SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Petition of

JOHN SHADE,

Petitioner,

for a Judgment pursuant to Article 78 of the Civil Practice Law and Rules

Index No. 106703/09

- against -

DECISION AND JUDGMENT

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

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Nicholas Figueroa, J.:

In this Article 78 proceeding, petitioner challenges an action taken by respondent Waterfront Commission of New York Harbor which prompted the loss of his position as general vice president of the Atlantic Coast District (the ACD) of the International Longshoremen's Association, AFL-CIO (the ILA) and prevents him from obtaining any other ACD office.

The undisputed facts are as follows.

Petitioner, a resident of Baltimore, Maryland, had served as the ACD vice president for Baltimore, Maryland, between 2000 and 2007, when he apparently resigned to assume the office of ACD's general vice president. The ACD, whose jurisdiction includes the Port of New York, is a labor organization chartered by the ILA (an "international union of local unions" [*ILA, Ind. v Hogan*, 3 Misc 2d 893, 897]).

Respondent is a bi-State agency formed under a 1953 compact between New York and New Jersey, as embodied in the Waterfront Commission Act (NY Unconsol. Laws §§ 9801 *et seq.*). The Act was designed to protect the New York-New Jersey waterfront from the then notoriously rampant influences of organized crime. Respondent was empowered to "administer and enforce" the statute's provisions (Unconsol. Laws § 9810[6]). Section 8 of the Act, the provision that is at issue in this proceeding, reads in relevant part as follows:

> [N]o person shall solicit, collect or receive any dues ... or other charges within the state for or on behalf of any labor organization ... if any officer, agent or employee of such labor organization ... has been convicted by a [federal or State] court ... of a felony.... No person, including such labor organization..., shall knowingly permit such convicted person to assume or hold any office, agency, or employment in violation of this section.

[Unconsolidated Laws, § 9933].

Incident to his ACD vice presidential post, petitioner had been a member of the ACD Executive Board, along with the ACD's president and its then general vice president, secretary-treasurer, and 17 other vice presidents. Near the end of 2001, respondent began a probe into whether petitioner's criminal record (including State and federal convictions for felonies, all dating between 1970 and 1990 and relating to illegal gambling) precluded him from lawfully holding his position. But respondent thereafter took no steps toward removing him.

However, in the spring of 2009, about two years after petitioner's election to the general-vice-presidency, respondent again invoked section 8 to question the lawfulness of his holding an ACD office. After interviewing petitioner on April 15, 2009, respondent informally advised him of its conclusion that he could not lawfully remain in office. By a letter dated April 23, 2009, respondent advised the ILA's President that petitioner's criminal record disqualified him from

"hold[ing] any position as an officer, agent, or employee of the [ACD]." The letter further asserted that petitioner's "continuance in office violates ... Section 8 of the ... Act and, [a]ccordingly, unless [he] is removed immediately from any positions that are covered by ... Section 8, the Commission will take appropriate action ...." In a letter addressed to petitioner's counsel, dated April 30, 2009, respondent further advised the ILA's counsel that,

> The Commission will wait ten ... days before taking any action in this matter. Unless [petitioner] has resigned, or been removed from office, by May 11, 2009, the Commission will employ whatever criminal or civil remedies it has at its disposal, with respect to [him] and his superior officers in both the [ILA] and the [ACD], who knowingly permit a convicted person to assume or hold any office,

A letter dated May 6, 2009, from ILA counsel reported to respondent that petitioner was no longer an officer of, or otherwise employed by, the ACD. Petitioner commenced this proceeding about a week later. The thrust of his petition is that respondent exceeded its statutory jurisdiction when it announced to the union that petitioner could not occupy any office, even an ACD vice presidency for the Baltimore area, which post according to petitioner has no significant influence on the Port of New York (CPLR 7803[2]).

The instant petition assumes that respondent's April 23rd letter constituted a "final determination" for purposes of Article 78 (CPLR 7801[1]) and is therefore ripe for challenge. In opposition, respondent contends in substance that it has made no "determination" to speak of, at least in the sense of taking any action injurious to petitioner. According to respondent, the loss of petitioner's recent position with the ACD and his exclusion from any other ACD office were not caused by respondent's letter, but, instead, by the act of the ILA, which had either removed him or insisted on his resignation.

Settled principles establish whether the subject of an Article 78 challenge amounts to a final agency determination. First, the agency's action or announcement of its position must not be tentative or subject to review within the agency at the behest of the complaining party *(Essex County v Zagata*, 91 NY2d 447, 454). Second, such action or stance must have caused the petitioner concrete injury (*id.*).

