

Marohn v Waterfront Commn. of N.Y. Harbor

2011 NY Slip Op 32238(U)

August 15, 2011

Supreme Court, New York County

Docket Number: 116280/10

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOVER

PART 1

Index Number : 116280/2010

MAROHN, ROY

vs

NYC WATERFRONT COMMISSION

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

o/for _____

Answering Affidavits — Exhibits _____

No(s). 1, 2, 3

Replying Affidavits _____

No(s). 7, 8, 9

No(s). _____

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

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).

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 8/15/11



_____, J.S.C.

HON. EILEEN A. RAKOVER

- 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 15

-----X
ROY MAROHN,

Petitioner,

-against-

WATERFRONT COMMISSION OF NEW YORK
HARBOR,

Index No.
116280/10

**DECISION
and ORDER**

Mot. Seq.

⁰⁰¹
UNFILED JUDGMENT

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HON. EILEEN A. RAKOWER:

Roy Marohn ("Petitioner") brings this special proceeding pursuant to CPLR Article 78 to challenge the August 16, 2010 decision by the Waterfront Commission of New York Harbor ("the Commission"), made after a hearing,¹ to revoke Petitioner's registration as a "maintenance man." Petitioner states that he has worked in the maintenance department at the Port Newark Container Terminal ("PNCT") since approximately July 20, 1989, when he received a temporary registration to work as a maintenance man from the Commission. The Commission issued him a permanent registration on October 31, 1991. As a maintenance man, Petitioner's general duties and responsibilities consisted of attending to garbage, painting, welding, burning, cleaning, and other general maintenance functions.

On July 30, 2009, the Commission issued a Notice of Hearing to Petitioner advising him of charges alleging that he:

- Inappropriately and without consent grabbed the leg and touched the breast of a female coworker on May 17, 2007;
- willfully attempted to cause physical injury to coworker Gerard Jordan by threatening him with a 15" wrench, and caused property damage to PNCT by

¹The court notes that no challenge is made on the grounds of substantial evidence under CPLR §7803(4) which necessitates a transfer to the Appellate Division pursuant to CPLR §7804(g).

hitting the door of the break room with the wrench on October 3, 2007; and similarly threatening Jordan with a blackjack two days later, on October 5, 2007;

- committed fraud, deceit and misrepresentation by failing to disclose past drug use on his 1989 application for inclusion in the Longshoreman's register;
- committed fraud, deceit and misrepresentation in an interview with the Commission on July 31, 2008; and
- used cocaine 2-3 times a week from 1980 through 2007.

A hearing was conducted on March 25 and May 10, 2010 before Administrative Law Judge Michael J. Zidonik ("ALJ Zidonik"). Petitioner initially proceeded *pro se* despite being advised that he had the right to have a lawyer at the hearing. However, Petitioner subsequently obtained counsel during the hearing. Prior to the presentation of the Commission's case, Petitioner's attorney moved to exclude any use of the transcripts from interviews of Petitioner under oath on July 31 and October 7, 2008 because he was not told that he had the right to have an attorney present at those interviews. ALJ Zidonik denied Petitioner's motion.

The first witness to testify on behalf of the Commission was Patricia Wilson. Wilson testified that she is a security officer at PNCT. She stated that, on May 17, 2007, while working her normal 4:00 to 12:00 shift, Petitioner came into her booth with a red cup which contained wine. He sat down in a chair next to Wilson and attempted to engage her in conversation. At one point, Petitioner "got out of the chair and he grabbed [Wilson's] thighs and he bent down," as if to hide from a security patrol. Wilson testified that Petitioner got back up and sat in the chair, at which time Wilson admonished him for touching her legs. Wilson testified that about five to ten minutes later, Petitioner "got up and touched [her] on [her] breast." After Wilson yelled at him, Petitioner left the booth. Wilson testified that at no time did she consent to any form of touching by Petitioner. She reported the incident to her supervisor, her union, and the Port Authority Police Department.

Gerard Jordan was also called by the Commission as a witness.² Jordan testified that he is employed as a terminal maintenance foreman at PNCT. Jordan testified that, on October 3, 2007, after he told Petitioner to get back to work

²ALJ Zidonik gave the Commission permission to treat Jordan as a hostile witness because he submitted a character letter in support of Petitioner.

because his break was over, Petitioner responded, "go fuck yourself, white nigger." Jordan testified that, later that day, Petitioner approached Jordan in the break room and threatened him with a 15-inch wrench, waving it at him and "ranting and raving." Jordan testified that Petitioner also said words to the effect of "I'll kill you and your entire family." After this exchange, Petitioner hit the break room door with the wrench, causing damage to the door. Jordan testified that, two days later, on October 5, 2007, Petitioner, while holding a blackjack, told Jordan that he would harm Jordan and his wife.

