OFFICE OF THE CITY AUDITOR
ENSURING OPEN AND ACCOUNTABLE GOVERNMENT

CITY OF PORTLAND

Office of City Auditor LaVonne Griffin-Valade

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HEARINGS OFFICER'S ORDER

APPEAL OF CODY R. MCGILLIVRAY

CASE NO. 3110429
[Police Bureau Case No. 11-83990]

PARK: Waterfront Park

DATE OF HEARING: November 3, 2011

APPEARANCES:

None

HEARINGS OFFICER: Ms. Kimberly M. Graves

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Mr. McGillivray did not appear at the hearing or testify on his own behalf. No one appeared on behalf of the City. The Hearings Officer admits Exhibits 1 through and including 28 into the evidentiary record on her own motion.

The Hearings Officer finds that Mr. McGillivray received the Notice of Exclusion ("Exclusion") from a City of Portland Park (Waterfront Park), which is the subject of this case, on September 29, 2011, at approximately 4:35 a.m. (Exhibit 3). The Exclusion lists Waterfront Park as the City park from which Mr. McGillivray would be excluded for 30 days. Mr. McGillivray received the Exclusion on September 29, 2011, for allegedly violating ORS 164.245 Criminal Trespass in the 2nd Degree. Mr. McGillivray submitted a request for an appeal hearing on the day the Exclusion was issued (Exhibit 1).

ORS 164.245 provides that a person commits the crime of Criminal Trespass in the 2nd Degree if the person enters or remains unlawfully in a motor vehicle or in or upon premises. Portland City Code (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 criminal or traffic law of the State of Oregon." PCC 20.12.265C provides that "an exclusion issued under the provisions of this Section shall be for thirty (30) days."

The City submitted a number of exhibits related to the contact with Mr. McGillivray on September 29, 2011. Exhibit 2 is a copy of the Notice of Exclusion or Warning From City of Portland Park issued to Mr. McGillivray. The summary portion of the report reads, "Subject in Park during closure hours." Exhibit 9 is a Special Report written by Officer Billard in which the officer lists a number of individuals who were contacted together and issued Park Exclusions. Mr. McGillivray is included as the 8th name on the list. The second page of the Special Report indicates that while conducting a patrol of Waterfront Park during park closure hours, the officer contacted the named subjects and issued them park exclusions for trespassing in the park during closure hours.

Mr. McGillivray submitted a handwritten appeal form (Exhibit 1) in which he writes, "Cruel and unusual punishment, economic impact, defense of nessesity [sic]. Additional explanation attatched [sic]." Exhibit 1a is a handwritten document in which Mr. McGillivray lists three grounds upon which he is appealing the Exclusion. The first basis for appeal listed by Mr. McGillivray states, "Defense of necessity [sic]: I am a homeless individual who is unable to obtain shelter, nesessitating [sic] sleeping in the park as sleep is nesasary [sic]." The second basis for appeal states, "Cruel and unusual punishment: as per the fact that sleeping in the park in violation of ORS 164.245 was done out of nesessity [sic] due to lack of shelter. I should not recieve [sic] such overbearing punishment simply because I was sleeping." The final basis for appeal states, "Economic impact: As per the fact I have no gainful employment I am forced to collect cans and bottles to earn money. As per the fact I live in downtown rooutinely [sic] collect at the waterfront. Exclusion where of will impact me economicly [sic] in a very substantial manner. Therefore causing cruel and unusual punishment."

The Hearings Officer finds that the evidence in the record is the documents admitted into the evidentiary record.

The Hearings Officer finds no material conflicts in the information of the parties. The Hearings Officer finds that report submitted by Officer Billard accurately reflect the events leading up to the issuance of the Exclusion on September 29, 2011, to Mr. McGillivray. The Hearings Officer notes that Mr. McGillivray does not contest the facts as set out by the officer, but instead offers only explanation/justification for his behavior which led to the issuance of the exclusion. The Hearings Officer notes that Mr. McGillivray has attempted to raise some Constitutional issues in defense of his conduct. The information contained in Exhibit 1a lacks specificity with regard to which Constitutional sections Mr. McGillivray intends to rely on in his defense, and more specifically fails to indicate whether Mr. McGillivray is relying on the United States Constitution or the Oregon Constitution. The Hearings Officer cannot consider such broad Constitutional claims without more specific information regarding the defenses that Mr. McGillivray intends to rely on. The Hearings Officer declines to address any Constitutional claims which were not raised with sufficient specificity. The Hearings Officer finds that Waterfront Park is a "park" as defined in PCC 20.04.010. The Hearings Officer finds, based on the submitted documents, that Mr. McGillivray was in Waterfront Park at a time when the park was closed. The Hearings Officer finds that it is more probable than not that being in a park when the park is closed to the public is a violation of ORS 164.245-Criminal Trespass in the 2nd Degree. The Hearings Officer finds that the preponderance of the evidence in the record is that it is more likely than not that on September 29, 2011, the crime of Criminal Trespass in the 2nd Degree under ORS 164.245 was committed by Mr. McGillivray in Waterfront Park. The Hearings Officer finds that under PCC 20.12.265A, Exclusion is the appropriate remedy for a person who has committed a criminal act within a City of Portland park.

