



CITY OF
PORTLAND, OREGON
HEARINGS OFFICE

1900 S.W. 4th Avenue, Room 3100
Portland, Oregon 97201
Telephone: (503) 823-7307
FAX: (503) 823-4347
TDD (503) 823-6868

HEARINGS OFFICER'S ORDER

APPEAL OF NIKAIA

CASE NO. 3080386
[Police Bureau Case No. 08-104038]

PROPERTY / ZONE / PARK: Eastbank Esplanade

DATE OF HEARING: December 4, 2008

APPEARANCES:

Dr. Nikaia, Appellant

Officer Robert Quick, for the City

HEARINGS OFFICER: Mr. Gregory J. Frank

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Dr. Nikaia, appellant, appeared and testified on his own behalf. Portland Police Officer Quick appeared and testified on behalf of the City. The Hearings Officer makes this decision based upon the testimony of Dr. Nikaia and Officer Quick and the exhibits admitted into the evidentiary record (exhibits 1 through and including 4 and 17 through and including 21); neither Dr. Nikaia nor Officer Quick objected to the introduction of these exhibits. The Hearings Officer placed primary emphasis upon the testimony of Dr. Nikaia and Officer Quick.

Dr. Nikaia elected to have the City proceed first with its case. Officer Quick testified that on October 19, 2008 he was on a mission, with other police officers, on the Eastbank Esplanade, a Portland Park. Officer Quick stated that he observed Dr. Nikaia and another individual (Decker) squatting down and warning their hands over a couple of open flames. Officer Quick testified that he asked Decker to put out his flame and he complied. Officer Quick testified that he asked, audibly, Dr. Nikaia to put out his flame and Dr. Nikaia responded that he did not need to put it out because the law does not apply to Native Americans. Officer Quick stated that he repeated his request to Dr. Nikaia and again Dr. Nikaia responded that the law did not apply to him. Officer Quick stated that Decker reached over two times and attempted to put out the flame but Dr. Nikaia reached out and pushed Decker's hand away on both attempts. When Dr. Nikaia was taken into custody, Officer Quick stated that Dr. Nikaia told him that he was hard of hearing in his left ear. Officer Quick stated that he had been talking to Dr. Nikaia from Dr.

Nikaia's right side and continued to do so. Officer Quick testified that Dr. Nikaia was identified by his Oregon ID card. Officer Quick stated that Dr. Nikaia requested the officer's business card and the officer gave Dr. Nikaia one of his business cards.

Dr. Nikaia testified that prior to being contacted by Officer Quick, he was sitting on a concrete riser listening to "drumming." He stated that despite his hearing loss he can feel/hear the drumming. Dr. Nikaia stated that he had been there for more than 20 minutes and observed a person with a 3" candle and a tiny Sterno burning for more than 20 minutes; Dr. Nikaia estimated the flames had been burning for up to one hour. Dr. Nikaia stated that he then got up, walked over to get some water and returned to the concrete riser. Then, Dr. Nikaia stated, he walked over the person with the candle and Sterno and squatted to warm his hands. Dr. Nikaia testified that Officer Quick approached him and he told Officer Quick that if "he had anything important" to say he should write it down. Dr. Nikaia stated that the fire can that he was warming his hands on was not his. When asked by Officer Quick if he responded to Officer Quick's comments to Decker, Dr. Nikaia responded "not specifically."

During his closing comments, Dr. Nikaia stated that "everything said" by Officer Quick "is a blatant lie." Dr. Nikaia stated that he made it very clear to Officer Quick that he could not hear. Dr. Nikaia suggested that he may have responded to some of Officer Quick's comments or questions because he "can assume, by circumstances, what was said." Dr. Nikaia stated that he has hearing loss in both ears and he can hear better from his left ear; his right ear he hears nothing. Dr. Nikaia stated that Officer Quick's testimony should not be believed because Officer Quick was unable to spell his name correctly from the ID card he was given.

The testimony of Officer Quick and Dr. Nikaia could not have been much more divergent. This case requires the Hearings Officer to assess the credibility of Officer Quick and Dr. Nikaia in order to reach a decision.

Portland City Code 20.12.265 provides that a police officer may issue a park exclusion, from a City park, if an applicable provision of law is violated within the park. Portland City Code 20.12.265 D. requires, for many law violations, a warning be given to a person prior to the issuance of a park exclusion. Portland City Code 20.12.265 F. states that the Hearings Officer is to uphold a park exclusion if the Hearings Officer finds there is a preponderance of the evidence in the record that it is more likely than not, the person issued the park exclusion in fact committed the violation.

Exhibit 2, a copy of the Notice of Exclusion issued to Dr. Nikaia, stated that Dr. Nikaia was excluded for violating Portland City Code 20.12.110 (Fire in Park). 20.12.110 prohibits the lighting of a fire within a City Park (certain exceptions permitted, such as lighting of a cigarette, pipe, or cigar).

