



CITY OF PORTLAND

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HEARINGS OFFICER'S ORDER

APPEAL OF JOSEPH ROWE

CASE NO. 3110286

DATE OF HEARING: July 28, 2011

APPEARANCES:

Mr. Joe Rowe, Appellant

Mr. Joseph Schilling, for the City

HEARINGS OFFICER: Mr. Gregory J. Frank

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Mr. Joseph Schilling ("Schilling") appeared at the hearing and represented the City. Mr. Joseph Rowe ("Rowe") appeared at the hearing and represented himself. Ms. Sadie Atwell ("Atwell"), Ms. Maria Elena Alvarado ("Alvarado"), Ms. Shatoya Mills ("Mills"), Mr. Peter Beland ("Beland"), Schilling and Rowe all testified at the hearing. The Hearings Officer makes this decision based upon the oral testimony received at the hearing and upon the documents admitted into the evidentiary record (Exhibits 1, 1a, 1c, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15 and 16. Exhibits 17 and 18 were also admitted as the written final argument by Rowe and Schilling.

Rowe received a City of Portland Notice of Exclusion, dated July 8, 2011, from Peninsula Park (Exhibit 3 – hereafter referred to as the "Notice of Exclusion"). The Notice of Exclusion indicates the reason Rowe received the Notice of Exclusion was violation of ORS 166.025 (Disorderly Conduct). In the "Summary of Incident" section of the Notice of Exclusion, the issuing officer states, "Makes unreasonable noise and obstructs pedestrian traffic in park."

A person violates ORS 166.025 if the person, with intent or recklessly, causes public inconvenience, annoyance or alarm by engaging in conduct that was violent, tumultuous or threatening or makes unreasonable noise or obstructs vehicular or pedestrian traffic on a public way or creates a hazardous/physically offensive condition.

The circumstances leading up to the issuance of the Notice of Exclusion, in general, are not disputed by the parties. However, the parties do dispute certain details of the events.

Overview of Incident Prior Leading to the Issuance of the Notice of Exclusion.

Generally, the parties agree that on July 8, 2011, at approximately 11:30 a.m., a Portland Public School truck stopped adjacent to Peninsula Park (see Exhibit 11, page 2) to deliver lunches for a City park program that feeds children. The parties agree that Rowe entered Peninsula Park and proceeded to a location within the park where the food was being delivered. Rowe initially spoke to the truck driver and later to a number of park employees. Rowe expressed intent was to determine the reason for the truck stopping on a public street. Rowe's discussion with the park employees was perceived by Rowe as conducted in a civil manner. Rowe's discussion with the park employees was characterized by the employees as being aggressive, confrontational and threatening. Rowe believed that he did not block a pedestrian way and one or more park employee(s) stated that Rowe did block pedestrians' passage. Rowe indicated that he did not move his bicycle towards Atwell and Atwell stated that Rowe did move his bicycle towards her in an intimidating manner.

Summary of Testimony and Evidence.

Atwell, a seasonal park employee, testified that on July 8, 2011 before the Noon hour, Rowe arrived at her location in Peninsula Park and asked a truck driver if it was his trucked parked on North Albina. Atwell stated that Rowe told the driver that he was not supposed to be parked on North Albina. Atwell stated that Rowe asked the driver for his name and the driver gave him his first name. Atwell testified that Rowe's behavior towards the driver was "rather aggressive." Atwell stated that she said, in a conversational tone and volume, that Rowe's behavior was "obnoxious." Atwell stated that she did not like the way Rowe was talking and did not want to give Rowe her business card. Atwell stated that during her conversation with Rowe she was "backing up." Atwell stated that Rowe talked to Mills and Beland in a "mocking" way. Atwell stated that Rowe kept asking for her name and "scooted" his bicycle closer to her; she estimated the bike got to within two feet of her. Atwell stated she was concerned that if Rowe moved his bicycle any closer it would have "gone over my feet." Atwell described the location where she had the verbal interaction with Rowe to be "pretty confined." During cross-examination Atwell stated that when she said "obnoxious" she did not believe that Rowe would be able to hear the statement.

Alvarado, a seasonal park employee, testified that on July 8, 2011, she saw Rowe, with his bicycle, approach the "shack" (Exhibit 11, pages 1 and 2 and Exhibit 9, area labeled "Bathroom 20'x12'") where the Portland School District truck driver was standing. Alvarado stated that Rowe kept asking the truck driver for his name. Alvarado stated she approached Rowe, attempted to talk to him, but was ignored by Rowe, who continued to focus his attention on the truck driver. Alvarado stated that she felt Rowe's behavior towards the truck driver was "rude." Alvarado stated she heard Atwell say Rowe's behavior was "obnoxious" and that Rowe told Atwell to be quiet. Alvarado stated that Rowe then turned his attention towards Atwell and he asked Atwell for her name. Alvarado stated that Mills approached Rowe and asked him "what is the problem?" Alvarado stated that Rowe responded to Mills' question with "I am the problem." Alvarado stated that Beland approached Rowe and told Rowe to talk to the park supervisor and Rowe responded that he did not want to talk to a supervisor. Alvarado stated that Rowe's actions caused a delay in preparation for the lunch program.

