



# CITY OF PORTLAND

Office of City Auditor LaVonne Griffin-Valade

## Hearings Office

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## HEARINGS OFFICER'S ORDER

TriMet vs. Nadine Cohen Mallery

CASE NO. 3100397

(TriMet Exclusion Number 164979)

HEARING DATE: October 26, 2010

### APPEARANCES:

Nadine Mallery, Excluded Party

Supervisor Nancy Carter, for TriMet

HEARINGS OFFICER: Mr. Gregory J. Frank

### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

**Timelines:** The Hearings Officer finds the following concerning the Notice of Exclusion being issued:

TriMet issued the Notice of Exclusion to Ms. Nadine Cohen Mallery on October 2, 2010. The case was forwarded to the City of Portland Hearings Office on October 8, 2010. The Hearings Office mailed a hearing notice to the parties on October 12, 2010, within the time prescribed in the TriMet Code. The notice contained the required information concerning Ms. Mallery's rights in the hearing process. An Interim Order extending the stay on the exclusion was also mailed on October 12, 2010.

**Sufficiency of the Notice of Exclusion:** A copy of the Notice of Exclusion was provided to Ms. Mallery when she was excluded. The notice did reference the violating conduct/applicable code provision.

**Stays:** The exclusion was subject to an automatic stay upon being issued.

**Mitigating and/or Aggravating Factors:** The Hearings Officer finds no mitigating or aggravating factors existed when the Notice of Exclusion was issued.

**Probability that the excluded individual engaged in the conduct supporting the exclusion:** Ms. Mallery appeared at the hearing and testified on her own behalf. TriMet Supervisor Carter appeared and testified on behalf of TriMet. The Hearings Officer makes this decision based upon the testimony of Ms. Mallery and Supervisor Carter, and the documents admitted into the evidentiary record (Exhibits 1 through and including 8).

At the beginning of the hearing, Ms. Mallery was asked by the Hearings Officer if she wished to raise any issues or ask any questions related to the Statement of Rights (Exhibit 6). Specifically, Ms. Mallery was asked by the Hearings Officer if she would like the hearing rescheduled to a later date to allow her time to consult with an attorney. Ms. Mallery decided that she wished the hearing to proceed. Ms. Mallery asked the Hearings Officer for an ADA accommodation. Upon inquiry by the Hearings Officer, Ms. Mallery stated that the specific accommodation she was requesting was that the hearing not be held at all, because holding the hearing would create stress and anxiety for her. The Hearings Officer determined that such an accommodation request, to not hold a hearing at all, was not reasonable. The Hearings Officer denied Ms. Mallery's request to cancel the hearing.

Ms. Mallery received a Notice of Exclusion on October 2, 2010 for allegedly violating TMC 29.15 (fare violation). A person violates TMC 29.15 (fare violation) if the person rides a TriMet vehicle without having, in his/her possession, proof of purchase of a valid fare. Also, a person violates TMC 29.15 (fare violation) if the person, upon request of a TriMet representative, fails to display for the representative's view, proof of purchase of a valid fare.

Supervisor Carter testified that on October 2, 2010 she boarded a Green Line Max train at the Gateway Transit Center and performed passenger fare checks. Supervisor Carter stated, while on the Green Line Max train, she contacted Ms. Mallery in the priority seating area and asked Ms. Mallery to show her "ticket/fare." Supervisor Carter stated Ms. Mallery did not have, in her possession, proof of purchase of a valid fare. Supervisor Carter stated that Ms. Mallery indicated that she was homeless and needed to return to her homeless shelter. Supervisor Carter stated that she initially offered to issue Ms. Mallery a warning and a complimentary ticket so that she could return home. Supervisor Carter stated that Ms. Mallery, upon arriving at the 60<sup>th</sup> Avenue Transit Station, demanded to get off the train, asked for her identification to be returned, and told Supervisor Carter that she (Mallery) would buy a ticket. Supervisor Carter stated that she conducted a "records check" with TriMet and was informed that Ms. Mallery had received a prior citation for non-payment of fare. Supervisor Carter, upon questioning by Ms. Mallery, denied that Ms. Mallery asked for an ADA accommodation while on the Max train.

Ms. Mallery's initial testimony was to read and/or paraphrase Exhibit 8. The Hearings Officer acknowledges reading Exhibit 8 in its entirety. Ms. Mallery testified that she had, at an earlier time, unsuccessfully attempted to obtain her October 2010 monthly pass. Ms. Mallery stated that on October 2, 2010, when contacted by Supervisor Carter, she did not have a valid ticket/fare. Ms. Mallery stated, upon questioning by Supervisor Carter, that she had forgotten to purchase a ticket. Ms. Mallery stated that she suffers from PTSD and interconnected problems such as hypoglycemia and a herniated disk. Ms. Mallery stated that she repeatedly asked Supervisor Carter for an ADA accommodation; get off the train and eat to address symptoms of hypoglycemia. Ms. Mallery acknowledged that Supervisor Carter did, initially, offer to issue her a warning and give her a complimentary ticket/fare. Ms. Mallery stated that she did walk away from Supervisor Carter, take the elevator at the 60<sup>th</sup> Avenue Transit station upstairs and purchase a ticket/fare. Ms. Mallery stated that she believed that the reason she received the Notice of Exclusion on October 2, 2010 was in retaliation for her request for an ADA accommodation.