Jordan also testified that, subsequent to these altercations, Petitioner has made considerable strides to "straighten out" some of the problems that he had by attending rehab and anger management sessions. Jordan also stated that Petitioner showed remorse for the incidents and that he forgave Petitioner. Jordan further testified that Petitioner still works under his supervision, has not caused any problems since the October 2007 incidents, shows up to work on time and performs in a satisfactory manner.

Petitioner also testified on his own behalf. He testified that he has attention deficit disorder and is bipolar. Petitioner stated that he was not treated for these conditions at the time of the October 2007 incidents, but is now receiving the proper medication and medical treatment. He further testified that he was going through a difficult separation from his wife and was in deep debt. Petitioner stated that he never picked up the wrench with the intention of striking Jordan, or damaging property, and that he hit the door with the wrench when he accidentally tripped. Similarly, with respect to the alleged blackjack incident, Petitioner states that the object was in fact a drumstick with tape on it, and that he never had any intention of striking Jordan with it.

With respect to Wilson's allegations, Petitioner testified that he initially came into her office on May 13, 2007 to fix her air conditioner. She asked him about putting blinds up. Petitioner told her that he could not put blinds up in her booth without authority from PNCT. Petitioner testified that he returned two days later because Wilson asked him to take measurements so she could purchase her own blinds. He sat down and spoke with Wilson about blinds and redoing the floor. Petitioner testified that at no time did he ever touch Wilson's thigh or breast. He further testified that he plead guilty to a disorderly person's offense in connection with the incident "[b]ecause that's the deal that [Wilson] made."

On cross-examination, the Commission questioned Petitioner on his prior drug use, and his testimony under oath in an interview with the Commission, wherein Petitioner admitted to be a regular user of cocaine at age 25, and that he used cocaine twice a week. Petitioner testified that, contrary to what he said at the interview, he did not use cocaine.

ALJ Zidonik issued his Report and Recommendation to the Commission ("Report") on June 14, 2010. In his Report, ALJ Zidonik found that the Commission had proved all of the allegations against Petitioner by a preponderance of the evidence. With respect to charges that Petitioner committed fraud, deceit and misrepresentation in both his application for inclusion in the Longshoreman's register, and during his July 31, 2008 interview under oath, ALJ Zidonik referred to the transcript of his October 7, 2008 interview under oath, wherein he admitted to using cocaine when he was 19, and becoming a regular user from age 25 onward. Petitioner was 33 when he applied for registration with the Commission, and denied having ever used any narcotics. Similarly, at his July 31, 2008 interview, Petitioner denied ever using any drugs aside from "smok[ing] a little marijuana" when he was a teenager.

With respect to the incident with Wilson, ALJ Zidonik found Wilson's testimony to be credible, and discredited the testimony of Petitioner. ALJ Zidonik further found Petitioner's testimony with respect to the incidents with Jordan to be incredible, and found that Jordan attempted to minimize the seriousness of the incident. Having found Petitioner to have engaged in the conduct alleged by the Commission, ALJ Zidonik recommended that Petitioner's registration as a maintenance man be revoked.

On August 16, 2010, the Commission unanimously adopted ALJ Zidonik's Report and terminated Petitioner's registration. This petition ensued.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds

a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]). Additionally, if a penalty is imposed by the agency, "the sanction must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." (*Featherstone v. Franco*, 95 NY2d 550, 554 [2000]).

Here, the court finds that the Commission's decision to revoke Petitioner's registration had a rational basis. First, ALJ Zidonik properly considered the July 31 and October 7, 2008 interview transcripts. While Section 1.20 of the Rules and Regulations of the Waterfront Commission provide that an employee "shall have the right to be accompanied and represented by counsel" at an interview under oath, Petitioner can cite to no regulation or statute which confers upon the Commission an affirmative duty to advise the interviewee of his or right to counsel prior to proceeding. "Miranda warnings ... are grounded in the rights to remain silent and to counsel under the Fifth and Sixth Amendments, which only apply in the context of criminal proceedings" (*In re Michael WW.*, 20 A.D.3d 609, 610-11 [3rd Dept. 2005]). Upon consideration of the 2008 interview transcripts, it was rational for ALJ Zidonik to conclude that Petitioner misrepresented his history of drug abuse both in his 1989 application, as well as in his July 31, 2008 interview.

With respect to the May 17, 2007 incident with Wilson and the October 2007 incidents with Jordan, there was ample testimony in the record for ALJ Zidonik to sustain all of the related charges against Petitioner. These findings were based upon ALJ Zidonik's determinations of credibility, which are largely unreviewable by the court (*see Berenhaus v. Ward*, 70 N.Y.2d 436 [1987]).

Lastly, given the foregoing conduct, the court does not find the penalty of revocation to be shocking to one's sense of fairness.

Wherefore, it is hereby

ADJUDGED that the Petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: August 15, 2011



EILEEN A. RAKOWER, J.S.C.

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