Mills, a seasonal park employee, testified that on July 8, 2011, she was in the "shack" talking with Beland and heard "loud voices." Mills stated that the voices she heard were not "yelling." Mills stated she heard Atwell say to Rowe "back up" and at that time, Beland asked Rowe if there was a problem.

Mills stated that Rowe asked her for her name a "number of times" and she told Rowe to speak to a supervisor.

Beland, a seasonal park employee, stated that Rowe arrived at Peninsula Park between 11:30 a.m. and 11:40 a.m. and heard Rowe say to the truck driver that a TriMet bus was being obstructed by the truck. Beland stated that he went into the "shack" and was speaking to Mills when the talking outside the "shack" became so loud that he could not hear Mills conversation. Beland stated that he walked back outside the "shack" and heard Rowe ask Mills or Atwell, a number of times, for her name. Beland stated that he sympathized with Rowe's concern about the truck blocking the street but felt Rowe's "means" were inappropriate.

Schilling, a regular park employee, testified that he prepared the Notice of Exclusion based upon conversations with the seasonal park employees referenced above. Schilling stated that he delivered the Notice of Exclusion to Rowe's residence.

Rowe testified that on July 8, 2011, he was riding his "cargo bike" when he observed a truck parked on North Albina blocking a vehicular travel lane. Rowe stated that a TriMet bus was stopped behind the truck. Rowe stated that before entering Peninsula Park, he took pictures of the truck blocking the street and shortly thereafter, in the vicinity of the "shack," he started his audio recording device. Rowe stated he did not follow the driver but rather made contact with the driver in the vicinity of the "shack." Rowe provided a diagram showing the location of the "shack" (Exhibit 9). Rowe stated that he contacted the driver at "door 2" (Exhibit 9). Rowe testified that during his conversation with the truck driver, Atwell, Alvarado, Mills and Beland, his bicycle was pointed east/west with the "nose pointed west at the dirt pile." Rowe stated that after talking with the truck driver and getting the truck driver's name, he started to leave when he heard someone say to him "obnoxious." Rowe stated he asked for names and /or business cards from park employees. Rowe stated that he was told to go and talk with the park supervisor and that he did proceed to the community center but the supervisor appeared busy and so he left the park. Rowe stated he did place a phone call to Josh (park supervisor) but talked to "Debbie." Rowe stated that he did not receive a return message from Josh.

During rebuttal testimony, Mills stated that Rowe was, at the time of his interaction with Atwell, about two feet from "door 2." Mills also stated that Rowe was standing in close proximity to his bicycle. Mills stated that Atwell was "trapped between a cart and the bike."

Rowe submitted a CD disk which he represented contained the audio recording of the majority of the events related to Rowe's interaction with park staff on July 8, 2011 (Exhibit 16). Schilling objected to the admission of Exhibit 16. Rowe testified that the recording was of his voice and the voices of the truck driver and park employees on July 8, 2011.

The truck driver referenced in the summary of evidence above was heard by the Hearings Officer to state his name. Rowe's voice was recognized by the Hearings Officer as one of the voices on the recording. Atwell's voice was recognized by the Hearings Officer as one of the voices heard on the recording. The Hearings Officer finds that there is sufficient evidence in the record to conclude that Exhibit 16 is a recording of the events of July 8, 2011 as claimed by Rowe. The Hearings Officer finds that the recording was properly authenticated, consistent with Oregon Rules of Evidence Rule 901. The Hearings Officer admitted Exhibit 16 into the record and did listen to a recording lasting approximately 4 ½ minutes.

The Hearings Officer's review of Exhibit 16 indicated the following:

- Rowe asked the truck driver for his name and the truck driver responded by providing his name; and
- Atwell's alleged statement of "obnoxious" can be heard on the recording and Rowe did respond by asking for Atwell's name or business card; and
- A voice can be heard on the recording saying "now you are blocking us" – the voice believed to be one of the park employees; and
- Rowe asks park employees additional times for name(s) or business card(s); and
- A voice can be heard on the recording directing Rowe to continue the discussion with a supervisor; and
- A voice (not Rowe's) indicated "voices were loud;" and
- A voice (not Rowe's) indicated Rowe's comments were "harassing" park employees.

Analysis of Evidence in the Context of ORS 166.025.

The City's allegation is that Rowe violated ORS 166.025 (Disorderly Conduct) because he made "unreasonable noise" and/or he "obstructs pedestrian traffic in park" (Exhibit 3). The Hearings Officer, therefore, must determine from the facts whether or not Rowe "intentionally" or "recklessly" made (1) unreasonable noise and/or (2) obstructed pedestrian traffic on July 8, 2011 at Peninsula Park.

