

CITY OF PORTLAND

Office of City Auditor LaVonne Griffin-Valade

Hearings Office

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HEARINGS OFFICER'S ORDER

APPEAL OF JAMES LOPES

CASE NO. 3120254

[Police Bureau Case No. Unknown]

DATE OF HEARING: May 29, 2012

APPEARANCES:

Mr. James Lopes, Appellant

Officer David Sanders, on behalf of the City

HEARINGS OFFICER: Ms. Kimberly M. Graves

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Mr. James Lopes appeared at the hearing on his own behalf. Officer David Sanders appeared on behalf of the City. The Hearings Officer makes this decision based upon the arguments of Mr. Lopes, the testimony of Officer Sanders, and the exhibits admitted into the evidentiary record (Exhibits 1 through, and including, 8).

Mr. Lopes made an opening statement, though declined to testify on his own behalf. In his opening statement, Mr. Lopes indicated that he has a history with the officer from last summer, and that he was not near anyone who was arrested. Mr. Lopes stated that he did not have any marijuana on him and that there is no basis for the exclusion. Mr. Lopes submitted Exhibits 1 through, and including, 3, for the Hearings Officer's consideration. Exhibit 1 is an appeal form. Mr. Lopes writes in Exhibit 1, "I wasn't doing anything wrong, he checked my person I didn't have any suspected drugs only a cigarette." Exhibit 2 is a copy of the Notice of Exclusion or Warning from City of Portland Park which indicates a violation of Portland City Code (PCC) 20.12.240. The Notice of Exclusion lists Waterfront Park as the park which Mr. Lopes is excluded from for 180 days. Exhibit 3 is a complaint submitted to the Independent Police Review Division. Mr. Lopes has written on the complaint, "He has been horasing (sic) me for a year now likes to kick me out of parks."

Officer Sanders testified that on April 18, 2012, he was acting as a bike patrol officer in Waterfront Park when he contacted Mr. Lopes. Officer Sanders testified that he routinely patrols Portland parks and

deals with alcohol and drug related issues. Officer Sanders testified that he first observed Mr. Lopes seated on a park bench with another individual. Officer Sanders testified that he was approximately 20 yards away from Mr. Lopes when he saw Mr. Lopes turn and make eye contact with him. Officer Sanders testified that after making eye contact with him, Mr. Lopes made a furtive movement and appeared to be concealing a marijuana cigarette into his pant leg. Officer Sanders testified that he contacted Mr. Lopes and asked him to turn over the cigarette. Officer Sanders testified that Mr. Lopes reached into his pant leg and then quickly placed the alleged marijuana cigarette into his mouth. Officer Sanders testified that he ordered Mr. Lopes to spit out the cigarette, and even grabbed his mouth, but that Mr. Lopes refused. Officer Sanders testified that Mr. Lopes denied having a marijuana cigarette. Officer Sanders testified that he excluded Mr. Lopes for Failing to Obey the order of a Park Officer and for violating ORS 162.295 for Tampering with Physical Evidence. Officer Sanders testified that he did not find any marijuana on Mr. Lopes and did not note any physical signs of current usage. Officer Sanders testified that he has personally excluded Mr. Lopes from a City of Portland park within the last 11 months.

Upon cross examination by Mr. Lopes, Officer Sanders testified that he did not bring any evidence of marijuana usage with him to the hearing. Officer Sanders testified that he did not search Mr. Lopes prior to issuing the exclusion. Officer Sanders testified that he has attended court with Mr. Lopes in the past regarding park exclusions. Officer Sanders testified that he wrote the current exclusion for 180 days because of Mr. Lopes' history of having greater than two exclusions in the past two years. Officer Sanders testified that 180 days is the appropriate length for the exclusion given Mr. Lopes' history.

Mr. Lopes offered a brief closing argument. Mr. Lopes stated that he has dealt with the officer in the past on other exclusions. Mr. Lopes stated that he received two exclusions within days of each other. Mr. Lopes stated that there was no evidence presented of marijuana use or criminal activity. Mr. Lopes stated that he was excluded for 180 days because the officer knows him, not because it was warranted based on his history.

The City did not submit any documents for the Hearings Officer's review. The Notice of Exclusion, Exhibit 2, lists a violation of 20.12.240 as the code section which led to the issuance of the exclusion.

PCC 20.12.265A provides, "In addition to other remedies provided for violation of this Code, or of any of the laws of the State of Oregon, any Park Officer may exclude any person who violates any applicable provision of law in any Park from that park in accordance with the provisions of this section." PCC 20.12.265B defines "applicable provision of law" as including "any applicable provision of this code" PCC 20.12.265C provides "if the person to be excluded has been excluded from one or more Parks on two or more occasions within two years before the date of the present exclusion, the exclusion shall be for 180 days."