The Hearings Officer finds that the Exclusion issued to Mr. McGillivray on September 29, 2011, is valid and therefore Mr. McGillivray's appeal is denied.

The Exclusion was issued to Mr. McGillivray on September 29, 2011, and Mr. McGillivray filed his appeal the same day. The term of the Exclusion is for 30 days. The Hearings Officer finds that a stay of the Exclusion has been in effect since September 29, 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 December 3, 2011.

ORDER AND DETERMINATION:

The Exclusion issued to Mr. McGillivray on September 29, 2011, is valid and therefore, Mr. McGillivray's appeal is denied.

The stay of the notice pending hearing shall terminate immediately, at which time, the Exclusion shall go into effect and continue until 4:30 p.m. on December 3, 2011.

This order has been mailed to the parties on November 4, 2011.

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

Dated: November 4, 2011

Kimberly M. Graves, Hearings Officer

KMG:rs

Enclosure

Exhibit #	Description	Submitted by	Disposition
1	Appeal form page 1a	Complaint Signer's Office,	Received
1a	Appeal letter	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	Special Report	Complaint Signer's Office,	Received
5	Custody Report	Complaint Signer's Office,	Received
6	Oregon Uniform Citation and Complaint - Tae Yong Kim	Complaint Signer's Office,	Received
7	Custody Report	Complaint Signer's Office,	Received
8	Oregon Uniform Citation and Complaint - Tommy Louis Ruelas	Complaint Signer's Office,	Received
9	Special Report	Complaint Signer's Office,	Received
10	Notice of Exclusion or Warning From City of Portland Park - Tommy Ruelas	Complaint Signer's Office,	Received
11	Notice of Exclusion or Warning From City of Portland Park - Tae Yong Kim	Complaint Signer's Office,	Received
12	Notice of Exclusion or Warning From City of Portland Park - Rebekah Khadlejah Faust	Complaint Signer's Office,	Received
13	Notice of Exclusion or Warning From City of Portland Park - Michael Wayne Faust, Jr.	Complaint Signer's Office,	Received
14	Notice of Exclusion or Warning From City of Portland Park - William George Streb, Jr.	Complaint Signer's Office,	Received
15	Notice of Exclusion or Warning From City of Portland Park - Thomas M. Martz	Complaint Signer's Office,	Received
16	Notice of Exclusion or Warning From City of Portland Park - Kayla Kelley	Complaint Signer's Office,	Received
17	Notice of Exclusion or Warning From City of Portland Park - Ray Bowen	Complaint Signer's Office,	Received
18	Notice of Exclusion or Warning From City of Portland Park - Code R. McGillivray	Complaint Signer's Office,	Received
19	Notice of Exclusion or Warning From City of Portland Park - Shawna Rambo	Complaint Signer's Office,	Received
20	Notice of Exclusion or Warning From City of Portland Park - Philip James Foster	Complaint Signer's Office,	Received
21	Notice of Exclusion or Warning From City of Portland Park - Buddy Allen Johnson	Complaint Signer's Office,	Received
22	Notice of Exclusion or Warning From City of Portland Park - Steven Michael Parr	Complaint Signer's Office,	Received
23	Notice of Exclusion or Warning From City of Portland Park - Michael Craig Heckman	Complaint Signer's Office,	Received
24	Notice of Exclusion or Warning From City of Portland Park - Michael William Faust	Complaint Signer's Office,	Received
25	Notice of Exclusion or Warning From City of Portland Park - Derek James Hart	Complaint Signer's Office,	Received
26	Notice of Exclusion or Warning From City of Portland Park - Clarence Fleharty	Complaint Signer's Office,	Received
27	Mailing List	Hearings Office	Received
28	Hearing Notice	Hearings Office	Received