



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 CAMERON WHITTEN

CASE NO. 3110502

DATE OF HEARING: November 21, 2011

APPEARANCES:

Appellant did not appear

Ms. Ellen Osoinach, on behalf of the City

HEARINGS OFFICER: Mr. Gregory J. Frank

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Mr. Cameron Whitten ("Whitten") filed an Appeal to the City of Portland Hearings Officer, contesting the validity of a Park Exclusion ("Exclusion"), on November 1, 2011 (Exhibit 1). Whitten provided his mailing address as 1132 SW 13th Avenue, Portland, Oregon 97205 (Exhibit 1). The Hearings Office mailed Whitten a Notice of Hearing ("Notice") on November 9, 2011 (Exhibit 13). The Notice set Whitten's appeal hearing for Monday, November 21, 2011, at 1:30 p.m. at Room 3000 on the 3rd floor, 1900 SW 4th Avenue, Portland, Oregon (Exhibit 13). The Notice also provided additional information regarding attendance, witnesses and requests for postponement (Exhibit 13).

Whitten, after the date of mailing of the Notice (Exhibit 13), did not contact the Hearings Office to indicate that he would be unavailable on the scheduled hearing date. The Hearings Officer delayed the scheduled start of the hearing (1:30 p.m.) until 1:43 p.m. in consideration of the possibility that Whitten was running late. Whitten was not present at the start of the hearing and did not appear at any time during the hearing; the hearing ended at 2:27 p.m. The Hearings Officer finds that Whitten was provided written notice of the hearing by mailing; the Notice was mailed to the address provided by Whitten. The Hearings Officer finds notice of the appeal hearing to Whitten is legally adequate.

Ms. Ellen Osoinach ("Osoinach"), City of Portland Deputy City Attorney, appeared as the legal representative for the City of Portland ("City"). Portland Police Captain Sara Westbrook ("Westbrook"), Portland Police Detective Chris Traynor ("Traynor") and Portland Parks and Recreation

Bureau Park Ranger Kurt Nelson ("Nelson") appeared at the hearing and testified on behalf of the City. The Hearings Officer makes this decision based upon the testimony of Westbrook, Traynor and Nelson, the legal arguments of Osoinach and the documents admitted into the evidentiary record (exhibits 1 through and including 14).

Westbrook testified that she was present at Jamison Square Park (the "Park") on the evening of October 29, 2011, and the early morning of October 30, 2011. During Westbrook's testimony, the City played a series of video clips. Westbrook identified the video clips as being photographed by the Portland Police Bureau Forensic Division and a local television station. Westbrook stated that the videos showed a group of persons sitting in the Park and a group of persons walking around the sitting persons on October 30, 2011. Westbrook pointed out the general location of where Whitten was sitting in the Park on October 30, 2011. Westbrook described communications with the sitting and walking groups late on October 29, 2011, and early in the morning on October 30, 2011. Westbrook stated that the sitting group, including Whitten, was informed that those remaining in the Park after midnight would be arrested. Westbrook stated that some of the persons in the sitting and walking groups indicated to Portland Police that they did not want to be arrested and others informed Portland Police that they intended to remain in the Park and be arrested. Westbrook testified that after midnight an amplified announcement was broadcast, throughout the Park, that the Park was closed and anyone remaining in the Park would be arrested.

Nelson testified that he was present at the Park on the evening of October 29, 2011, and the early morning of October 30, 2011. Nelson stated that his role, on October 29, 2011, and October 30, 2011, at the Park, was to assist Portland Police by observing persons in the Park and issuing park exclusions to those violating laws/rules. Nelson stated that an additional role, on October 29, 2011, and October 30, 2011, was to announce the Park was closed at midnight. Nelson stated that, after midnight, he moved through a large crowd of people announcing the Park was closed and that anyone remaining in the Park would receive a park exclusion. Nelson stated that he communicated the Park was closed to the sitting and walking groups. Nelson stated that he communicated to the sitting and walking groups that those remaining in the Park after midnight would be arrested and also be issued a park exclusion. Nelson characterized his communications to persons in the Park on October 29, 2011, and October 30, 2011, as verbal warnings.

