



On February 25, 2010, the Commission issued an amended notice of hearing charging Peter Monforte (“Monforte”), William Donoughe (“Donoughe”) and petitioner with operating a large-scale marijuana grow operation at 68 Jay Street in Brooklyn and 324 Canal Street in Manhattan. Pursuant to the Waterfront Commission’s Rules and Regulations, the Commission and petitioner then appeared before Administrative Law Judge Patrick McGinley (“ALJ McGinley”) for a hearing on the charge.

During the hearing, the Commission called two witnesses: Gary Cangelosi (“Cangelosi”) and U.S. Drug Enforcement Agency Special Agent Gaetano DiPasquale (“Agent DiPasquale”). Cangelosi was one of the three individuals arrested in connection with the grow operation. The other two were Monforte and Vincent Rispoli (“Vincent”), petitioner’s brother. Both Monforte and Vincent plead guilty to marijuana trafficking charges.<sup>1</sup>

On the first day of the hearing, Monforte admitted his involvement in the grow operation, pled guilty to the charge, and consented to revocation of his longshoreman registration. Monforte’s attorney indicated that Monforte would assert his 5<sup>th</sup> Amendment rights if called to testify at the hearing.

Vincent was incarcerated at the time of petitioner’s hearing. Petitioner’s attorney served a subpoena on the United States Bureau of Prisons to produce Vincent at the hearing, but he was not produced. At the hearing, petitioner’s attorney argued that the

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<sup>1</sup>Neither petitioner nor Donoughe were arrested or charged in connection with the grow operation.

Commission colluded with the U.S. Attorney's Office to prevent Vincent from testifying. The Commission denied this allegation.

In his testimony, Cangelosi stated that he had harvested, and had witnessed petitioner harvest, marijuana on numerous occasions at both the Jay Street and Canal Street locations. This included weighing and trimming the plants and placing the dried buds into bags. On cross-examination, Cangelosi conceded that he previously told federal agents that he was never allowed to harvest at either location. However, he testified that he now "believed" that he was allowed to harvest at the Brooklyn location.

Agent DiPasquale testified that he was present at the U.S. Attorney's Office during proffer sessions with Monforte and Vincent, in which they agreed to cooperate in exchange for implicating others in the marijuana grow operation. Petitioner's attorney moved to prevent the admission of hearsay statements Monforte and Vincent made at these meetings. ALJ McGinley denied the motion and Agent DiPasquale testified that during the proffer sessions, both Monforte and petitioner's brother stated that they had worked with petitioner in the marijuana grow operation.

ALJ McGinley issued his Report and Recommendation on April 20, 2011. In his Report and Recommendation, ALJ McGinley found that the Commission had established by a preponderance of the evidence that petitioner "participated in long-term large scale marijuana grow rooms for several years . . ." Accordingly, ALJ McGinley concluded that petitioner's presence at the waterfront terminals was "a danger to the public peace or safety."

ALJ McGinley found Cangelosi's testimony concerning the marijuana grow operation to be credible, despite certain inconsistencies. ALJ McGinley stated that the combination of Cangelosi's testimony and Agent DiPasquale's hearsay recitation were the bases for his finding, and that the hearsay statements "were necessary to the determination of this case." Though he did not find that the admission of Vincent's hearsay statements compromised petitioner's due process rights, ALJ McGinley acknowledged that he was "troubled by [petitioner's] inability to cross-examine either of the profferees" and that this inability "should be considered by the Commission in determining punishment herein." Thus, ALJ McGinley recommended a six-month suspension of his registration instead of a permanent revocation.

Exceptions to ALJ McGinley's recommendation were due on May 9, 2011. On that date, petitioner joined in the exceptions Donoughe had previously submitted, arguing that Cangelosi's testimony was "not worthy of belief" and that the only other testimony to support ALJ McGinley's findings was Agent DiPasquale's hearsay recitations.

Jason Szober ("Szober"), counsel for the Commission, affirms that on May 9, 2011, he met with Commission Secretary Cecilia Bastos ("Bastos") to request a one-day extension of time to submit exceptions. Neither petitioner's nor Donoughe's attorneys were at the meeting. Bastos granted the request but did not issue a formal written decision or an explanation as to why she granted the one-day extension.

On May 10, 2011, Szober submitted the Commission's exceptions, requesting permanent revocation of petitioner's registration. On August 9, 2011, the Commission

issued its decision revoking petitioner's longshoreman registration effective August 22, 2011.

Petitioner then commenced this Article 78 proceeding requesting that the Court annul the Commission's determination. Petitioner argues that the Commission hearing did not comport with statutory or constitutional due process because: 1) ALJ McGinley allowed the Commission to submit Agent DiPasquale's hearsay recitation of Vincent's statements at the proffer session after the government ignored a subpoena and effectively prevented petitioner from cross-examining Vincent; and 2) the Commission's request for an extension of time to submit exceptions to ALJ McGinley's recommendation was an improper, *ex parte* communication. Petitioner also argues that revocation of his longshoreman registration after an unblemished record of twenty-seven years with the Commission is an abuse of discretion.

In opposition, the Commission argues that the hearing process did not violate petitioner's due process rights because Vincent's failure to appear was not the Commission's fault. The Commission argues that Vincent's failure to appear resulted from the United States Bureau of Prisons' ignoring the subpoena and petitioner's attorney's failure to take sufficient steps to enforce the subpoena. The Commission argues that, in any event, hearsay is admissible in administrative hearings.

