

SUPERIOR COURT OF NEW JERSEY  
HUDSON COUNTY - LAW DIVISION  
CRIMINAL PART  
DOCKET NO. HUD-L-3523-10

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NICHOLAS BERGAMOTTO :

Movant, :

v. :

WATERFRONT COMMISSION :  
OF NY HARBOR, :

Respondent. :

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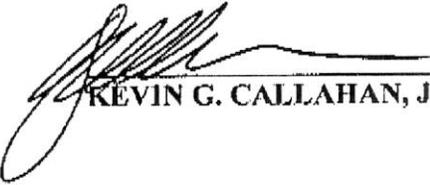
REMANDED MOTION TO REVIEW DECISION OF  
WATERFRONT COMMISSION

ORDER

This matter having been opened to the Appellate Court by Nicholas Bergamotto, Esq., appearing on behalf of Movant, Nicholas Bergamotto ("Bergamotto"), and Phoebe S. Sorial, Esq., appearing on behalf of the respondent, The Waterfront Commission of the New York Harbor ("the Commission"), on an Emergent Motion, has been remanded to this Court for a probable cause hearing to determine the validity of the Commission's decision to adjourn Bergamotto's Administrative Hearing to decide whether to permanently revoke his license as a checker on the waterfront, and the Court having considered the papers submitted and for the reasons set forth on the record from July 13, 2010, and contained in this Court's July 15, 2010 written opinion;

IT IS on this 15<sup>th</sup> day of July, 2010,

**ORDERED** that the application to set aside the Commission's decision to adjourn the hearing *sine die* is **DENIED**.

  
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KEVIN G. CALLAHAN, J.S.C.

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**NICHOLAS BERGAMOTTO,**

**Movant/Defendant**

**vs.**

**THE WATERFRONT COMMISSION  
OF THE NEW YORK HARBOR,**

**Defendant.**

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**SUPERIOR COURT OF NEW JERSEY  
CRIMINAL DIVISION  
HUDSON COUNTY**

**Docket No. HUD-L-3523-10**

This decision supplements the Court's oral decision from July 13, 2010. Pursuant to the Appellate Court's Order dated, June 25, 2010, this Court has reviewed and considered the parties' papers and oral arguments to determine whether the Waterfront Commission of the New York Harbor ("the Commission") arbitrarily and capriciously adjourned Nicholas Bergamotto's Administrative Hearing to permanently revoke his license as a checker on the waterfront. Bergamotto v. Waterfront Commission of NY Harbor, No. A- (App. Div. June 24, 2010). Specifically, on July 13, 2010, this Court conducted a probable cause hearing to determine whether the Commission acted arbitrarily or capriciously by adjourning, *sine die*, the hearing scheduled for May 20, 2010, based on the representation of Deputy Attorney General Mark Eliades that conducting the hearing during the ongoing criminal investigation or prosecution would compromise those proceedings.

### **I. PROCEDURAL HISTORY**

The defendant/movant Nicholas Bergamotto ("Bergamotto") began working as a checker on Port Elizabeth in 2001. He initially worked under a temporary registration but was eventually issued a permanent registration by the Commission on June 26, 2006. On April 21, 2010, this Court issued an arrest warrant for Bergamotto and on April 22, 2010, Bergamotto was arrested

and charged in a two-count complaint with Criminal Usury and Money Laundering. The Commission temporarily suspended Bergamotto's registration on April 23, 2010, pending a hearing on the charges against him.

A hearing was scheduled for May 20, 2010, but was adjourned *sine die* after the Deputy Attorney General requested in a letter to the Commission, dated April 27, 2010, that "any administrative proceeding or hearing against either individual be deferred at this time to the extent that any such proceeding or hearing may obstruct and prejudice both a continuing investigation/prosecution." The letter did not cite any evidence supporting the charges against Bergamotto, nor did it set forth a timetable for prosecution of the case against Bergamotto.

Bergamotto appealed the Commission's decision and the Appellate Court remanded the case to this Court for "immediate judicial review" of the decision pursuant to N.J.S.A. 32:23-118. During the review, Bergamotto argued the decision to postpone the hearing was arbitrary and capricious because it was solely based on the Attorney General's bald request and that conducting the hearing would in no way prejudice the State's investigation. In response, the Commission acknowledged it was privy to information regarding the investigation that had not been set forth in the affidavit, arrest warrant, or letter from the Deputy Attorney General. The Commission further noted a hearing on the matter would have to be "full-blown" and would require the disclosure of evidence that could jeopardize the prosecution of Bergamotto and/or other targets of the investigation.

