of the offense. The Hearings Officer finds the factors listed in PCC 14B.050 B.2 and C, in the context of PCC 14B.90.010, do provide factors to be considered by Sgt. King, during his review, and to be considered by Ms. Holm (Director’s designee) in her review. The Hearings Officer finds that Sgt. King and Ms. Holm, in making their recommendations, utilized the factors listed in PCC 14B.050, in the context of PCC 14B.010.

The Hearings Officer finds that Sgt. King’s recommendations (Exhibits 6 and 12) were based, at least in part, upon his training and experience. The Hearings Officer also finds that Sgt. King’s recommendations (Exhibits 6 and 7) were based upon the information received during his investigation.

The Hearings Officer finds the training and experience argument, made by Mr. Stalnaker, Jr., is not persuasive.

Mr. Stalnaker, Jr. argued that Sgt. King's recommendations of denial were inconsistent and arbitrary when considering Sgt. King's testimony that he had, in the past, recommended a Second Hand Dealer permit be issued to a person with a felony conviction on their record. Based upon the Hearings Officer's review of the record (testimony and Exhibits) it appears that Mr. Stalnaker, Jr. is relying upon a cross-examination question, during the hearing, of Sgt. King and a cross-examination question of Ms. Holm. Mr. Stalnaker, Jr. asked "Sgt. King, have you ever issued approval for someone with a felony conviction for a Second Hand Dealer permit?" Sgt. King responded, "yes I have." Mr. Stalnaker, Jr. asked no further questions of Sgt. King related to Sgt. King's recommendation of approval, in the past, of persons with felony convictions. Mr. Stalnaker, Jr. asked Ms. Holm, "have you approved prior applicants with felony convictions?" Ms. Holm responded to the question with "not that I am aware of...I do not recall." Mr. Stalnaker asked Ms. Holm no additional questions about approving applications, in the past, where an applicant had one or more felony convictions. The Hearings Officer found no evidence, in the admitted Exhibits, related to recommendation of approval in prior cases where a person had a felony conviction listed on the criminal history form.

The Hearings Officer finds that there is insufficient evidence in the record to consider Mr. Stalnaker, Jr.'s inconsistency and arbitrary argument, as discussed above. Based upon the testimony of Ms. Holm, the Revenue Bureau Director (or designee) has not issued a recommendation to approve an application for a Second Hand Dealer permit when the applicant indicated one or more prior felony convictions. As such, based upon the evidence in the record, the Hearings Officer finds recommending denial, in this case, is consistent with prior Revenue Bureau Director recommendations.

Mr. Stalnaker, Jr.'s remaining arguments, in general, are simple disagreements with Ms. Holm's conclusions, and to the extent she relied upon Sgt. King's recommendations, as they relate to PCC 14B.90.050 C. In summary, Mr. Stalnaker, Jr. argues that Appellant Dodenhoff is unlikely to engage in the activities that led to his felony convictions, that the felony convictions are remote in time and that the felony convictions are generally unrelated to the operation of a Second Hand Dealer business. The Hearings Officer reiterates the ORS 183.482 (7) admonition that a review body, such as the Hearings Officer, may not substitute his judgment as to any issue of fact or agency discretion. However, the Hearings Officer must review, in some detail, ORS 183.482 (8)(b).

ORS 183.482 (8)(b)(A) requires the Hearings Officer to determine if the recommendation of denial, as set forth in Exhibit 2, is "outside the range of discretion delegated to the agency." The Hearings Officer finds that the Revenue Bureau Director (or designee) is authorized by the Portland City Council, through PCC 14B.90.050 B.2, to deny an application for a Second Hand Dealer permit if the person on the application committed a felony. The Hearings Officer finds denial of Appellant Dodenhoff's application, which listed (see Exhibits 9, 10, and 11) Appellant Dodenhoff had been convicted of two felonies, is within its decision making powers. The Hearings Officer finds that the Revenue Bureau Director (or designee) is granted discretion, by the Portland City Council through PCC 14B.90.050 C. to approve an application even if the applicant lists the conviction of a felony on his application. The Hearings Officer finds that it is within the range of authorized discretion of the Revenue Bureau Director (or designee) to approve or deny an application for a Second Hand Dealer permit, when a felony is listed on the application, so long as the PCC 14B.90.050 C. factors are considered (see discussion below related to the PCC 14B.90.050 C. factors).

ORS 183.482 (8)(b)(B) requires the Hearings Officer to determine if the recommendation of denial is inconsistent with any City of Portland Revenue Bureau rule, officially stated position, or prior agency practice. Mr. Stalnaker, Jr. brought no City of Portland rule, officially stated position or prior agency practice to the attention of the Hearings Officer that would implicate the recommendation of denial of Appellant Dodenhoff's application to be inconsistent. Mr. Stalnaker, Jr. did attempt to elicit evidence of inconsistent practices by Sgt. King and Ms. Holm in the granting/denial of Second Hand Dealer permits with respect to applicants who had felony convictions on their records. As stated above, the response from Sgt. King was that he had recommended approval of a Second Hand Dealer permit, in one or more past cases, when the applicant had a history of a felony conviction. However, Ms. Holm, as the Director's designee and the person who ultimately exercised discretion under PCC 14B.90.050 C, did not recall even a single instance of approval of an application if the applicant had been convicted of a felony. The Hearings Officer concludes there is not credible evidence in the record to suggest that the denial of Appellant Dodenhoff's application for a Second Hand Dealer permit was inconsistent with any rule, officially stated position or prior agency practice.

