



CITY OF PORTLAND

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HEARINGS OFFICER'S ORDER

APPEAL OF BARRY JOE STULL

CASE NO. 3110519

DATE OF HEARING: November 21, 2011

APPEARANCES:

Mr. Barry Joe Stull, Appellant

Ms. Ellen Osoinach, on behalf of the City

HEARINGS OFFICER: Mr. Gregory J. Frank

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Ms. Ellen Osoinach ("Osoinach"), Deputy City Attorney, appeared as the City of Portland ("City") representative. Portland Police Officer Jason Straub ("Straub") and Police Officer Chad Daul ("Daul") appeared as witnesses for the City. Mr. Barry Joe Stull ("Stull"), Appellant, appeared at the hearing and represented himself. The Hearings Officer makes this decision based upon the testimony of Straub, Daul and Stull, the legal arguments of Osoinach and Stull and the documents admitted into the evidentiary record (Exhibits 1 through and including 9).

Stull received a Notice of Exclusion From City of Portland Park ("Park Exclusion") on October 29, 2011 from Lownsdale and Chapman Square Parks (Exhibit 1a). The stated basis for issuing the Park Exclusion was that Stull had violated ORS 166.025 (Disorderly conduct in the second degree). Generally, a person violates ORS 166.025 if the person intentionally or recklessly causes public inconvenience or annoyance by engaging in violent, tumultuous or threatening behavior.

Straub testified that on October 29, 2011, in the vicinity of Chapman Square Park, he made contact with a person named Mike Landers ("Landers"). Straub stated that he believed that Landers was part of the "security" group for the Occupy Portland encampment at Chapman Square and Lownsdale Square parks. Straub stated that Landers informed him that Stull had approached Landers and threatened him with the words "I'm going to beat your ass" while holding a large "metal ring." Landers told Straub that he (Landers) was "not really afraid, I can defend myself." Straub noted that Landers is several inches taller

and approximately 150 pounds heavier than Stull. Straub stated that "other" unidentified persons had corroborated Landers statement.

Straub testified that between 15 and 30 minutes after contacting Landers he contacted Stull in the Occupy Portland "engineering tent." Straub stated that Stull told him that Landers' complaint was all about retaliation against Stull because Stull had obtained a judicial restraining order against a friend of Landers.

Straub stated, during cross examination, that he believed Landers to be associated with Occupy Portland security because of a blue duct tape armband with "security" writing thereon. Straub also stated that he had made contact with Landers, in the "security" area of the Occupy Portland encampment on prior occasions. During cross examination, Straub acknowledged that he had prepared the Park Exclusion prior to contacting Stull and that he did not ask Stull to recount Stull's version of the events. Straub acknowledged, during cross examination, that he made the decision to issue the Park Exclusion primarily upon Landers' statements.

Daul testified that he confirmed that Stull had received a prior City of Portland Park Exclusion from Lillis-Albina Park on September 14, 2010, for "camping after hours."

Stull testified that on October 29, 2011, he was engaged in work activities in the "engineering tent" at the Occupy Portland encampment. Stull stated that while in the "engineering tent" he was "sorting hardware and tools" including hammers and nails. Stull stated that other Occupy Portland campers came to the "engineering tent," on October 29, 2011 and were "undoing" Stull's efforts to organize hardware and tools that had been donated to Occupy Portland. Stull admitted that these other Occupy Portland campers were frustrating him. Stull stated that he viewed the Occupy Portland "security" people (those wearing blue duct tape armbands) to be a "gang of bullies."

Stull testified that he suffers from a serious disability and that stressful situations cause him physical pain. Stull stated that his standard response, when facing a confrontational situation, is to threaten to obtain a judicial restraining order against persons involved in the confrontation. Stull denied physically threatening anyone, on October 29, 2011, at the Occupy Portland encampment, with a large metal ring.

The Hearings Officer finds that the key testimony in this case was offered by Straub and Stull. The Hearings Officer notes that Straub's testimony was exclusively hearsay and Stull's testimony was based upon his actions and statements. Osoinach suggested that Landers' statement to Straub was an exception to the hearsay rule and therefore was admissible (excited utterance). The Hearings Officer finds that hearsay is generally admissible in administrative hearings. However, the Hearings Officer generally considers hearsay less credible and reliable than non-hearsay evidence and therefore gives hearsay testimony less weight than first hand observational evidence.

