SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER PART IA PART 16

Justice

Application of Margaret Dillon

-v-

Waterfront Commission of New York

INDEX NO. 100575/13

MOTION DATE

MOTION SEQ. NO. 001

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).

This Article 78 proceeding is granted in accordance with the accompanying memorandum decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: AUG 15 2013

ALICE SCHLESINGER, J.S.C.

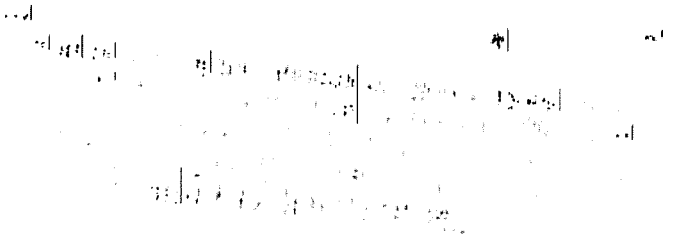
ALICE SCHLESINGER

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

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APPLICATION OF MARGARET DILLIN,

Petitioner,

Index No. 100575/13
Motion Seq. No. 001

For a Judgment Pursuant to CPLR Article 78 Annulling and/or Reversing a December 18, 2012 Determination and Order Revoking Petitioner's Registration as a Longshoreman,

-against-

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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SCHLESINGER, J.:

On December 18, 2012, a decision was made by the respondent Waterfront Commission of New York Harbor to revoke the registration of petitioner Margaret "Margo" Dillin as a longshoreman. The ultimate finding was "that the continuance of her registration would be inimicable to the public peace or safety" (Answer, Exh J). This determination accepted the report and recommendation of Administrative Law Judge Patrick W. McGinley (Exh I). He had presided at a hearing held on six days between April 10, 2012 and June 28, 2012. His report, dated November 13, 2012, found that Ms. Dillin had violated the Waterfront Commission Act ("WCA") Part II, Section 5-i(6), by having attended two social functions — a wine tasting party and a Christmas party in 2007.

The record here is very complicated and I did not intend to demean the ALJ's findings by stating the above. However, it is those attendances, which Ms. Dillin acknowledged occurred, that were used as a predicate for her expulsion from Local 1588 of the International Longshoremen's Association by the Federally Appointed Administrator on July 20, 2011, and that, along with the 2011 expulsion, were the factual basis for the First Charge here (Exh F).

There were two other charges before the ALJ; the second was associated with the first, but the third was not. The second charge was that Ms. Dillin had associated with Nicholas Furina, an identified member of an organized crime group, under circumstances where such association created a reasonable belief "that her participation in any activity required to be registered under the WCA would be inimical to the policies of the WCA within the meaning of the WCA, Part II, Section 5-i(6)."

Clearly, this charge was the Commission's counterpart to the Union's decision to expel Ms. Dillin. Therefore, it was intimately related to Count 1. The third count, which was found not to be proved by a preponderance of evidence, had to do with whether Ms. Dillin had violated another Part of the WCA by having impeded the effectuation of justice by having failed to satisfy a judgment against her. This charge related to her receipt of food stamps in 1994, an unpaid fine from 1999, and an arrest for a warrant based on that unpaid fine on February 24, 2010.

In his report, ALJ McGinley begins his findings by saying that there were three salient, uncontroverted facts. The first was Ms. Dillin's attendance at the Christmas Party hosted by Nicholas Furina at a restaurant, although the only aspect to the "uncontroverted" part by petitioner is her statement at the hearing.

> I came in, I sat down where I was supposed to sit and that was it. I never even - I went to go get food, I went to the bathroom, I bought a ticket, I won a rocking horse, and I went home.

In further elaboration, Ms. Dillin's consistent position has been that she was unaware if Nicholas Furina was present at the party, that she had been invited to the party by his son Anthony — who was her boss — and that she had been escorted to the party by her friend Richard Koch (Karczewski), who she later learned knew Nicholas.

The second "salient uncontroverted" fact was that Ms. Dillon admitted attending a wine tasting party at the home of Nicholas Furina, who she did not see. Here again, for accuracy, Ms. Dillin testified that she believed the party was hosted by her boss Anthony, who had invited her, and she believed that she was in Anthony's home. The third "salient uncontroverted" fact was that the Commission proved that Nicholas Furina is a member or associate of organized crime. No one contested that fact, and when Furina was called as a witness, he consistently "took" the Fifth Amendment.