The Hearings Officer reviewed the recording (Exhibit 16) with special attention paid to the volume and tone of voices. The Hearings Officer finds that no person heard on the recording was "yelling" or speaking unreasonably loud. The Hearings Officer notes that Atwell expressed her opinion that Rowe's comments were "obnoxious" and Alvarado stated Rowe's comments towards the truck driver were "rude." However, even if Rowe's statements towards the truck driver and Atwell were "obnoxious" or "rude," there would be no violation of ORS 166.025 (1)(b) unless the statements were unreasonably loud. As such, the Hearings Officer finds that Rowe's oral communication with park staff at Peninsula Park on July 8, 2011 was not in violation of ORS 166.025 as creating unreasonable noise.

The testimony and evidence offered by Rowe and the City disagreed as to whether pedestrian traffic was obstructed by Rowe on July 8, 2011 at Peninsula Park. Atwell described the location where she interacted with Rowe, on July 8, 2011, to be "a very confined space." Mills testified that the location of Rowe and his bicycle on July 8, 2011 interfered with the delivery of the children's lunches. Rowe, using a diagram (Exhibit 9) indicated that the location of his person and bicycle did not obstruct pedestrian movement in front of the "shack."

The Hearings Officer takes notice that the interaction between Rowe and the truck driver/park employees lasted less than five minutes. The Hearings Officer finds that other than the park employee comments above (a very confined space and interfered with delivery of lunches), there is no evidence in the record that any pedestrian was obstructed by Rowe and/or his bicycle on July 8, 2011 at Peninsula Park. Further, having listened to the recording (Exhibit 16), the Hearings Officer finds that the language and tone used by Rowe could be considered persistent and annoying but also finds that Rowe's language and tone did not reach the point where it could be considered so loud or aggressive that it created an obstruction to passing pedestrians. The Hearings Officer finds that Rowe did not intentionally or recklessly obstruct pedestrian traffic.

Having listened to the recording and appreciating the work-related obligations of the park employees, the Hearings Officer fully agrees that Rowe was extremely persistent at a time when the park employees felt pressured to organize a free lunch program for children in the park. The Hearings Officer can fully

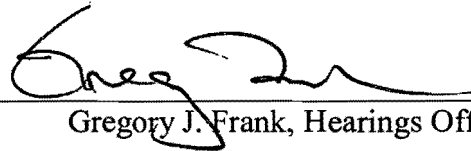
appreciate Rowe's desire to assure that public roadways are not blocked. The Hearings Officer finds that nothing contained in this Order is intended to characterize the actions/statements by Rowe, Atwell, Alvarado, Mills, Beland or Schilling as illegal or improper.

The Hearings Officer finds that the City did not meet its burden of providing a preponderance of evidence showing that Rowe had violated ORS 166.025. The Hearings Officer finds the Notice of Exclusion is not valid.

ORDER AND DETERMINATION:

1. The Notice of Exclusion is not valid; Rowe prevailed in his appeal.
2. This order has been mailed to the parties on August 16, 2011.
3. This order may be appealed to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Dated: August 16, 2011



Gregory J. Frank, Hearings Officer

GJF:rs

Enclosure

Exhibit #	Description	Submitted by	Disposition
1	Appeal form page 1a	Complaint Signer's Office,	Received
1a	Memo from Rowe	Complaint Signer's Office,	Received
1b	7/8/11 Transcript by Rowe	Complaint Signer's Office,	Not Offered
1c	Notice of Exclusion or Warning From City of Portland Park	Complaint Signer's Office,	Received
2	Appeal form page 2	Complaint Signer's Office,	Received
3	Notice of Exclusion or Warning From City of Portland Park	Complaint Signer's Office,	Received
4	Portland Parks & Recreation Park Rangers Special Report	Complaint Signer's Office,	Received
5	Portland Police Bureau Special Report	Complaint Signer's Office,	Received
6	Mailing List	Hearings Office	Received
7	Hearing Notice	Hearings Office	Received
8	Revision 2 of Transcript event on July 8, 2011	Rowe, Joseph	Received
9	Diagram	Rowe, Joseph	Received
10	Timeline	Rowe, Joseph	Received
11	Photos	Rowe, Joseph	Received
12	Photo info.	Rowe, Joseph	Rejected
13	QuickTime Player	Rowe, Joseph	Received
14	Nokia phone	Rowe, Joseph	Received
15	Oregon Summer Meal Sites 2011	Rowe, Joseph	Received
16	CD	Rowe, Joseph	Received
17	8/3/11 letter	Schilling, Joseph	Received
18	8/10/11 Written Closing Statement	Rowe, Joseph	Received
18a	Note	Rowe, Joseph	Rejected