The Hearings Officer finds, based upon the testimony of both Dr. Nikaia and Officer Quick, that Officer Quick's recollection of the events leading up to the issuance of the park exclusion to Dr. Nikaia is more credible. The Hearings Officer finds that Officer Quick completed the Notice of Exclusion (Exhibit 4) shortly after his observation of and interaction with Dr. Nikaia. Exhibit 2 states "subject warming on open flame, refused to put out flame." The Hearings Officer finds that Dr. Nikaia's name was spelled, by Officer Quick on the park exclusion form (Exhibit 2), the same as on Dr. Nikaia's ID card (Exhibit 4). The Hearings Officer finds that Officer Quick has no plausible benefit from making a statement that he gave a business card to Dr. Nikaia. The Hearings Officer finds that Officer Quick's testimony is credible when he stated that he and the other police officers (and one or more park rangers) purpose for

their presence at the location where Dr. Nikaia was contacted were reports that during past "drumming" events there were open flames. The officers were there to curtail such activity and if a flame had been burning for over 20 minutes the persons responsible would be contacted and the activity stopped. The Hearings Officer finds that Dr. Nikaia's testimony that persons at the location had candles and other items burning for up to an hour is not credible.

The Hearings Officer finds that Officer Quick made a reasonable assumption that Dr. Nikaia could hear him based upon Dr. Nikaia's actions (orally and by his action of denying Decker from putting out the flame). Dr. Nikaia did not affirm or deny, specifically, Officer Quick's statement that he prohibited Decker from putting out the flame.

Based upon the above, the Hearings Officer finds that Dr. Nikaia was in a City of Portland Park (Eastbank Esplanade) on October 19, 2008 and was observed warming his hands over an open flame. The Hearings Officer finds that Dr. Nikaia's possessive behavior regarding the open flame leads to the conclusion that it is more likely than not that the source of the open flame was Dr. Nikaia's. The Hearings Officer finds that Officer Quick warned Dr. Nikaia by his request to have Dr. Nikaia put out the flame. The Hearings Officer finds that Dr. Nikaia refused to put it out, on two occasions, by responding that as a Native American the fire law did not apply to him. The Hearings Officer finds that Dr. Nikaia refused to put out the flame when he, on two occasions, held out his arm to prohibit Decker from putting out the flame.

The Hearings Officer finds that the Notice of Exclusion From City of Portland Park issued on October 19, 2008 is valid. The Hearings Officer finds that Dr. Nikaia's appeal was filed on October 26, 2008; thereby Dr. Nikaia was excluded, prior to the issuance of a stay on October 26, 2008, for 7 days. The exclusion term may not exceed 30 days.

ORDER AND DETERMINATION:

1. The Notice of Exclusion From City of Portland Park issued to Nikaia on October 19, 2008 is valid; appellant's appeal is denied.
2. The remaining term of the park exclusion from Eastbank Esplanade shall begin on December 9, 2008 and end at 5:00 PM on December 24, 2008.
3. This order has been mailed to the parties on December 8, 2008.
4. This order may be appealed to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Dated: December 8, 2008

GJF:rs



Gregory J. Frank, Hearings Officer

Enclosure

Exhibit #	Description	Submitted by	Disposition
1	Appeal form page 1a	Olmos, Officer	Received
2	Notice of Exclusion or Warning From City of Portland Park	Olmos, Officer	Received
3	Appeal form page 2	Olmos, Officer	Received
4	Oregon Identification Card	Olmos, Officer	Received
5	Custody Report - Carolyn A. Fendler	Olmos, Officer	Not Offered
6	Custody Report - Robert John Fuller	Olmos, Officer	Not Offered
7	Custody Report - DR Nikaia	Olmos, Officer	Not Offered
8	Custody Report - Richard G. Miller	Olmos, Officer	Not Offered
9	Custody Report - Joseph M. Morgan	Olmos, Officer	Not Offered
10	Custody Report - Karl Harding	Olmos, Officer	Not Offered
11	Custody Report - Merle Harrison Wright	Olmos, Officer	Not Offered
12	Investigation Report	Olmos, Officer	Not Offered
13	Notice of Exclusion or Warning From City of Portland Park - Nikaia	Olmos, Officer	Not Offered
14	Notice of Exclusion or Warning From City of Portland Park - Chrystal M. Hopson	Olmos, Officer	Not Offered
15	Citations	Olmos, Officer	Not Offered
16	Special Report	Olmos, Officer	Not Offered
17	Mailing List	Hearings Office	Received
18	Hearing Notice	Hearings Office	Received
19	Request to reschedule	NIKAIA, D R	Received
20	Letter request accommodation	NIKAIA, D R	Received
21	Hearing Notice	Hearings Office	Received