Osoinach argued that Stull's testimony was inconsistent and not credible. The Hearings Officer disagrees with Osoinach that the testimony of Stull lacked credibility. The Hearings Officer finds that Stull admitted that there were hammers, nails and other items that could be considered weapons in the "engineering tent" on October 29, 2011. The Hearings Officer finds that Stull admitted that he considered the "security" personnel at Occupy Portland to be a "gang of bullies." The Hearings Officer finds that Stull admitted that persons were aggravating him in the "engineering tent" on October 29, 2011. The Hearings Officer finds that any of these admissions could be construed as inferring that he

had made a threat against Landers. The Hearings Officer finds Stull's admissions to be candid and credible and give support to the Hearings Officer finding Stull's testimony at the hearing was credible.

The Hearings Officer finds, for the purposes of this hearing, that Stull's testimony is credible. The Hearings Officer finds that Straub was a credible witness but that his testimony was solely based upon the statements of a person who did not appear at the hearing. Therefore, the Hearings Officer finds Straub's testimony to be less credible than Stull's hearing testimony.

The Hearings Officer finds that the City has the burden of showing, by a preponderance of the evidence, that it is more likely than not that Stull did violate ORS 166.025 (see Portland City Code 20.12.265 F.). The Hearings Officer finds that the City did not carry its burden. The Hearings Officer finds, based on the evidence in the record, that Stull did not engage in violent, tumultuous or threatening behavior while at the Occupy Portland encampment on October 29, 2011. The Hearings Officer finds the Park Exclusion is not valid.

The Hearings Officer takes note that the Park Exclusion states the following:

"Starting today, you cannot remain in or upon, or enter in or upon, the City of Portland Park known as Lownsdale/Chapman Square for a time period of ..."

Portland City Code 20.12.265 A. states a park officer (including police officer) may "exclude any person who violates any applicable provision of law in any Park from that Park..." The Hearings Officer finds that Straub's testimony related to Stull allegedly violating ORS 166.025 in Chapman Square Park. The Hearings Officer finds there is no evidence in the record to suggest that Stull violated ORS 166.025 in Lownsdale Square Park. The Hearings Officer, had not the exclusion been found invalid for the reasons stated above, would have found the Park Exclusion invalid because the Park Exclusion form was improperly filled out by Straub; excluding Stull from a City of Portland Park where he had not committed a violation.

ORDER AND DETERMINATION:

1. The Park Exclusion (Exhibit 1a) is not valid; Stull prevails in this appeal.
2. This order has been mailed to the parties on November 23, 2011.
3. This order may be appealed to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Dated: November 23, 2011

GJF:rs/jeg

Enclosure



Gregory J. Frank, Hearings Officer

Exhibit #	Description	Submitted by	Disposition
<u>1</u>	<u>Appeal form page 1a</u>	<u>Complaint Signer's Office,</u>	<u>Received</u>
<u>1a</u>	<u>Notice of Exclusion or Warning From City of Portland Park</u>	<u>Complaint Signer's Office,</u>	<u>Received</u>
<u>2</u>	<u>Notice of Exclusion or Warning From City of Portland Park</u>	<u>Complaint Signer's Office,</u>	<u>Received</u>
<u>3</u>	<u>Appeal form page 1b - Appellant's Copy</u>	<u>Complaint Signer's Office,</u>	<u>Received</u>
<u>4</u>	<u>Appeal form page 2</u>	<u>Complaint Signer's Office,</u>	<u>Received</u>
<u>5</u>	<u>Special Report</u>	<u>Complaint Signer's Office,</u>	<u>Received</u>
<u>6</u>	<u>Special Report - Officer Straub</u>	<u>Complaint Signer's Office,</u>	<u>Received</u>
<u>7</u>	<u>Notice of Exclusion or Warning From City of Portland Park</u>	<u>Complaint Signer's Office,</u>	<u>Received</u>
<u>8</u>	<u>Mailing List</u>	<u>Hearings Office</u>	<u>Received</u>
<u>9</u>	<u>Hearing Notice</u>	<u>Hearings Office</u>	<u>Received</u>