OFFICE OF THE CITY AUDITOR
ENSURING OPEN AND ACCOUNTABLE GOVERNMENT

CITY OF PORTLAND

Office of City Auditor LaVonne Griffin-Valade

Hearings Office
1900 SW 4th Avenue, Room 3100
Portland, OR 97201
phone: (503) 823-7307 - fax: (503) 823-4347
web: www.portlandoregon.gov/auditor/hearings

HEARINGS OFFICER'S ORDER

APPEAL OF SARA McDANIEL

CASE NO. 3110397
[Police Bureau Case No. 11-75590]

PROPERTY / ZONE / PARK: WATERFRONT PARK

DATE OF HEARING: OCTOBER 11, 2011

APPEARANCES:

Appellant did not appear

Officer Ben Labasan, on behalf of the City

HEARINGS OFFICER: Ms. Kimberly M. Graves

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Ms. Sara McDaniel did not appear on her own behalf at the hearing. Ms. McDaniel was mailed a Notice of Hearing on September 20, 2011. The Notice was not returned to the Hearings Office via the U.S. Mail Service, and Ms. McDaniel did not contact the Hearings Office prior to the hearing date to request that the hearing be rescheduled. Officer Ben Labasan appeared on behalf of the City. Mr. James Descoteaux appeared and testified at the request of Officer Labasan and on behalf of the City. The Hearings Officer makes this decision based upon the testimony of Officer Labasan and Mr. Descoteaux, and the exhibits admitted into the evidentiary record (Exhibits 1 through, and including, 7).

Officer Labasan testified that on September 1, 2011 he was called by "PPI," Portland Patrol, Inc, regarding Ms. McDaniel's conduct. Officer Labasan testified that he was aware that PPI had cited Ms. McDaniel in the past for similar conduct for which she was alleged to have engaged in on September 1, 2011. Officer Labasan testified that when he contacted Ms. McDaniel on September 1, 2011 she was within Waterfront Park and had a bicycle with her on which she was advertising ice cream for sale. Officer Labasan testified that Ms. McDaniel's bicycle had a cooler attached to it, and that the outside of the cooler had photos of ice cream affixed to it with prices listed for each item pictured. Officer Labasan testified that he asked Ms. McDaniel whether she had a permit for selling ice cream in the park, and Ms. McDaniel indicated that the permit cost $400 and she can't afford to purchase one. Officer

Labasan testified that he did not ask Ms. McDaniel whether she had been selling ice cream in the park on September 1, 2011, but that he believed she was based on the information provided to him by Mr. Descoteaux.

Mr. Descoteaux testified that on September 1, 2011 he saw Ms. McDaniel sell a "popsicle" to a woman while in Waterfront Park. Mr. Descoteaux testified that he observed the interaction while standing under the Morrison Bridge. Mr. Descoteaux testified that Ms. Daniel and the purchaser were standing between the Morrison Bridge and the street, near the "seawall" in the grass. Mr. Descoteaux testified that the area is within Waterfront Park. Mr. Descoteaux testified that he was aware that the woman selling the "popsicle" was Ms. McDaniel because he had had contact with her in the past and recognized her, her clothing and bicycle. Mr. Descoteaux testified that after witnessing the sale he caught up with the purchaser and asked whether she had purchased the "popsicle" from Ms. McDaniel in the park. Mr. Descoteaux stated that the woman admitted to purchasing the "popsicle" in the park. Mr. Descoteaux stated that he then caught up with Ms. McDaniel to inquire about selling in the park. Mr. Descoteaux indicated that Ms. McDaniel was stopped in the park when he contacted her, and that she had a bicycle with her. Mr. Descoteaux described the bicycle as pink with a cooler attached to the back. On the cooler, Mr. Descoteaux testified, there were images of various ice cream products with prices listed next to or near each image. Mr. Descoteaux stated that Ms. McDaniel denied selling any items in the park, and indicated that the woman Mr. Descoteaux spoke with could have purchased the item from someone else. Mr. Descoteaux testified that Ms. McDaniel had previously been cited for selling ice cream in the park, and that he had personally issued Ms. McDaniel a warning for the same conduct in the previous month.

The City submitted a number of documents for the Hearings Officer's review which the Hearings Officer entered into the record on her own motion. Exhibit 2 is a copy of the Notice of Exclusion or Warning from City of Portland Park issued on September 1, 2011 to Ms. McDaniel for violating PCC 20.12.020. The Notice of Exclusion lists Waterfront Park as the park which Ms. McDaniel is excluded from for 30 days. Exhibit 5a is a copy of a Custody Report completed by Officer Labasan regarding Ms. McDaniel's conduct. Exhibit 5b is a copy of an Incident Report completed by Mr. Descoteaux regarding Ms. McDaniel's conduct.

