



CITY OF PORTLAND

Office of City Auditor LaVonne Griffin-Valade

Hearings Office

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HEARINGS OFFICER'S ORDER

TriMet vs. Jennie L. Bricker

CASE NO. 3110436

(TriMet Exclusion Number 177051)

HEARING DATE: November 8, 2011

APPEARANCES:

Ms. Jennie Bricker, Excluded party

Inspector Larry Boltjes, on behalf of TriMet

HEARINGS OFFICER: Ms. Kimberly M. Graves

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Timelines: The Hearings Officer finds the following concerning the Notice of Exclusion being issued:

TriMet issued the Notice of Exclusion to Ms. Bricker on October 5, 2011. The case was forwarded to the City of Portland Hearings Office on October 7, 2011. The Hearings Office mailed a Notice of Hearing and Interim Order extending the stay on the exclusion to the parties on October 11, 2011, within the time prescribed in the TriMet Code. The notice contained the required information concerning Ms. Bricker's rights in the hearing process.

Sufficiency of the Notice of Exclusion: A copy of the Notice of Exclusion was provided to Ms. Bricker when she was excluded. The notice referenced the violating conduct/applicable code provision.

Stays: The exclusion was stayed on the Hearings Officer's direction because on October 11, 2011.

Mitigating and/or Aggravating Factors: The Hearings Officer finds no mitigating or aggravating factors existed when the Notice of Exclusion was issued.

Probability that the excluded individual engaged in the conduct supporting the exclusion: TriMet has the burden to demonstrate that it is more probable than not that the conduct forming the basis to issue the Notice of Exclusion occurred. Inspector Boltjes appeared and testified on behalf of TriMet. Inspector Boltjes testified that on October 5, 2011, he was conducting routine fare inspections at the Sunset Transit Center. Inspector Boltjes testified that he was on the eastbound platform dealing with an uncooperative subject when his attention was drawn to Ms. Bricker. Inspector Boltjes stated that the subject that he was dealing with was calling him names and being very loud and abusive. Inspector Boltjes testified that the subject was yelling so loudly that others on the platform

could hear some of what was going on. Inspector Boltjes testified that he repeatedly told the uncooperative subject that he did not have a right to yell and be abusive on TriMet property. Inspector Boltjes testified that the subject responded by stating that it was his 1st Amendment right to yell and be loud. Inspector Boltjes stated that he told the subject that he did not have the right on TriMet property to be loud and abusive. Inspector Boltjes stated that there were approximately 7-8 people on the platform, in addition to himself and the uncooperative subject. Inspector Boltjes stated that, while he was dealing with the uncooperative subject, Ms. Bricker began yelling as well. Inspector Boltjes testified that Ms. Bricker was attempting to interject her opinion into the contact that he was having with the uncooperative subject. Inspector Boltjes testified that he attempted to tell Ms. Bricker that it was not her place to interject into the matter that was taking place, but that Ms. Bricker would not stop yelling. Inspector Boltjes testified that he was on the east end of the platform, and that Ms. Bricker was "half way down the platform." Inspector Boltjes testified that Ms. Bricker's yelling was drawing the attention of all passengers on both platforms, and that Ms. Bricker was trying to get other people involved in the incident taking place. Inspector Boltjes stated that he left the uncooperative subject that he was dealing with to address Ms. Bricker's conduct. When Inspector Boltjes left the uncooperative subject to deal with Ms. Bricker, the uncooperative subject ran off. Inspector Boltjes testified that he contacted Ms. Bricker and ultimately excluded her for Excessive Noise.

Ms. Bricker was issued a Notice of Exclusion on October 5, 2011, for allegedly violating TMC 28.15 A.(13) [Excessive Noise]. A person violates TMC 28.15 A.(13) [Excessive Noise] if the person makes "excessive or unnecessary noise, including boisterous and unreasonably loud conduct" within a TriMet vehicle or District Station with the intent to cause inconvenience, annoyance or alarm to the public, District personnel, or a peace officer or with reckless disregard to the risk thereof."