Nelson testified that the Park is closed from 12:01 a.m. until 5:00 a.m. Nelson stated that authorized persons, including City of Portland police officers and City of Portland Park Rangers, clearly communicated the time the Park would close, that all persons in the Park must leave after midnight and that those who remained were subject to receiving a park exclusion. Nelson stated that Whitten refused to leave the park after midnight and after being ordered to leave. Nelson stated that Whitten remained in the Park in violation of ORS 164.245 (Trespass), Portland City Code ("PCC") 20.12.210 (Hours of Park Closure) and PCC 20.12.240 (Directions of Park Officers to be Obeyed).

Nelson testified that after the Park closure was announced/communicated all but one of the sitting group remained in the Park. Nelson stated that as Portland Police began taking persons in the sitting group into custody he began noting what each person was wearing. Nelson stated that Whitten had "Cameron" on his shirt. Nelson stated that he completed park exclusion forms for each of the persons taken into custody for remaining in the Park after midnight.

Traynor testified that at approximately 3:00 a.m. on October 30, 2011, he contacted Whitten at the Portland Police Bureau Central Precinct ("Central Precinct"). Traynor stated that initially Whitten was uncooperative by refusing to exit a police vehicle and also refusing to give his name. Traynor stated that while Whitten was at Central Precinct he was issued a citation and a park exclusion and thereafter released. Traynor identified Exhibit 10 as an accurate copy of the Exclusion served on Whitten on October 30, 2011.

Whitten included a written statement on his request for an appeal hearing (Exhibit 1). Whitten stated:

"Police bias on who they arrested. There are citizens who use that park past curfew and don't get arrested. There were hundreds of people in the park and they only gave exclusions to a discriminated few. I was in the park peacefully assembling and partaking in zero dangerous activities. Police endangered my life while I was sitting surrounding me with jumpy horses which could have trampled me."

Whitten provided no other evidence for the consideration of the Hearings Officer in this case.

Exhibits 2 and 10 are copies of the Exclusion from Jamison Park issued to Whitten on October 30, 2011. Whitten received the park exclusion because he allegedly violated ORS 164.245 (Trespass), Portland City Code ("PCC") 20.12.210 (Hours of Park Closure) and PCC 20.12.240 (Directions of Park Officers to be Obeyed). A person violates ORS 164.245 if the person "enters or remains unlawfully in a motor vehicle or in or upon premises." Premises is defined in ORS 164.205 (6) as including "any real property, whether privately or publicly owned." Enter or remain unlawfully is defined in ORS 164.205 (3) as "to enter or remain in or upon premises when the premises, at the time of such entry or remaining, are not open to the public..."

Whitten received the Exclusion, in addition to allegedly violating ORS 164.245, for allegedly violating PCC 20.12.210 (Hours of Park Closure). A person violates PCC 20.12.210 if the person is in a City of Portland Park "during hours of park closure." Finally, Whitten received the Exclusion for allegedly violating PCC 20.12.240 (Directions of Park Officers to be Obeyed). A person violates PCC 20.12.240 if the person disobeys a lawful direction of a Park Officer. PCC 20.12.240 states that a direction of a park Officer is reasonable "if it directs a person to obey, or cease a violation of, any law, rule or regulation applicable to the Park." PCC 20.12.240 also states that "a direction of a Park Officer is not 'reasonable' under this Section if it is directed to speech or conduct of the right to engage in which is, under the circumstances, protected by the federal or Oregon constitution."

Based upon the evidence in the record, the Hearings Officer finds that hours of park closure, for the Park, are 12:01 a.m. to 5:00 a.m. The Hearings Officer finds that Whitten, and others, were given oral warnings that the Park would close at 12:01 a.m. on October 30, 2011, and that Whitten did not leave the Park until arrested at approximately 3:00 a.m. The Hearings Officer finds that the Park is real property included as "premises" under ORS 164.245. The Hearings Officer finds that Whitten remained in the Park (premises) after being warned to leave and therefore was in the Park at such time as it was not open to the public. The Hearings Officer finds, based upon the evidence in the record, that there is a preponderance of evidence that it is more likely than not that Whitten, on October 30, 2011, did violate ORS 164.245.