ORS 183.482 (8)(b)(C) requires the Hearings Officer to determine if the recommendation of denial is in violation of any constitutional or statutory provision. The Hearings Officer finds Mr. Stalnaker, Jr. raised and/or implicated no specific constitutional or statutory provisions in his request for hearing (Exhibit 4), or in his oral arguments presented at the hearing. The Hearings Officer finds that the denial of Appellant Dodenhoff's application for a Second Hand Dealer permit did not violate any identified constitutional or statutory provision.

Finally, the Hearings Officer shall address Mr. Stalnaker's argument that the Hearings Officer should find that Ms. Holm misapplied the PCC 14B.90.050 C. factors. In essence, Mr. Stalnaker, Jr.'s argument is that a proper consideration of the PCC 14B.90.050 C. factors would result in the granting of the Second Hand Dealer permit to Appellant Dodenhoff. As stated earlier, the Hearings Officer may not substitute his judgment for that of the City of Portland Revenue Bureau as set forth in Exhibit 2. The Hearings Officer, however, may consider whether or not the Determination (Exhibit) is supported by substantial evidence related to the PCC 14B.90.050 C. factors.

The Hearings Officer finds that there is substantial evidence in the record that Sgt. King (Exhibits 6 and 12) and Ms. Holm (Exhibits 2 and 8) did consider the three factors listed in PCC 14B.90.050 C. The Hearings Officer finds that Sgt. King, or his designee, investigated the criminal background of Appellant Dodenhoff (Exhibits 6 and 12). The Hearings Officer finds that Sgt. King became aware that Appellant Dodenhoff had been convicted, on two occasions, for a felony (cultivation of marijuana) (Exhibits 6 and 12). The Hearings Officer finds that Sgt. King became aware that Appellant Dodenhoff had failed to note, on his criminal history form, a 2006 arrest for "felon in possession of a firearm" (Exhibits 6 and 12). The Hearings Officer finds that Sgt. King became aware of Appellant Dodenhoff being on "parole" (Exhibit 12). Sgt King concluded that Appellant Dodenhoff would be "at high risk for not being able to comply with the many laws regulating secondhand dealers" (Exhibit 12). Sgt. King testified at the hearing that he does not have a set time when determining if a conviction is remote in time. However, Sgt. King did indicate during his hearing testimony that whether or not the felon's parole/supervision has ended is a factor to be considered. Sgt. King testified at the hearing that Appellant Dodenhoff had been convicted in California on/about 2001, and reoffended again in 2004; a period of 3 to 4 years between one conviction and a second offense. Sgt. King concluded that the two felonies were "not remote in time" (Exhibit 6). Ms. Holm stated that her primary reason for recommending denial, per Sgt. King's letters (Exhibits 6 and 12), were the drug convictions (Exhibit 5, page 3).

The Hearings Officer acknowledges that evidence is in the record (Exhibits 4, 7 and 11) relating to how Appellant Dodenhoff is "now a changed man." The Hearings Officer also acknowledges that there is evidence in the record that Appellant Dodenhoff may have been growing marijuana for his, and perhaps others, medical purposes. However, Sgt. King's statement, in Exhibit 5, suggests that Appellant's statements to police regarding the number of plants and their intended use did not correlate with the number of marijuana plants and drug paraphernalia actually found by police at Appellant Dodenhoff's residence. The Hearings Officer finds there is no persuasive evidence in the record to suggest that PCC 14B.90.050 C.3 should have been seriously considered by Ms. Holm in reaching her decision to deny Appellant Dodenhoff's application.

Conclusion:

The Hearings Officer finds that the denial of Appellant Dodenhoff's application for a Second Hand Dealer permit (Exhibit 2) is supported by substantial evidence. The Hearings Officer finds that the denial of Appellant Dodenhoff's application for a Second Hand Dealer permit (Exhibit 2) is not "inconsistent and/or arbitrary." The Hearings Officer finds that the denial of Appellant Dodenhoff's application for a Second Hand Dealer permit (Exhibit 2) is within the range of discretion granted to the Director (or designee) of the Revenue Bureau and is not inconsistent with any identified City of Portland rule, officially stated position, or prior practice. The Hearings Officer finds that the denial of Appellant Dodenhoff's application for a Second Hand Dealer permit did not violate any identified constitutional or statutory provision. The Hearings Officer finds that the Determination (Exhibit 2) is valid and that Appellant's appeal should be denied.

ORDER AND DETERMINATION:

1. The Determination (Exhibit 2) is valid; Appellant Dodenhoff's appeal is denied.
2. This order has been mailed to the parties on May 14, 2010.
3. This order may be appealed to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Dated: May 14, 2010

GJF:cb/rs

Enclosure



Gregory J. Frank, Hearings Officer

Exhibit #	Description	Submitted by	Disposition
1	Appeal form page 2	Holm, Anne	Received
2	Letter to Dodenhoff from Holm dated 2/10/10	Holm, Anne	Received
3	Appeal form page 1	Holm, Anne	Received
4	Letter to Holm from Stalnaker dated 2/24/10	Holm, Anne	Received
5	Historical Narrative of Dodenhoff Case and Secondhand Dealer Program (4 pgs)	Holm, Anne	Received
6	Letter Holm from King dated 12/14/09	Holm, Anne	Received
7	Letter to Holm from Dodenhoff, noted date of 3/30/09 (2 pgs)	Holm, Anne	Received
8	Letter to Dodenhoff from Holm dated 3/9/09 (2 pgs)	Holm, Anne	Received
9	Applicant for Occasional Secondhand Dealers and Secondhand Dealers	Holm, Anne	Received
10	City of Portland Secondhand Dealer Personal History Form	Holm, Anne	Received
11	Letter to City of Portland Revenue Director, License & Tax Division from Dodenhoff, dated 2/4/09	Holm, Anne	Received
12	Letter to Holm from King dated 3/5/09	Holm, Anne	Received
13	Mailing list	Hearings Office	Received
14	Hearing notice	Hearings Office	Received