

Karahuta v Waterfront Commn. of N.Y. Harbor

2016 NY Slip Op 32709(U)

August 14, 2006

Supreme Court, New York County

Docket Number: 115557/05

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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KEVIN KARAHUTA

Index No. 115557/05

Petitioner,

vs.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

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EMILY JANE GOODMAN, J.S.C.:

Petitioner Kevin Karahuta brings this Article 78 proceeding to annul the determination of Respondent Waterfront Commission (the "Commission") dated July 13, 2005, which denied Petitioner's application for reinstatement to the longshoremen's register.¹

Petitioner registered as a longshoreman and commenced work on the waterfront in July 2000. In October 2000, the Commission revoked Petitioner's registration for his allegedly wrongful failure to reveal a March 1998 arrest for marijuana possession. Petitioner participated in a Pretrial Intervention program ("PTI") as of March 3, 1999, and by order of the Superior Court of New Jersey dated November 16, 2001, the records underlying that arrest were expunged pursuant to NJSA 2C:52-1 et seq.

¹The Court accepts the facsimile transmission of January 31, 2006 (which includes Respondent's Verified Answer, Respondent Affirmation of Deutsch and Respondent Affirmation of Kelly) in lieu of submission of the originals. Accordingly to Respondent, originals were submitted to motion support, but were lost.

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However, in September 2002 the Commission denied his application to re-register as a longshoreman.

In 2003 Petitioner sought a licence from the New Jersey Casino Control Commission. After an investigation, the Division of Gaming Enforcement of the Department of Law and Public Safety reported that Petitioner's licensing and employment record were "satisfactory" and that there was "no negative information" regarding his character, honesty, integrity and responsibility.

Petitioner again applied to the Commission to register as a longshoreman in November 2004. In addition to a letter of recommendation written by an individual from APM Terminals (Petitioner's employer), his application included an explanation that his failure to mention the 1998 arrest during the original application process was due to the advice of counsel. Petitioner also referenced the 2001 expungement order. However, by order dated July 13, 2005, the Commission denied the application. The order cited the following reasons for its determination:

- 1) The serious fraud committed by the petitioner on his application of July 5, 2000 for inclusion in the Waterfront Commission Register as a longshoreman (equipment operator), resulting in immediate cancellation of his temporary registration on October 6, 2000; and

- 2) The serious fraud committed by the petitioner at his interview conducted at the offices of the Waterfront Commission of New York Harbor, 39 Broadway, 4th floor, New York on July 5, 2000; and

3) On March 14, 199 the petitioner possessed over five pound[s] of marijuana from which possession the Commission concludes that he intended to distribute said marijuana; and

4) The petitioner's use of marijuana since the immediate cancellation of his temporary registration on October 6, 2000; and

5) The petitioner's failure to maintain any type of steady employment since the immediate cancellation of his temporary registration on October 6, 2000, since which time he has been supported financially by his parents and by unemployment compensation, and has only been gainfully employed for approximately one year as a casino dealer by the Borgata Casino, Hotel and Spa in Atlantic City, New Jersey; and

6) The petitioner was terminated from his position as a casino dealer by the Borgata Casino because of excessive absences after receiving several written notices from the Borgata of such violations, further indicating the petitioner's inability to maintain the type of consistent work attendance he would be required to maintain as a longshoreman in order to meet shaping requirements and not be decasualized.

This proceeding followed.

The Waterfront Commission was established in 1953 to investigate corruption on the waterfronts of New York and New Jersey (see Eastern Indus. Supply Corp. v Waterfront Commn. of New York Harbor, 96 AD2d 469 [1st Dept 1983]).² The Commission is neither an agency of the State of New York nor an agency of

²The Commission acquired legitimacy and viability on August 12, 1953 by an act of Congressional consent (see Pub. Laws 252, c. 407, 83rd Congress, 1st Session).

the State of New Jersey. Rather, it is "a body corporate and politic, an instrumentality of the states of New York and New Jersey." (see Unconsol. Laws § 9807). As a creation of a compact between the State of New York and the State of New Jersey, each state surrenders a portion of its sovereignty and the compact may not be modified without the consent of both states (see C.T. Hellmuth & Associates, Inc. v. Washington Metropolitan Area Transit, 414 F Supp 408 [D Maryland 1976]); Matter of Metro-ILA Pension Fund to the Waterfront Commission of New York Harbor, Index No. 13500/86, Supreme Court, New York County, November 19, 1986 [Hon. Kenneth Shorter]).

