



CITY OF
PORTLAND, OREGON
OFFICE OF THE CITY AUDITOR
Hearings Office

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HEARINGS OFFICER'S ORDER

APPEAL OF SPENCER CRUM

CASE NO. 3100328
[Bureau Case No.: 10-62364]

PARK: Wilson Pool

DATE OF HEARING: August 31, 2010

APPEARANCES:

Mr. Spencer Crum, Appellant

The City did not appear

HEARINGS OFFICER: Mr. Gregory J. Frank

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Mr. Spencer Crum ("Appellant") appeared at the hearing and testified on his own behalf. Mr. Nikolas Koukoumanos appeared at the hearing and testified on behalf of Appellant. Mr. Abdullah Naimi appeared at the hearing and testified on behalf of Appellant. No person appeared and testified on behalf of the City. The Hearings Officer makes this decision based upon the testimony of Appellant, Mr. Koukoumanos and Mr. Naimi and the documents admitted into the evidentiary record (Exhibits 1 through and including 17).

Exhibit 2 is a copy of a Notice of Exclusion From City of Portland Park issued to Appellant on July 29, 2010 (related to events occurring on July 24, 2010). Exhibit 2 indicates Appellant was excluded, on July 29, 2010 from the Wilson Pool Park, for allegedly violating the following laws/ordinances: Harassment, Offensive Physical Contact, and Reckless Endangering ORS 163.195.

The City documents provided a very limited explanation of the events of July 24, 2010 at the Wilson Pool. Exhibit 2 (duplicate copies are found in Exhibits 6 and 8) notes, in a section entitled "one sentence summary of incident" that Appellant "wrestles with and injures a child." Exhibit 8, page 2, contains space for a written statement/affidavit of the person who issued the Notice of Exclusion to Appellant; the space, in this instance, states "see attach report." The only "report" found in the admitted documents is a "Rescue Report" (Exhibit 9). Exhibit 9 contains a notation in the "contributing factor"

section the following statement: "Was put in headlock and thrown around" (Exhibit 9). The City provided a number of documents titled "Witness Statement" (Exhibits 10, 11, 12, 13, 14 and 15). Exhibit 10 contained a statement that "Spencer grabbed Thomas around the neck using his arm and wrenched him around."

Mr. Koukoumanos testified that while in the Wilson Pool on July 24, 2010, he and friends (including Appellant) were playing water basketball. Mr. Koukoumanos stated there were groups of "kids" playing basketball, with some quite young, some middle school age, and his group that were older. Mr. Koukoumanos stated that a "couple" of the middle school kids were aggressive, including their jumping on the older player's backs. Mr. Koukoumanos stated that on occasion, the middle school kids would jump from the side of the pool onto Appellant and onto others. Mr. Koukoumanos stated his group of older players, including Appellant, asked the aggressive middle school age kids to stop and when they refused, they (group of older players including Appellant) began to push the middle school age kids off of them. Mr. Koukoumanos stated that they played basketball for a couple of hours at the Wilson pool and the interaction with the middle school age kids lasted for quite a long time. Mr. Koukoumanos stated that during the interaction with the middle school age kids, neither the lifeguards nor any parents commented on their behavior towards the middle school kids. Mr. Koukoumanos stated that Appellant "handled the situation as good as he could have." Mr. Koukoumanos stated that the injury to one of the aggressive middle school age kids was "just a freak accident."

Mr. Naimi testified that he did not see the injury to one of the middle school age kids. He stated, during the time the older group (including the Appellant) were playing basketball, a "couple of the middle school age kids were very reckless" in their behavior. Mr. Naimi stated that Appellant's actions towards the middle school age kids were "definitely not overly physical."

Appellant testified that one of the middle school age kids repeatedly jumped on him and he (Appellant) told the boy to stop. Appellant stated that when the middle school age boy did not stop he would either push the boy away or "toss him back in the water." Appellant denied putting the middle school age boy who was injured into a headlock. Appellant stated that he had tossed the middle school age boy into the water to get him (middle school boy) off him (Appellant) a number of times and the boy was not injured. Appellant denied using a "wrestling hold" on the injured boy. Appellant denied harassing anyone at the Wilson pool on July 24, 2010. Appellant stated that he did not engage in any offensive physical contact on July 24, 2010. Appellant stated that he did not believe he acted in a reckless manner towards the injured middle school boy on August 24, 2010.