Ms. Dillin's expulsion from Local 1588 was the central event in the successful efforts of both that Union, by its Deputy Administrator Robert Stewart, as well as the Commission to eliminate Dillin from their ranks. Thus, the second charge is completely dependent on that first Union proceeding. That fact is made clear from the part Mr. Stewart played when he was called as the Commission's third witness. He was clearly the most important witness.

For example, at the hearing, Stewart was allowed by the ALJ, over objection, to testify as both a fact and an expert witness. As a fact witness, he was the conduit by which the ALJ admitted into evidence Stewart's own earlier investigation and minutes of the Union hearing, wherein he filed charges against Ms. Dillin on March 9, 2011 and made an impassioned "closing argument" to Administrator Robert McGuire on July 2, 2011. This testimony also carried with it 47 exhibits leading up to and including the Union hearing.[1] As an expert witness, he was permitted to give his own interpretations as to relevant terms of

[1]These exhibits included several anonymous letters written to the Union complaining about Ms. Dillin. Despite reservations by Administrator McGuire, these letters were certainly used for purposes of questioning Ms. Dillin and for their actual content. "Hearsay" and the Sixth Amendment's right of confrontation were briefly alluded to but essentially ignored.

art, such as what constituted an "improper association," and his opinions about petitioner's conduct.

Mr. Stewart was asked about any relationship he had with Ms. Dillin. He described one in the earlier days of her work on the docks, which began in 2003. It appears that Ms. Dillin had made frequent complaints about the constant harassment and worse to which she and her daughter, who had also come to work there, were subjected. Ms. Dillin was one of a handful of women longshoreman on the Jersey docks. Despite the fact that some of the experiences she suffered seemed crude and frightening, none seemed to impress Stewart. Referring to the years 2004 and 2005, he testified (p. 220 of hearing):

> She inundated us with complaints about sexual harassment from various members and it was very time consuming and expensive for as to investigate all of these to try to sort through them. In the end the ones that we were able to work through proved to be entirely without foundation and totally spurious.[2]

The ALJ in his report discussed Stewart's testimony at length and cited liberally to the exhibits he had brought with him. Stewart laid out the findings made by the Administrator which had led to petitioner's expulsion from the Union. Those included engaging in prohibited association with Nicholas Furina (attendance at the previously mentioned two social functions), bragging to pier co-workers about her relationship with Furina (Ms. Dillin in her many interviews with Stewart acknowledged such bragging but explained that it had no basis in fact and had been done only to get the men to leave her alone), and receiving preferential job assignments, specifically driving a van, presumably one of the more desirable jobs.

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[2]In 2006, petitioner filed a complaint with the United States Equal Employment Opportunity Commission (EEOC). An agreement was reached wherein she received an amount of money and an order for the harassment to stop. But according to Ms. Dillin, the harassment did not stop (¶6, p.3 of petitioner's affidavit of April 3, 2013).

However, regarding the last finding of preferential treatment, Paul Murowski, a witness called by the defense at the hearing, testified that he was a ship foreman and would give out the assignments, including van drivers. He stated that no one had ever told him to give petitioner preferential treatment and that he would choose van drivers based on who he believed would be a safe driver. Later on, though, Stewart, who ran Union activities on the docks, directed him to choose van drivers only by seniority, which he did.

No mention of this part of Murowski's testimony was discussed in the ALJ's findings. Rather, he noted that Murowski was Nicholas Furina's son-in-law but still showed the good sense, unlike Ms. Dillin, to avoid going to parties that Furina hosted.

The ALJ then recalled two witnesses called by the defense, David Hallerman and Michael Bolger, both of whom he found credible when they testified about hearing petitioner boast about her attending a wine tasting at Furina's house.[3]

Not surprisingly on this record, the ALJ found that Count 1 set forth in the Notice of Hearing had been established. He found exactly what the Union Administrator McGuire had found vis-a-vis the events, which were attendance at the parties, bragging about a relationship with Furina, and receiving preferential assignments. However, this time those same actions now qualified as an offense within the meaning of the WCA. In other words, the petitioner's three offensive activities were used first to expel her from the Union and then to constitute evidence to support the first charge brought by the Commission.