Ms. Bricker appeared at the hearing and stated that she was 30 feet away from Inspector Boltjes while he was dealing with the uncooperative subject. Ms. Bricker stated that it was possible to hear the interaction between Inspector Boltjes and the other subject from that distance. Ms. Bricker stated that she heard Inspector Boltjes tell the uncooperative subject that he did not have any 1st Amendment rights. Ms. Bricker testified that she responded to this statement by raising her voice "enough to be heard," but without yelling. Ms. Bricker stated that she remained in the same place, but "projected" her voice so that it could be heard by Inspector Boltjes. Ms. Bricker stated that she was not trying to get others involved, and that she was not paying attention to the other people on the platform. Ms. Bricker stated that she had only one goal and that goal was to "express my opinion, and my opinion was critical." Ms. Bricker stated that she did not violate the TMC because she was not making "excessive" noise and that she did not have the intent to cause inconvenience, annoyance or alarm. Ms. Bricker stated that she believes that her speech was annoying to Inspector Boltjes, but not because of the conduct and instead because of the content of her speech. Ms. Bricker stated that she believes TMC 28.15 A 13 as applied to herself is unconstitutional because it violates Article 1, Section 8 of the Oregon Constitution and the 1st Amendment of the United States Constitution. Ms. Bricker stated that TriMet cannot regulate her speech based on content, or unreasonably regulate the volume of her speech without regard to content. Ms. Bricker submitted two additional Exhibits for the record, and Exhibits 1 through, and including, 8 were received into the record without objection.

Ms. Bricker raised Article 1, Section 8 of the Oregon Constitution in defense of her conduct which led to the issuance of the Exclusion on October 5, 2011. Article 1, Section 8 provides "No law shall be passed restraining the free expression of opinion, or restrict the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." This provision prohibits the legislature from enacting laws restraining the free expression of opinion or restricting the right to speak freely on any subject. If a law concerning free speech on its face violates this prohibition, it is unconstitutional, if the law is not unconstitutional on its face, it nevertheless might be applied in a manner that would violate Art. 1, Sec. 8. In *State v. Robertson*, 293 Or 402, 649 P.2d 569 (1982) the Supreme Court of Oregon set out a framework for challenges to statutes under Article 1, Section 8 of the Oregon Constitution. This Hearings Officer will summarize the framework here. There is a distinction between laws which focus on the content of speech and

those which focus on eliminating the act of obtaining results which are forbidden. The court reasoned that laws which focus on the content of speech violate Art. 1, Sec. 8 “unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.” *Id.* at 412, 838 P.2d 558. The Court further divided laws which focus on forbidden results into two categories. The first category focuses on forbidden effects, but expressly prohibits expression used to achieve those effects. *Id.* at 417-418, 649 P.2d 569. Such laws are analyzed for overbreadth. The second category focuses on forbidden effects, but without referring to expression at all. Laws which fall into this final category the court wrote: “If [a] statute [is] directed only against causing the forbidden effects, a person accused of causing such effects by language or gestures would be left to assert (apart from a vagueness claim) that the statute could not constitutionally be applied to his particular words or other expression, not that it was drawn and enacted contrary to Art. 1, Sec. 8.” *Id.* at 417, 649 P.2d 569.

The Hearings Officer finds that TMC 28.15A 13 falls into the later category put forth by the court in *Robertson* as it is directed at the forbidden effect of excessively loud noise, and does not refer to or restrict any particular means by which such noise is created. The question remaining is then whether TMC 28.15A 13 was unconstitutionally applied to Ms. Bricker’s conduct.