## **II. THE DECISION TO POSTPONE WAS NOT ARBITRARY AND CAPRICIOUS**

The Waterfront Commission Act § 5(q)(2), N.J.S.A. 32:23-118, permits the Commission to postpone a hearing, indefinitely if it so chooses, at the request of a law enforcement agency when that hearing will compromise an ongoing criminal investigation or prosecution. A decision

to postpone a hearing is subject to immediate judicial review. Id. The judicial review is conducted “in the manner provided by the law of such State for review of the final decision or action of administrative agencies of such State.” N.J.S.A. 32:23-51. The standard of review to be applied is whether the administrative agency’s decision was “arbitrary, capricious and unreasonable.” Non-profit Affordable Housing Network of New Jersey v. COAH, 265 N.J. Super 475, 479 (1993). Upon review of New Jersey law, a decision is deemed “arbitrary and capricious” when it is a “gross abuse of discretion.” State v. Leonardis, 73 N.J. 360, 381 (1977).

The Commission’s actions “are entitled to a presumption of lawfulness and good faith.” Shuster v. Bd. Of Ed. Of Montgomery Twp., 96 N.J.A.R. 2d (EDU) 670, 676. “In order to overcome the ‘presumption of correctness,’ a challenger of a board action must prove by a preponderance of the credible evidence that such action was arbitrary, capricious and unreasonable.” In re J.P. v. Bd. of Ed. of South Brunswick, OAL DKT EDU 4969-01 (Dec. 17, 2002) (2002 N.J. Agen LEXIS 952), quoting, South Mountain Civic Ass’n. v. Bd. Of Ed. Of Millburn Twp., OAL DKT EDU 0589-83 (July 13, 1983) adopted Comm’r. (Aug. 29, 1983).

Three key elements govern the review:

(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

Circus Liquors, Inc. v. Governing Body of Middletown Tp., 199 N.J. 1, 10 (2009).

In his brief, Bergamotto argued the postponement was “arbitrary and capricious” and that the Commission should set forth an explanation for the indefinite adjournment. *See* Appellant’s Brief at 6 ¶ 2. Although the Commission may postpone a hearing at the request of law

enforcement, its decision to do so is arbitrary and capricious only when it cannot be supported by "substantial credible evidence in the record." Circus Liquors, Inc., 199 N.J. at 10.

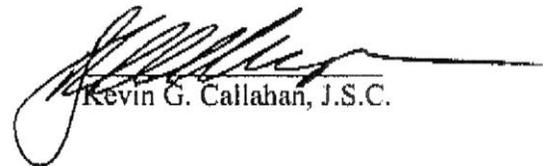
Here, the Court finds the Commission's decision was not an abuse but rather within the guidelines set forth for the disposition of such matters. The Court finds that the record in this case supports the Commission's decision. First, Det. Brian Bruton alleged in his affidavit that Bergamotto was involved in criminal usury and money laundering. Second, a warrant was issued for the arrest of Bergamotto based on that affidavit and the arrest was then carried out. Two criminal charges were filed against Bergamotto by the Deputy Attorney General who, as of April 27, 2010, plans on presenting the case to the State Grand Jury for indictment. Finally, the Commission acknowledged during the probable cause hearing that it is aware of information concerning the investigation that has not yet been disclosed to Bergamotto, which further indicates the Commission's decision to adjourn the hearing was not arbitrary and capricious. It is therefore clear the Commission's decision was not based solely on the letter from the Deputy Attorney General but made in light of the totality of the circumstances.

A criminal investigation is proceeding and prosecution appears likely. It would be inappropriate for the Commission to conduct a "full blown" hearing on whether to reinstate Bergamotto before the Deputy Attorney General's Office has disposed of the matter. If the Commission were to disregard the Deputy Attorney General's request and conduct the hearing, it may either inadvertently compromise the criminal investigation, or force itself into a position of passing judgment on Bergamotto's innocence or guilt before the charges have been presented to the State Grand Jury.

Furthermore, while the Court is mindful of the financial difficulties Bergamotto now suffers as a result of his suspension and of the fact that he is presumed innocent in the criminal

context, Bergamotto is still a *licensed* employee and is subject to a heightened standard of conduct as a result of said license. In other words, Bergamotto should have been aware that any arrest could result in the suspension of his registration. In fact, any employee in any profession stands the risk of suspension after he has been arrested and charged with a crime.

Therefore, the Court finds the Commission did not act arbitrarily or capriciously when it postponed the hearing upon the request of the Deputy Attorney General. The postponement was made pursuant to the Waterfront Commission Act and in light of the reasons for Bergamotto's arrest. Accordingly, there was a rational basis for the indefinite postponement of the hearing and Bergamotto's request for a hearing is hereby **DENIED**.



Kevin G. Callahan, J.S.C.