The Hearings Officer finds that the testimony of Supervisor Carter and Ms. Mallery addressed a number of matters not relevant to the issue in this case. The issue in this case is whether it is more probable than not that on October 2, 2010, Ms. Mallery violated TMC 29.15 (fare violation). The Hearings Officer finds that the testimony of Ms. Mallery and Supervisor Carter is consistent in regards to whether or not Ms. Mallery had in her possession, while on a TriMet Max train, proof of purchase of a valid fare. The Hearings Officer finds it is more probable than not that Ms. Mallery, on October 2, 2010, did not have in her possession proof of purchase of a valid fare. Based upon the evidence in the record the Hearings Officer finds it is more probable than not that on October 2, 2010, Ms. Mallery did ride a TriMet Max train without having in her possession proof of purchase of a valid fare. The Hearings Officer finds that it is more probable than not that on October 2, 2010, Ms. Mallery did violate TMC 29.15 (fare violation).

The Hearings Officer finds that a TriMet Supervisor, such as Supervisor Carter, has discretion as to when to issue a warning, issue a Notice of Exclusion or issue a Citation. The Hearings Officer acknowledges that the evidence in the record indicates Supervisor Carter offered to issue Ms. Mallery a warning, but later issued the Notice of Exclusion. The Hearings Officer finds that the testimony of Supervisor Carter was that she did not issue the Notice of Exclusion to Ms. Mallery in retaliation for Ms. Mallery's request for an accommodation. Ms. Mallery expressed her opinion that the reason the Notice of Exclusion was issued was retaliatory for her request for an ADA accommodation. Based upon the evidence in the record the Hearings Officer finds that Ms. Mallery was issued the Notice of Exclusion on October 2, 2010 for failing to have a valid fare in her possession and not in retaliation for an ADA accommodation.

The Hearings Officer finds that the Notice of Exclusion issued to Ms. Nadine Cohen Mallery on October 2, 2010 is valid.

Special Exceptions: The Hearings Officer finds Ms. Mallery is transit dependent and disabled. The Hearings Officer finds that Ms. Mallery needs access to the TriMet Green Line Max trains on Monday, Wednesday and Friday between 8:00 a.m. and 5:00 p.m. Even though Ms. Mallery has been granted a qualified exclusion, she must still follow all TriMet laws/rules while on TriMet property/vehicles. Violation of TriMet laws/rules (such as failure to have in her possession when riding a TriMet vehicle proof of purchase of a valid fare), while on TriMet property/vehicles may subject Ms. Mallery, during the term of this exclusion, to being charged with the crime of Interfering with Public Transportation (ORS 166.116) or the crime of Criminal Trespass in the Second Degree (ORS 164.245).

#### ORDER AND DETERMINATION:

1. Validity of the Notice of Exclusion:

The Hearings Officer modifies the Notice of Exclusion issued to Ms. Nadine Cohen Mallery on October 2, 2010.

2. Length of the Exclusion:

The exclusion shall become effective with this Order, on November 2, 2010, and shall conclude on November 30, 2010 at 5:00 p.m.

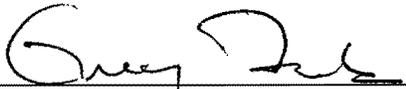
3. Scope of the Exclusion:

Ms. Mallery shall have access to the TriMet Green Line Max trains on Monday, Wednesday and Friday between 8:00 a.m. and 5:00 p.m.

4. This order has been mailed to the parties on October 27, 2010, not more than five (5) business days following the hearing, and will become final on November 2, 2010.

5. This order may be appealed to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Dated: October 27, 2010

  
Gregory J. Frank, Hearings Officer

GJF:rs/cb

## Enclosure

<b>Exhibit #</b>	<b>Description</b>	<b>Submitted by</b>	<b>Disposition</b>
<u>1</u>	<u>Appeal form page 2</u>	<u>Turner, Anna</u>	<u>Received</u>
<u>2</u>	<u>TriMet Fare Inspection System printout</u>	<u>Turner, Anna</u>	<u>Received</u>
<u>3</u>	<u>Notice of Exclusion</u>	<u>Turner, Anna</u>	<u>Received</u>
<u>4</u>	<u>Mailing List</u>	<u>Hearings Office</u>	<u>Received</u>
<u>5</u>	<u>Hearing Notice</u>	<u>Hearings Office</u>	<u>Received</u>
<u>6</u>	<u>Statement of Rights</u>	<u>Hearings Office</u>	<u>Received</u>
<u>7</u>	<u>Letter from Nadine Mallery</u>	<u>Turner, Anna</u>	<u>Received</u>
<u>8</u>	<u>Transfer, ticket, Officer Sandvik business card, wrist ID</u>	<u>Turner, Anna</u>	<u>Received</u>