The Hearings Officer finds that multiple verbal warnings were given to Whitten that the Park would close at 12:01 a.m. on October 30, 2011 and that if he remained he would be arrested and be issued a park exclusion. The Hearing Officer finds that Whitten remained in the Park until approximately 3:00 a.m. on October 30, 2011, and was, therefore, in the Park during hours of closure. The Hearings Officer finds, based upon the evidence in the record, that there is a preponderance of evidence that it is more likely than not that Whitten, on October 30, 2011 did violate PCC 20.12.210.

The Hearings Officer finds that Nelson communicated to Whitten, late in the evening on October 29, 2011, and shortly after midnight on October 30, 2011, that the Park was closed and that Whitten must leave the Park. The Hearings Officer finds Whitten did not leave the Park as requested by Nelson. The Hearings Officer finds that Nelson directed Whitten to obey PCC 20.12.210 and Whitten refused to obey Nelson's directive. The Hearings Officer finds that Whitten asserted that he was in the Park to "peacefully" assemble. The Hearings Officer finds, based upon the evidence in the record, that it may be inferred (Whitten's statement in Exhibit 1) that Whitten was in the Park to engage in speech and/or conduct that might be protected by the federal or Oregon constitution. However, the Hearings Officer finds that such argument was not presented in adequate detail and/or specificity for the Hearings Officer's consideration. The Hearings Officer will not speculate as to the facts or law that may be applicable to a possible federal or Oregon constitutional argument. The Hearings Officer finds, based upon the evidence in the record, that there is a preponderance of evidence that it is more likely than not that Whitten, on October 30, 2011, did violate PCC 20.12.240.

The Hearings Officer finds that Whitten was issued the Exclusion subject to this hearing on October 30, 2011, and that he filed his request for an appeal hearing on November 1, 2011. The Hearings Officer finds that the term of the Exclusion issued to Whitten on October 30, 2011, is thirty (30) days. The Hearings Officer finds that a park exclusion is stayed upon the filing of a request for an appeal hearing. The Hearings Officer finds, for the purpose of calculating the remaining term of the park exclusion issued to Whitten, that three (3) days of the exclusion must be deducted from original thirty (30) day term. Therefore, the remaining term of the Whitten park exclusion from Jamison Park is twenty seven (27) days. The Hearings Officer finds that the remaining term shall commence on the date of this Order and end at 4:30 p.m. on December 20, 2011.

ORDER AND DETERMINATION:

1. The Notice of Exclusion From City of Portland Park, as set forth in Exhibits 2 and 10, is valid; Whitten's appeal is denied.
2. The term of Whitten's exclusion from Jamison Square Park shall commence on the date of this Order and end at 4:30 p.m. on December 20, 2011.
3. The stay of the notice pending hearing is hereby immediately terminated.
4. This order has been mailed to the parties on November 23, 2011.

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

Dated: November 23, 2011



Gregory J. Frank, Hearings Officer

GJF:rs/jeg

Enclosure

Exhibit #	Description	Submitted by	Disposition
1	Appeal Form page 1	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: 11-94549	Complaint Signer's Office.	Received
5	Investigation Report: 11-94556	Complaint Signer's Office.	Received
6	Special Report: 11-94556	Complaint Signer's Office.	Received
7	Special Report: 11-94556	Complaint Signer's Office.	Received
8	Special Report: 11-086751	Complaint Signer's Office.	Received
9	Custody Report: 11-94549	Complaint Signer's Office.	Received
10	Notice of Exclusion or Warning From City of Portland Park	Complaint Signer's Office.	Received
11	Post-it notes	Complaint Signer's Office.	Received
12	Mailing List	Hearings Office	Received
13	Hearing Notice	Hearings Office	Received
14	Photos	Osoinach, Ellen	Received