The ALJ acknowledged that "all of the foregoing" had been "proven at a separate hearing," but significantly added (at p 7) that the conduct:

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[3]Hollerman and Bolger were two of the three live witnesses who testified at the Union proceeding. It seems that counsel for petitioner (defendant at the hearing) believed that he could extract favorable testimony from them at this proceeding. He could not, and the strategy back fired.

> renders her presence at the piers or other waterfront terminals in the port of New York District a danger to the public peace and safety; a cause which would permit her disqualification from inclusion in the Longshoreman's Register upon original application.

Petitioner's expulsion from the Union was found (at p 7) to violate Section 3-a(1) of an Order of the United States District Court dated January 30, 2003, as well as a 1992 Consent Decree, the latter by "knowingly associating with Nicholas Furina, an associate of the Genovese organized crime family." The ALJ then explained why he had found that the expulsion from the Union based on a violation of the Consent Decree, the boasting, and the preferential treatment created a danger on the waterfront:

> These activities would clearly lead her co-workers on the piers to believe that organized crime is in control on the Waterfront and would contribute greatly to the problems set forth in Article I below.

Article I of the WCA's "Findings and Declarations" is a description of the "depressing and degrading" conditions existing on the waterfront when the WCA was passed and how such criminal conduct had infiltrated labor organizations and produced a plethora of evils.

The ALJ then went on to consider (at p 8) Count 2, which referred to Section 5-i(6) of the WCA and provided for revocation of registration where:

> Association with a person who has been identified by a federal, state or local law enforcement agency as a member or associate of an organized crime group... or who is a career offender, under circumstances where such association creates a reasonable belief that the participation of the registrant under this act would be inimical to the policies of this act.

Count 2 is critical to the determination here because merely finding that Count 1 had been proven did nothing more than merely echo petitioner's exclusion from the Union. But

Count 2, which makes association with a person who is a member of an organized crime group a violation of the WCA, is an additional finding. And significant to that finding is how the ALJ defined the word "association".

Counsel for petitioner argues here that the way it was defined — a definition helped along by Deputy Administrator Stewart — was too loose, and to the extent that Ms. Dillin was found to have met this definition, the finding was wrong and arbitrary and capricious as well.

First, the ALJ pointed out that the word is not defined in the WCA statute. However, undeterred by this point, he elected to "accept the definition given during the instant hearing by the Commissioner's expert witness, Robert Stewart, that to associate means some type of a context where you have no legitimate business requirement to be there". (p. 209 of the transcript).

This definition translates to an extremely relaxed, almost casual standard. That is the manner in which the ALJ then proceeded to analyze petitioner's conduct. So, as to Ms. Dillin's attendance at the parties? There was no legitimate business reason for her to attend a party, and she intentionally went and she meant to go. "There was nothing inadvertent or accidental about her attendance at these parties." And it made no difference to ALJ McGinley that Ms. Dillin had not had any contact with Furina at the parties or that she had not even known that he would be there.

Further, there were "clues" "that a reasonable and prudent person would have recognized to avoid associating" with someone like Furina. What were they? "The circumstances surrounding each party". (Frankly, this Court does not understand this reference or what the circumstances were or what the ALJ meant, even though the Court has read the entire transcript). The ALJ also pointed to the fact that the invitation had been

from Nicholas' son, Anthony. However, it should be pointed out that Anthony was not only not barred from the waterfront, he was petitioner's boss at the time. The final "clue" was Ms. Dillin's attendance at the events with Richard Koch, a "good friend of Nicholas Furina." But petitioner testified that she only learned about their friendship after the parties.

The above findings by the ALJ must be viewed in the context of petitioner's consistent, sworn testimony that she did not know Nicholas Furina, that she had never met him, had never associated with him, and had never received anything from him, despite her boastful statements. Also, it must be viewed in the context that no one else has ever said anything to the contrary. In other words, no one, not even the three longshoremen who did not like petitioner and who testified against her, said that they had ever seen Ms. Dillin have any contact with Furina. Further, there were no photographs of the two together, nor any evidence placing them together. In fact, it appears that there was no testimony to the effect that Nicholas Furina was at either or both of the two parties petitioner attended, or at least that he was there when Ms. Dillin was.