Portland City Code ("PCC") section 14A.40.020 A states that "no person shall cause or attempt to cause another person reasonably to apprehend that they will be subjected to any offensive physical contact." The Hearings Officer found no reference to a definition of "offensive physical contact." The Hearings Officer finds that without a definition of "offensive physical contact," it is not possible to find that Appellant engaged in "offensive physical contact." The Hearings Officer finds the alleged violation of PCC 14A.40.020 A (Offensive Physical Contact Prohibited) was not proven by the City.

ORS 166.065 sets forth the elements of the crime of Harassment. ORS 166.065 (1)(A) states that a person commits the crime of harassment if the person intentionally "harasses or annoys another person by subjecting such other person to offensive physical contact." Again, the Hearings Officer was not provided by the City a definition of "offensive physical contact." Also, in this case there is no evidence in the record that Appellant "intentionally" subjected another person to offensive physical contact. The

Hearings Officer finds the City failed to prove, by a preponderance of the evidence, a violation of ORS 166.065.

ORS 163.195 sets forth the elements of the crime of Recklessly endangering another person. ORS 163.195 (1) states that a person "commits the crime of recklessly endangering another person if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person." The City failed to describe actions of the Appellant, on July 24, 2010 at the Wilson pool, that would constitute reckless behavior by Appellant. Appellant, and his witnesses, described behavior of a few middle school age boys (jumping onto the backs of Appellant and others) and that Appellant asked the middle school age boy to stop such behavior, then pushing them back and finally tossing the boys into the water. Appellant stated that he had tossed the middle school age boy who was injured a couple of times before the boy's injury and that he felt that his actions did not create a serious risk of injury towards the injured boy. Appellant, although remorseful that the boy was injured, did not believe his actions were reckless in pushing the boy away and tossing the boy into the water.

The Hearings Officer finds that the City provided only scant evidence related to Appellant's actions. The Hearings Officer finds that the City did not provide sufficient evidence to convince the Hearings Officer that Appellant acted recklessly as contemplated in ORS 163.195. The Hearings Officer finds that the City failed to carry its burden of proof that Appellant violated ORS 163.195.

The Hearings Officer finds that Appellant prevails in his appeal challenging the validity of the Notice of Exclusion From City of Portland Park issued on July 29, 2010.

ORDER AND DETERMINATION:

1. The Notice of Exclusion From City of Portland Park issued to Spencer Crum (Appellant) on July 29, 2010, for events occurring at the Wilson Pool Park on August 24, 2010, is not valid; Appellant prevails in this appeal.
2. This order has been mailed to the parties on September 2, 2010.
3. This order may be appealed to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Dated: September 2, 2010

GJF:rs

Enclosure



Gregory J. Frank, Hearings Officer

Exhibit #	Description	Submitted by	Disposition
1	Appeal form, page 1a	Crum, Spencer	Received
2	Notice of Exclusion or Warning from City of Portland Park	Crum, Spencer	Received
3	Mailing List	Hearings Office	Received
4	Hearing Notice	Hearings Office	Received
5	Fax cover sheet	Complaint Signer,	Received
6	Notice of Exclusion or Warning From City of Portland Park	Complaint Signer,	Received
7	Appeal form page 2	Complaint Signer,	Received
8	Notice of Exclusion or Warning From City of Portland Park	Complaint Signer,	Received
9	Rescue Report	Complaint Signer,	Received
10	Witness Statement - Alyssa Hersh	Complaint Signer,	Received
11	Witness Statement - Andrew Locke Harris	Complaint Signer,	Received
12	Written statement	Complaint Signer,	Received
13	Witness Statement - Jonathan Eric Hansen	Complaint Signer,	Received
14	Witness Statement - Hunter Morford	Complaint Signer,	Received
15	Written statement	Complaint Signer,	Received
16	Special Report	Complaint Signer,	Received
17	Updated Mailing List	Hearings Office	Received