A person violates PCC 20.12.020 if the person, without a lease, concession or permit, solicits for or conducts any business in a Park. For purposes of section 20.12.020, "solicit for or conduct any business" means: 1. Sell or offer to sell any article or service; 2. Display goods, or descriptions or depictions of goods or services, with the intent to engage any member of the public in a transaction for the sale of any good or service; or perform or engage in any act with the intent or expectation of receiving payment therefor from any person."

Ms. McDaniel submitted an appeal form, Exhibit 1, with an accompanying letter, Exhibit 1a, regarding the Exclusion she received from a City of Portland Park on September 1, 2011. Ms. McDaniel writes:

> "Using waterfront as a bike route. Stopped in park to take a break. Officer James accused me of selling ice cream in park. I did not sell ice cream or had the intention. He said I sold a popsicle to a woman @ one end. I did not sell to any woman. This is circumstantial evidence - I did not sell ice cream."

The letter, Exhibit 1a, contains the same information as the appeal form. Ms. McDaniel did not provide any further information regarding the Exclusion she received on September 1, 2011. .

The Hearings Officer considers the testimony of Officer Labasan and Mr. Descoteaux to be credible, and to accurately reflect the conduct of Ms. McDaniel which led to the issuance of the Notice of Exclusion on September 1, 2011. The Hearings Officer notes that Ms. McDaniel's statements contained in Exhibit 1 and 1a are contrary to the statements presented at the hearing by Officer Labasan and Mr. Descoteaux. The Hearings Officer notes that Ms. McDaniel's failure to appear at the hearing leaves the Hearings Officer with no information upon which a determination regarding her credibility could be made. The Hearings Officer finds that Waterfront Park is a "park" as defined in PCC 20.04.010. The Hearings Officer finds that the preponderance of the evidence in the record is that it is more likely than not that Ms. McDaniel was in violation of PCC 20.12.020 on September 1, 2011 by selling items within the park, and by displaying goods for sale while within the park. The Hearings Officer finds that Ms. McDaniel had received a warning for engaging in conduct in violation of PCC 20.12.020 within the 2 years preceding the issuance of the Notice of Exclusion. The Hearings Officer finds that the Exclusion is valid and therefore Ms. McDaniel's appeal is denied.

The Exclusion was issued to McDaniel on September 1, 2011 and Ms. McDaniel filed her appeal on September 9, 2011. The term of the Exclusion is for 30 days less the eight days prior to filing of the appeal. The Hearings Officer finds that a stay of the Exclusion has been in effect since September 9, 2011. The Hearings Officer finds that the stay shall terminate immediately, at which time the Exclusion term shall begin and run until 4:30 p.m. on November 3, 2011. The Hearings Officer notes that this date is different than the date stated for the record at the hearing.

ORDER AND DETERMINATION:

1. The Exclusion (Exhibit 2) from Waterfront Park issued to Sara Jami McDaniel on September 1, 2011 is valid; Ms. McDaniel's appeal is denied.

2. The stay of the notice pending hearing shall terminate immediately, at which time the Exclusion term shall begin and run until 4:30 p.m. on November 3, 2011.

3. This order has been mailed to the parties on October 12, 2011, 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: October 12, 2011

Kimberly M. Graves, Hearings Officer

KMG:jeg

Enclosure

Exhibit #	Description	Submitted by	Disposition
1	Appeal Form Page 1a	Complaint Signer's Office,	Received
1a	Contest to Park Exclusion	Complaint Signer's Office,	Received
2	Notice of Exclusion or Warning from City of Portland Park	Complaint Signer's Office,	Received
3	Appeal Form Page 2	Complaint Signer's Office,	Received
4	PPB Special Report	Complaint Signer's Office,	Received
5	Custody Report: 11-75590	Complaint Signer's Office,	Received
5a	Notice of Exclusion or Warning From City of Portland Park	Complaint Signer's Office,	Received
5b	Portland Patrol Incident Report	Complaint Signer's Office,	Received
5c	Oregon Uniform Citation and Complaint	Complaint Signer's Office,	Received
6	Mailing List	Hearings Office	Received
7	Notice of Hearing	Hearings Office	Received