Counsel for petitioner points out that while the WCA does not define the term "associate" or "association," the Union's Code of Ethics does (Exh D). Specifically, subdivision (1)(d) in Article VI ("Prohibited Conduct") prohibits "knowingly associating with individuals barred from union activity, as set forth in Appendix B." Further, Appendix B, which defines a "barred person", states as follows:

> A person "knowingly associates" with a barred person if the person makes a calculated choice to associate with the barred person despite knowing of that person's status as a barred person.

Frankly, there is nothing unusual, quite the contrary, in adding the word "knowingly" to the term "associates", particularly when such conduct serves as a basis for a criminal

or other charge. Therefore, by not including "knowing", either implicitly or explicitly, in his definition of "associates", and in the manner in which he evaluated the testimony, I find that it was arbitrary and capricious for the ALJ to determine that Count 2 had been proved based on a finding that petitioner associated with Nicholas Furina by attending a few social functions at the invitation of her boss Anthony, who was Furina's son. I make this finding because there was simply no evidence that Ms. Dillin consciously chose to associate with Nicholas Furina, was ever seen in his presence, or ever received any benefit from him.

When something is arbitrary and capricious, it is not rationally based; it is a result reached without a sound basis in fact. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1*, 34 NY2d 222, 231 (1974). In layman's terms, such a decision would be said to make no sense. That is the situation here. The most critical fact, the foundation that gives all other findings support, must be established.

The critical fact here is Ms. Dillin's alleged association with Nicholas Furina. And when all the smoke has cleared, that simply has not been proved. It is not nearly enough, nor legally sufficient, to suggest that such a finding can be based on petitioner's own boasts. Those have very little, if any, probative value in light of Dillin's explanation of why she made those statements. Additionally, her explanation finds support in EEOC findings. Further, the ALJ never relied on such boasting in his findings with regard to Count 2.

In the "Conclusions" part of the Hearing Officer's Report, the ALJ states that his finding that Ms. Dillin had violated Section 5-i(6) by attending the wine tasting and Christmas parties (Count 2) were based on his view "that this section provides for strict liability". This may be the ALJ's way of dealing with the Commission's burden of showing a "known association with criminals," but there is no support for this strict liability standard, particularly when it serves not only to lessen the burden but to shift it as well.

In fact, this section of the WCA is not a strict liability section. In other words, it would be inconceivable for a violation to be found if the only evidence were two people intentionally at the same place at the same time, with no intent to be there together. Therefore, if the ALJ means that there would be such a violation because there are no exceptions in the Section, he is simply wrong. Neither he nor the Deputy Administrator can substitute his own definition for "associated with" in place of the commonly understood meaning — "knowingly associated with."

The final part of the decision is the ALJ's recommendation as to a penalty, which is the revocation of Dillin's registration. Again, he reaches his conclusion by revisiting the previous factual basis wherein he found that Ms. Dillin had associated with Nicholas Furina, bragged about it, and profited from it. By my determination here that the ALJ's finding of a violation of Count 2 is arbitrary and capricious, I am setting the entire decision aside. I do this because the finding on Count 1 is simply a duplication of the Union's finding when it expelled her and an adoption by the ALJ of the Administrator's findings there, without more.

Pursuant to the above, there would be no penalty. However, I believe I would be derelict if I did not further opine that under the circumstances here, the penalty of registration revocation is shocking and grossly disproportionate to the offense.

In this regard, it should be noted that many other union members attended these parties, particularly the Christmas party at a restaurant in 2007. Even one of the witnesses who testified against Ms. Dillin was present there and in fact seated next to her. No one else was prosecuted for having attended this party. Her bragging about her feigned contacts is unfortunate but certainly not grounds for taking away her livelihood and pension

rights. Finally, the benefit she obtained, the so-called preferential treatment of driving a van, is dubious at best.

Ms. Dillin may have been feisty and provocative and even unpleasant in maintaining a presence in this man's world on the docks. But it seems to be the consensus that she worked hard, refrained from committing any actual criminal conduct, and did her best as a single mother to raise two daughters. Revoking her registration is a complete over-reaction to what has been shown here.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is granted, the determination revoking petitioner's longshoremen's registration is revoked, and the matter is remanded to respondent for further proceedings before a different Administrative Law Judge and a new determination consistent with the terms of this decision.

Dated: August 15, 2013

AUG 15 2013

Alice Schlesinger
J.S.C.

ALICE SCHLESINGER

UNFILED JUDGMENT

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