Respondent does not argue that its April 23rd letter expressed only a preliminary estimate of petitioner's eligibility to work for the ACD *(compare Putnam v City of Watertown*, 213 AD2d 974). Nor does respondent suggest that there is some administrative process by which its stated position might be reviewed and reversed or ameliorated (*see id.*). Instead, as indicated above, respondent asserts that petitioner cannot claim to have suffered any injury at the hands of the agency itself.

In this connection, respondent attempts to make much of the difference between an injury caused by an agency's direct action as opposed to this case, where petitioner's ouster from the ACD was achieved by the agency only indirectly. But respondent cites no authority for the proposition that the latter type of case is beyond the reach of Article 78. Indeed, as a practical matter --and precedent suggests that Article 78 analysis should be pragmatic (*Essex County v Zagata, supra*; *Brown v New York State Racing and Wagering Bd.*, 60 AD3d 107, 112; *Demers v New York State Dept.* of *Environmental Conserv.*, 3 AD3d 744, 746) -- it would make no difference in the end whether respondent took the course it did or instead obtained an injunction from a court: in both instances, the agency's objective – petitioner's exile from the ACD – would be satisfied through an outside instrumentality (*cf. Lorillard Tobacco Co. v Roth*, 99 NY2d 316, 321 fn.3 [challenge to agency action not premature where agency "allegedly used threats to

force retailers to stop participating in (plaintiff's) promotions]). In other words, under the Act respondent has more than one arrow in its enforcement quiver, and the force of a threat (as illustrated by this case) is one of them.

The fallacy of respondent's argument is exposed when that argument is taken to its logical conclusion. After all, what petitioner seeks through this proceeding is the opportunity to return to an ACD vice presidency, the denial of which he claims is beyond respondent's purview. But the merits of such a claim would in effect be left in limbo if the petition were dismissed as respondent urges be done. On the one hand, the pall that respondent has succeeded in placing on petitioner's eligibility for the ACD office would continue. On the other hand, the agency would have no need to engage any future judicial process. Thus, the issue raised by petitioner, *i.e.*, that respondent overreached in forcing his ouster from office and preventing his reinstallment in another ACD office, will never have its day in court unless the instant petition is entertained.

It is therefore concluded that, for purposes of Article 78, respondent rendered a "final determination" in this case and that the petition thus satisfies Article 78. However, his position on the merits remains to be evaluated.

In this connection, it is noted, petitioner does not dispute respondent's jurisdiction to force his removal from the ACD general vice presidency. His challenge focuses instead on whether respondent's power extends to less influential ACD positions, including vice presidencies for specific areas. Stated somewhat differently, the issue on the merits is whether officers below the ACD general vice president, such as an ACD vice presidency for the Baltimore area, have too little effect on labor relations at the Port of New York to be within the ambit of section 8 and the reach of the statute's enforcement arm (*Int'l Longshoremen's Assoc, AFL-CIO, v The Waterfront*

Commn. of New York Harbor, 642 F2d 666, 672 ("section 8 ... appl[ies] only to those ILA officers who can exert influence over labor relations on the New York waterfront").

Petitioner disputes respondent's contention that this case involves an office having such influence. According to the petition, "the ACD has very little involvement in the wage scale conference and collective bargaining, the agreements for which are negotiated and signed by the ILA." Nevertheless, petitioner's bare suggestion that the ACD is not involved with matters affecting the New York waterfront appears to be belied by his implicit concession to respondent's jurisdiction over at least one ACD office, *i.e.*, the general vice presidency.

This is not to overlook petitioner's further suggestion that an ACD vice president in any event exerts only local influences. The dubiousness of such assertion become clear, however, in light of the fact that an ACD vice president sits on the ACD Executive Board, which petitioner himself acknowledges "makes all decisions for the ACD."

Nor is this to overlook petitioner's suggestion that, having but one vote on the Executive Board, he has only de minimis impact on the Port of New York and is in any event outweighed in influence by the six vice presidents from the Greater New York area. However, the proposition that an ACD vice president for an area such as Baltimore is beyond respondent's jurisdiction was tacitly rejected by precedent, in an order and judgment affirmed by the First Department (*Waterfront Commn. of New York Harbor v Billups*, Index No. 41473/81, *aff'd* 94 AD2d 675 [ACD vice president for the Norfolk, Virginia, area removable under section 8]; *cf. Waterfront Commn. of New York Harbor v Boyle*, Index No. 40866/81, *aff'd* 91 AD2d 879).

For the foregoing reasons, it is concluded that respondent was authorized under the Act to exercise its powers over ACD offices, including vice presidencies for specific areas

geographically remote from the Port of New York. Accordingly, the petition is denied.

This constitutes the decision and judgment of the court.

Dated: October 27, 2009

ENTER:

J.S.C.