

**Matter of Grosso v Waterfront Commn. of N.Y.
Harbor**

2013 NY Slip Op 30322(U)

February 7, 2013

Supreme Court, New York County

Docket Number: 104366/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 104366/2012
GROSSO, JOSEPH
vs.
NYC WATERFRONT COMMISSION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) _____
Answering Affidavits — Exhibits _____ No(s) _____
Replying Affidavits _____ No(s) _____

RECEIVED
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NEW YORK COUNTY OFFICE
130 S. SUPREME COURT - CIVIL

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

FILED
FEB 11 2013
CLERK OF COURT
NEW YORK COUNTY OFFICE

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NEW YORK COUNTY OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/7/13

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X

In the Matter of the Application of

JOSEPH GROSSO,

Petitioner,

Index No. 104366/12

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

WATERFRONT COMMISSION OF NEW YORK
HARBOR,

Respondent.

FILED
FEB 13 2013
NEW YORK
COUNTY CLERK'S OFFICE

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for
: _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmation in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Joseph Grosso brought the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to annul a determination made by respondent Waterfront Commission of New York Harbor (the "Commission") denying petitioner's Petition for Restoration of his longshoremen's registration and directing respondent to grant his petition for such relief. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. In October 1979, petitioner was registered by the Commission as part of the Longshoremen's Register and worked as a maintenance man on or near

the waterfront for Global Terminal ("Global"). On September 10, 1991, petitioner and another employee were arrested for misappropriating approximately 439 truck tires worth approximately \$33,216.00. On September 26, 1991, the Commission served a Notice of Hearing and Temporary Suspension Order on petitioner seeking revocation of his registration as a maintenance man based upon the misappropriation charges. On January 13, 1993, following his successful completion of a pre-trial intervention program, the criminal charges against petitioner were dismissed by order of the Superior Court, Hudson County, New Jersey. Following several evidentiary hearings, on December 21, 1994, the Commission revoked petitioner's registration, effective January 16, 1995, based on its finding that petitioner participated in the misappropriation of property. Petitioner did not commence an Article 78 proceeding challenging the Commission's Decision. However, from 1995 to 2003, petitioner filed five separate Petitions for Restoration of his registration which were denied on the basis of the Commission's findings that petitioner participated in the misappropriation of property while working for Global.

In 2011, petitioner was employed full time as an un-registered maintenance man at Columbia Container Services ("Columbia") in Newark, New Jersey. He was informed by his boss that the company was moving to the waterfront at Port Newark, New Jersey in January 2012 and that all employees were required to be registered with the Commission. Thus, on October 11, 2011, petitioner filed a Petition for Restoration of his registration. The Commission refused to issue petitioner a temporary pass and he went off the Columbia payroll in January 2012 and remains unemployed to date. On January 6, 2012 and February 15, 2012, petitioner was interviewed under oath by the Commission's counsel with respect to his Petition. At the interviews, petitioner testified that he never stole or conspired to steal tires from Global. Petitioner's counsel argued that the 1994

revocation hearing was tainted by a conflict of interest with respect to petitioner's first attorney and that the Administrative Law Judge made several important factual errors in reaching his recommended decision. Finally, petitioner argued that the other individual charged with the tire misappropriation in 1991 had his registration restored.

In an Order and Memorandum Decision dated August 6, 2012, the Commission denied petitioner's Petition for Restoration of his registration on the grounds that (1) petitioner "was part of a well-planned and deliberate scheme to misappropriate re-capped tires from his workplace over a period of time beginning in July 1991 through September 1991...and the 'serious nature' of such a scheme; (2) petitioner "fails to take responsibility for and continues to deny his actions"; and (3) petitioner "failed to present any evidence of economic hardship...". Petitioner then commenced the instant Article 78 proceeding challenging the Commission's Decision.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); see *Pell v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell*, 34 N.Y.2d at 231 (internal

citations omitted).

In the instant action, the Commission's Decision denying petitioner's Petition for Restoration of his registration was made on a rational basis. The Commission may, in its discretion, deny applications for such registration and revoke registrations upon a finding that the presence of the applicant/registrant "at the piers or other waterfront terminals in the Port of New York district...constitute[s] a danger to the public peace or safety." McKinney's Unconsolidated Laws §§ 9829(c) and 9831(a). The Waterfront Commission Act delineates various offenses for which the Commission "shall have power to reprimand any longshoreman registered under this article or to remove him from the longshoreman's register for such period of time as it deems in the public interest..." McKinney's Unconsolidated Laws § 9831. Among those offenses is the "[w]illful commission of or willful attempt to commit at or on a waterfront terminal or adjacent highway any act of...willful misappropriation of any other person's property, unless justified or excused by law." *Id.* at § 9831(e). As petitioner's registration was revoked in 1994 due to the Commission's finding, after evidentiary hearings, that petitioner previously used his position as general foreman to misappropriate property from his former employer, it was rational for the Commission to deny petitioner's Petition for Restoration on the same ground and because petitioner has failed to take responsibility for his actions over 21 years later. Further, petitioner did not commence an Article 78 proceeding to challenge the 1994 determination and it is undisputed that he is now time-barred from doing so.

Petitioner's assertion that the denial was arbitrary and capricious because the misappropriation charges against him were dropped in 1993, and thus, he is innocent, is without merit. The fact that the charges against him were dropped is irrelevant as the Commission already