A determination by the Commission denying reinstatement to the longshoremen's register must be upheld if it has a rational basis (Malverty v Waterfront Comm'n, 71 NY2d 977 [1988]; Sudano v Waterfront Comm'n, 87 AD2d 633 [2d Dept 1982]). The Commission's determination may be set aside if it is arbitrary and capricious (Anastasio v Waterfront Comm'n, 49 NY2d 973 [1980]).

There is no specific statutory provision in the Waterfront and Airport Commission Act ("WCA") (McKinney's Uncons. Laws of NY §§ 9801 et seq.) governing reinstatement after revocation of a license, except with respect to reinstatement after removal due to inactivity.³ Therefore, the Court discusses both the

³See WCA § 9837, which provides in relevant part that "[a] longshoreman who has been removed from the longshoreman's register pursuant to this article may seek reinstatement upon

requirements for initial inclusion in the longshoremen's register and the grounds for revocation of a license. The WCA provides that "the right to register [as a longshoreman] is *absolute* unless the person ha[s] been convicted of a crime . . . or unless the employment on the waterfront is clearly likely to endanger the public peace or safety" (WCA § 10060) (emphasis supplied). The requirements for initial inclusion in the longshoremen's register are governed by WCA § 9829. Under that provision, registration may be denied by reason to a person "[w]ho has been convicted by a court of . . . any state . . . without subsequent pardon, of treason, murder, manslaughter or of any felony or high misdemeanor" That section also permits denial for conviction of the offenses listed in WCA § 9814(b), which include weapons possession, possession or manufacture of burglar's tools, receipt of stolen property unlawful entry, aiding escape from prison, or "unlawfully possessing or distributing habit-forming narcotic drugs" and based upon an attempt or conspiracy to commit any of the referenced crimes. WCA § 9829 further allows an application to be denied if the applicant is advocating overthrowing the government, or, if the applicant's presence on the pier or waterfront constitutes a danger to public peace or safety.

fulfilling the same requirements as for initial inclusion in the longshoreman's register, but not before the expiration of one year from the date of removal").

WCA § 9831 permits, among other factors, the revocation of a license for "conviction of a crime or other cause which would permit disqualification of such person from inclusion in the longshoremen's register upon original application" and for "[f]raud, deceit or misrepresentation in securing inclusion in the longshoremen's register."

Respondent acted arbitrarily and capriciously in 2005 when it concluded, based ground (3) that Petitioner was a danger to public peace or safety. Petitioner was not convicted of a felony or high misdemeanor based upon possession of marijuana in 1998. In fact, although Petitioner was arrested, his arrest was expunged. Because ground (3) did not result in a conviction, Respondent can only maintain that Petitioner's presence at the waterfront constitutes "a danger to public peace or safety."

It is true that a conviction may warrant a finding that a longshoremen's presence at the piers constitutes a danger to the public peace and safety (see, e.g., Sudano v Waterfront Comm'n, 56 NY2d 1026 [1982]); Mirenda v Waterfront Comm'n, 34 NY2d 676 [1974]). Further, allegations independent of a conviction may warrant such a finding where the underlying facts involve a danger to public peace and safety (see Sessa v Waterfront Comm'n, 18 NY2d 759 [1966] [revocation of license was proper where the Waterfront Commission determined that longshoremen extorted and attempted to extort money from truckers and others]). However,

where as here, the underlying facts do not, on their face, implicate a danger to public peace and safety, and where no conviction has resulted, the finding that Petitioner poses such a danger is arbitrary and capricious. This is especially true where, as here, Petitioner successfully participated in the PTI, a program geared towards rehabilitation and deterrence (N.J.S.A. 2C:43-12) and ultimately obtained an order of expungement.