The Hearings Officer finds the testimony of the parties to be credible and accurately reflects the events leading up to the issuance of the Notice of Exclusion issued to Ms. Bricker on October 5, 2011. The Hearings Officer finds that on October 5, 2011, Inspector Boltjes was employed by TriMet and tasked with the duty of enforcing the rules of the TriMet Code on TriMet platforms and vehicles. The TriMet Code sets out rules for the “safety, convenience, and comfort of District Vehicle passengers, . . .” *TMC 28.05 Purpose*. The Hearings Officer notes that just prior to his contact with Ms. Bricker at 5:10 p.m., Inspector Boltjes was working in his capacity as an employee of TriMet and attempting to enforce the TriMet Code regulation regarding payment of fare. The Hearings Officer finds that the subject whom Inspector Boltjes was engaged with was uncooperative, and the contact was heated and involved raised voices, name-calling and insulting language. The Hearings Officer finds, based on the written report of Inspector Boltjes, that a number of people on the platform were commenting on the contact as it was occurring. The Hearings Officer finds that Ms. Bricker, while on the platform, began commenting on the contact between Inspector Boltjes and the uncooperative subject. The Hearings Officer finds that Ms. Bricker’s comments were at such a raised volume that they were distracting to Inspector Boltjes as he attempted to perform his duties as a TriMet Inspector. The Hearings Officer finds that the testimony and Exhibits indicate that the volume of Ms. Bricker’s statements, and not the content of the statements were of concern to Inspector Boltjes as he performed his duties. The Hearings Officer notes that in Ms. Bricker’s own submission, Exhibit 8, she writes that Inspector Boltjes was concerned with her “disturbing everyone on the platform,” and does not indicate that the *content* of her speech was at issue. The Hearings Officer finds that TMC 28.15A13 is constitutional as applied to Ms. Bricker’s conduct on October 5, 2011, and does not violate Article 1, Section 8 of the Oregon Constitution. Accordingly, the Hearings Officer finds that TMC 28.15A13, as applied, does not violate the First Amendment to the Constitution of the United States.

The Hearings Officer finds it is more probable than not that on October 5, 2011, Ms. Bricker violated TMC 28.15A13 creating excessive or unnecessary noise while on a District Platform. The Hearings Officer finds the Notice of Exclusion issued to Ms. Bricker on October 5, 2011, is valid.

Special Exceptions: The Hearings Officer finds there is no evidence in the record to suggest that Ms. Bricker is disabled, transit dependent, or that the exclusion is based upon expressive conduct or exercising religious opinion protected by the United States or Oregon Constitutions.

ORDER AND DETERMINATION:1. Validity of the Notice of Exclusion:

The Hearings Officer sustains the Notice of Exclusion issued to Ms. Bricker on October 5, 2011.

2. Length of the Exclusion:

The exclusion shall become effective with this Order, on November 30, 2011, and shall conclude on December 30, 2011 at 5:00 p.m.

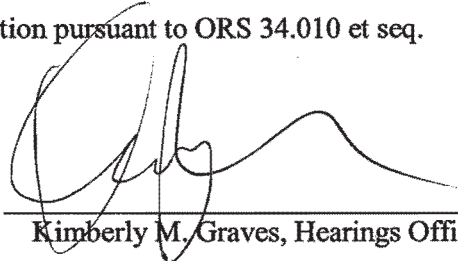
3. Scope of the Exclusion:

The scope of the exclusion shall be as described in the Notice of Exclusion.

4. This order has been mailed to the parties on November 23, 2011, not more than five (5) business days following the hearing, and will become final on November 30, 2011.

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

Dated: November 23, 2011



Kimberly M. Graves, Hearings Officer

KMG: jeg

Enclosure

Exhibit #	Description	Submitted by	Disposition
1	Appeal Form page 2	Turner, Anna	Received
2	TriMet Fare Inspection System printout	Turner, Anna	Received
3	Notice of Exclusion	Turner, Anna	Received
4	Mailing List	Hearings Office	Received
5	Notice of Hearing	Hearings Office	Received
6	Statement of Rights	Hearings Office	Received
7	10/6/11 letter	Bricker, Jennie L.	Received
8	10/5/11 testimony	Bricker, Jennie L.	Received