PCC 20.12.240 Rules and Regulations, Directions of Park Officers to be Obeyed states, in part, "No person shall violate any rule or regulation established under the authority of Section 20.04.020 or 20.04.050, nor refuse or fail to obey any reasonable direction of a Park Officer." PCC 20.12.240 provides that the direction of a Park Officer is reasonable if "it is otherwise reasonably related to the protection of the health, welfare or safety of the person or of any other person in the Park."

The Hearings Officer considers the testimony of Officer Sanders to be credible, and to accurately reflect the conduct of Mr. Lopes which led to the issuance of the Notice of Exclusion on April 18, 2012. The Hearings Officer finds that Waterfront Park is a "park" as defined in PCC 20.04.010. The Hearings

Officer finds that an order to turn over suspected drugs is an order which is reasonably related to protection of the health, welfare and/or safety of persons in a City of Portland Park. The Hearings Officer finds that failure to obey an order to turn over suspected drugs is a violation of PCC 20.12.240. The Hearings Officer finds that the preponderance of the evidence in the record is that it is more likely than not that Mr. Lopes was in violation of PCC 20.12.240 on April 18, 2012 when he refused to obey the order by Officer Sanders to turn over the alleged marijuana cigarette. The Hearings Officer finds that Mr. Lopes conduct involved a controlled substance and therefore a warning under PCC 20.12.265D was not required. The Hearings Officer finds that Mr. Lopes has been excluded from a City of Portland park at least two times within the last two years, and therefore the correct length of a new exclusion would be 180 days under PCC 20.12.265C. The Hearings Officer finds that the Notice of Exclusion issued on April 18, 2012 is valid and therefore Mr. Lopes' appeal is denied.

The Exclusion was issued to Mr. Lopes on April 18, 2012. Mr. Lopes brought his appeal documents to the Hearings Office on May 10, 2012. Mr. Lopes indicated that he had properly filed the appeal with the City, however the Hearings Office had not received notice of his appeal through the proper channels within the city. The Hearings Office accepted Mr. Lopes' appeal form and scheduled a hearing. The Hearings Officer notes that without traveling through the proper channels within the City, a stay was not put on the exclusion pending the hearing date. The Hearings Officer finds that the exclusion began on April 18, 2012, and has continued since that date. The Hearings Officer finds that 180 days from April 18, 2012 is October 15, 2012. The Hearings Officer finds that the Exclusion term shall run until 12 Midnight on October 15, 2012.

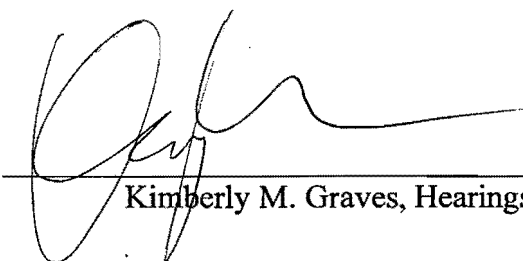
ORDER AND DETERMINATION:

1. The Exclusion (Exhibit 2) from Waterfront Park issued to James Lopes on April 18, 2012 is valid; Mr. Lopes' appeal is denied.
2. The Exclusion, which has been in effect since April 18, 2012, shall run until 12 Midnight on October 15, 2012.
3. This order has been mailed to the parties on June 1, 2012, and will become final and effective immediately.
4. This order may be appealed to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Dated: June 1, 2012

KMG:c2/c1

Enclosure



Kimberly M. Graves, Hearings Officer

Exhibit #	Description	Submitted by	Disposition
<u>1</u>	<u>Appeal Form page 1b</u>	<u>Lopes, James</u>	<u>Received</u>
<u>2</u>	<u>Notice of Exclusion or Warning From City of Portland Park</u>	<u>Lopes, James</u>	<u>Received</u>
<u>3</u>	<u>Independent Police Review Division Complaint</u>	<u>Lopes, James</u>	<u>Received</u>
<u>4</u>	<u>Mailing List</u>	<u>Hearings Office</u>	<u>Received</u>
<u>5</u>	<u>Notice of Hearing</u>	<u>Hearings Office</u>	<u>Received</u>
<u>6</u>	<u>Request to reschedule</u>	<u>Sanders, Officer</u>	<u>Received</u>
<u>7</u>	<u>Mailing List</u>	<u>Hearings Office</u>	<u>Received</u>
<u>8</u>	<u>Hearing Notice</u>	<u>Hearings Office</u>	<u>Received</u>