Further, Respondent has made no argument regarding why Petitioner's admitted recreational use of marijuana on five occasions in 2000 (ground 4), represents a threat to the public peace and safety today, or, is otherwise grounds to deny Petitioner's application to re-register. Respondent has not alleged that such behavior continued to date, nor that it determined that Petitioner would use marijuana while working. Accordingly reliance upon that ground was arbitrary and capricious. Reliance on grounds (5) and (6) as the basis of denial was similarly arbitrary and capricious. While WCA § 9834 permits the Commission to strike the names of persons who have not worked (or applied to work) as longshoremen within a specified period after registering, nowhere does it require the applicant to prove or guarantee his or her general job reliability. In this connection, it is noteworthy that WCA § 9837, which governs reinstatement for removal due to inactivity, states only that the applicant must fulfill "the same

requirements as for initial inclusion in the longshoremen's register." Criticism of Petitioner's post-revocation work history and speculation regarding attendance requirements does not constitute statutory disqualifying misconduct.

With respect to the Commission's determination that Petitioner's re-application should be denied on the grounds of fraud (charges 1 and 2), the Court remands the issue to Respondent for further consideration. The determination of fraud was based Petitioner's failure to disclose his 1998 arrest (1) in responding to question 18 on his longshoremen's application of July 5, 2000, directing him to list all arrests, whether convicted or dismissed, and (2) at an interview. Notably, although Petitioner had not yet received an order of expungement when he filled out the application and was later interviewed, he was already a participant in the PTI program, which if successfully completed, would result (and did result) in the expungement of his arrest.⁴ In support of the Petition, Petitioner's prior criminal counsel submits two affidavits asserting that Petitioner was advised by both counsel and the judge presiding over the criminal case at the time of sentencing

⁴N.J.S.A. 2C:52-27, "Effect of Expungement," provides that "if an order of expungement is granted, the arrest . . . and any proceedings related thereto shall be deemed not to have occurred, and the petitioner may answer any questions relating to their occurrence accordingly" (emphasis supplied).

that, upon completion of the PII program, Petitioner would be able to deny ever having been arrested to a prospective employer.⁵ Respondent admits in its Verified Answer that Petitioner's counsel's affidavits "would have offered a defense to the two counts of fraud." Although these affidavits were not submitted by Petitioner along with his Petition for Leave to Reapply, Petitioner did state therein that his failure to mention the 1998 arrest was based upon the advice of counsel. Accordingly, based on Respondent's own admission that the affidavits of counsel would have offered a defense to the fraud, and based on Respondent's arbitrary and capricious reliance grounds (3) through (6), the Court remands the issue to Respondent for further consideration and a new determination. In deciding the issue of fraud, Respondent should also consider whether further denial of Petitioner's otherwise absolute right to register as a longshoreman would constitute punishment disproportionate to the offense committed (see, Sudano v Waterfront Comm'n, 56 NY2d 1026, supra; Bell v Waterfront Comm'n, 20 NY2d 54 [1967]). Accordingly, it is

⁵While not the subject of judicial notice per se, it is common knowledge in any Criminal Court in New York that an adjournment in contemplation of dismissal means that a defendant can safely say he or she has no record. Every judge, including this one, has told hundreds of defendants that.

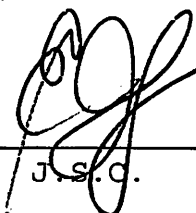
ADJUDGED, that the petition is granted and the order of the Respondent Waterfront Commission of New York Harbor dated July 13, 2005 denying Petitioner Kevin Karahuta reinstatement to the register of longshoremen is annulled, and it is further

ORDERED, that the determination regarding reinstatement is remanded to Respondent with the direction to render a new determination in light of this Decision, Order and Judgment, within 45 days of receipt of a copy thereof, with Notice of Entry.

This constitutes the Decision, Order and Judgment of the Court.

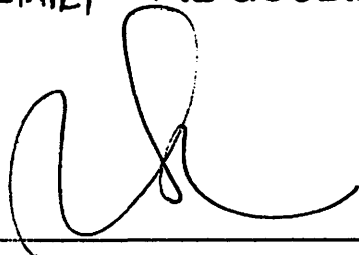
Dated: August 14, 2006

ENTER:



J.S.C.

EMILY JANE GOODMAN



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