The Commission further contends that its request for an extension of time to submit the exception to ALJ McGinley recommendation was not an *ex parte* communication under either the Waterfront Commission's Rules and Regulations or the

State Administrative Procedure Act. Moreover, the Commission maintains that even if it made its request after the deadline, the Commission Secretary could still have considered its exceptions. Lastly, the Commission maintains that the decision to revoke petitioner's longshoreman registration was a proper sanction because of the seriousness of the charges against petitioner.

### **Discussion**

Individuals facing suspension of their valuable professional licenses are entitled to administrative hearings that comport with constitutional due process. *See Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955); *Stanton v. Board of Trustees of Garden City*, 157 A.D.2d 712, 712 (2d Dept. 1990).

Petitioner argues that the Court should annul the Commission's determination because the admission of Vincent's and Monforte's hearsay statements violated his due process right to a fair hearing. It is well-established that hearsay evidence is admissible in administrative hearings. *See Gray v. Adduci*, 73 N.Y.2d 741, 742 (1988); *Gould v. Serio*, 298 A.D.2d 304, 305 (1<sup>st</sup> Dept. 2002). Thus, admission of Vincent's hearsay statements does not require that the Commission's decision be annulled. This is particularly true here because the Commission's attorney also presented Cangelosi's testimony, a witness with direct, personal knowledge of petitioner's involvement in the marijuana grow operation. While petitioner was unable to cross-examine Vincent concerning the hearsay statements attributed to Vincent and related by Agent DiPasquale, petitioner did have the

opportunity to cross-examine Agent DiPasquale. Most importantly, petitioner fully cross-examined Cangelosi, the witness who provided direct and substantial testimony implicating petitioner in the marijuana grow operation.

Other than his own speculation, petitioner's attorney has not provided any evidence that the United States Bureau of Prison's failure to produce Vincent was the Commission's fault, or that the Commission and the U.S. Attorney's Office colluded to prevent Vincent from testifying. Nor does petitioner deny that he could have sought to enforce the subpoena or request an adjournment of the hearing. Thus, the admission of Vincent's hearsay statements did not violate petitioner's due process rights.

Further, the Commission's oral request for an extension of time to submit exceptions to ALJ McGinley's recommendation was not a due process violation. Though *ex parte* communication between a party and a hearing officer may under certain circumstances violate due process and require reversal of a hearing determination, *see Signet Constr. Corp. v. Goldin*, 99 A.D.2d 431, 432 (1<sup>st</sup> Dept. 1984), it is generally not a due process violation unless the communication prejudiced the other party's rights. *See N.Y. Fragrance Inc. v. Union Sales Inc.*, 2008 U.S. Dist. LEXIS 57306, \*FN3 (E.D.N.Y. 2008); *Goldfinger v. Lisker*, 68 N.Y.2d 225, 231 (1986). The Commission's Rules and Regulations §6.13 provides that unless an extension of time has been granted, "exceptions, arguments or replies submitted after the prescribed time *need not* be considered by the Commission." (emphasis added) The Commission's Rules and Regulations do not prevent the Commission from considering late submissions. Thus, the

Commission's attorney's request for an extension did not confer any special advantage because the Commission was free to consider the Commission attorney's exception even absent this extension.

The Court agrees with petitioner that, to prevent the appearance of impropriety, the Commission's Secretary should not have considered an *ex parte* request for an adjournment. However, the Commission secretary's grant of an *ex parte* request for a one-day deadline extension did not prejudice petitioner's rights and did not amount to a due process violation.

Lastly, the Commission's decision to revoke petitioner's longshoreman registration was not disproportionate to the offense charged. Courts may set aside an administrative agency determination "only if the measure of punishment or discipline imposed is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." *Pell v. Board of Education*, 34 N.Y.2d 222, 233 (1974). Though ALJ McGinley did not recommend permanently revoking petitioner's registration, he did find that petitioner's presence at the piers was a danger to the public peace or safety, and based on this finding the Commission has the statutory discretion to revoke petitioner's registration. *See McNamara v. Waterfront Com. of New York Harbor*, 11 A.D.2d 1017, 1017-18 (1<sup>st</sup> Dept. 1960). Despite petitioner's prior lack of a disciplinary record as a longshoreman, this case, unlike those petitioner cites to support reversing the punishment, concerns a serious criminal offense involving a large-scale marijuana grow operation. Given the Commission's "purpose of eliminating criminal



activities in New York harbor,” McK. Unconsol. Laws § 9801, the punishment here does not shock this Court’s sense of fairness.

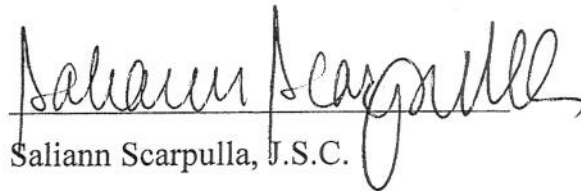
In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that the petition of Anthony Rispoli to vacate the determination of respondent the Waterfront Commission of New York Harbor is denied and dismissed.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York  
January 6, 2012

ENTER:

  
Saliann Scarpulla, J.S.C.