

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0256-11T2

IN THE MATTER OF WILLIAM F.
DONOUGHE, JR.

Argued April 24, 2012 - Decided May 8, 2012

Before Judges Payne and Reisner.

On appeal from the Waterfront Commission of New
York Harbor, No. RL-5107-W.

Gerald D. Miller argued the cause for appellant
William F. Donoughe, Jr. (Miller, Meyerson &
Corbo, attorneys; Mr. Miller, of counsel and on
the brief).

Phoebe S. Sorial, General Counsel, argued the
cause for respondent Waterfront Commission of New
York Harbor (Ms. Sorial, attorney and on the
brief).

PER CURIAM

William F. Donoughe, Jr. (defendant) appeals from an August
11, 2011 final administrative action of the Waterfront
Commission of New York Harbor (Commission) revoking his
registration as a warehouseman, following an administrative
hearing. The revocation was based on his having "harvested
marijuana plants" at two different locations in New York

(Brooklyn and Manhattan), offenses which would have been disqualifying factors had he committed them prior to applying for registration. For the reasons that follow, we affirm.

I

The following pertinent evidence was introduced at defendant's administrative hearing. Since 1977, defendant worked in the refrigeration department at Port Newark Maintenance and Repair, a position requiring that he be registered with the Commission. After an extended investigation of possible indoor marijuana farming in New York City, agents of the Federal Drug Enforcement Agency (DEA) discovered two "grow houses," one in a warehouse on Jay Street in Brooklyn, and the other in a large apartment on Canal Street in Manhattan. They arrested Gary Cangelosi, who admitted his participation in the large-scale growing operation, which involved over 150 plants at each location. Cangelosi implicated defendant and two other men, Anthony Rispoli and Peter Monteforte, who worked on the New York/New Jersey waterfront, as well as Vincent Rispoli, the owner of the Manhattan grow house. Facing a lengthy federal prison term, Cangelosi eventually pled guilty to drug charges and agreed to cooperate with the Commission in its administrative prosecution of defendant, Monteforte and Anthony Rispoli.

At the Commission hearing, Cangelosi gave detailed testimony concerning the marijuana growing operation at the grow houses in Brooklyn and Manhattan. While he could not remember the street name or address in Brooklyn, he gave a very detailed description of the location of the warehouse where the marijuana was grown, and an equally specific description of the warehouse itself and the room where the plants were kept. He also gave a specific description of the Canal Street premises, which was divided into an apartment with living space and a large open room used to grow the plants. Cangelosi spent a great deal of time at the Canal Street grow house, because he also lived there for three years.

According to Cangelosi, he participated in the marijuana growing operation for about seven years, from 2000 to the date of his arrest in 2007. He testified that he saw defendant harvesting marijuana twice at the Brooklyn location and more than twenty times at the Canal Street location. Cangelosi described the process of harvesting the marijuana, and explained that he and defendant were given one to two ounces of the drug as payment whenever they participated in a harvest.

The principal DEA investigator, Gaetano DiPasquale, testified that after he discovered the grow houses and arrested Vincent Rispoli and Peter Monteforte, he participated in

"proffer sessions" with each man. During the sessions, they both provided information in the hope that the United States Attorney's office would offer them a favorable plea bargain. According to DiPasquale, both Rispoli and Monteforte told him that defendant was one of the people who helped harvest the marijuana.

Monteforte received a relatively short prison term. When he appeared at the Commission hearing as Donoughe's co-defendant, he offered no defense to the Commission's action and his counsel indicated that Monteforte would invoke his Fifth Amendment right against testifying. Vincent Rispoli, who was serving a five-year prison term, did not appear at the hearing. Donoughe's attorney obtained a subpoena from the administrative judge and served it on the Federal Bureau of Prisons in an attempt to obtain Rispoli's testimony at the hearing. However, according to the attorney, the warden at the prison at which Rispoli was incarcerated would not honor the Commission's subpoena. At the oral argument of this appeal, counsel conceded that he made no attempt to enforce the subpoena or to obtain Rispoli's testimony by video or by taking a de bene esse deposition at the prison.

Defendant did not testify at the hearing. Instead, he relied on the sworn statement he provided to the Commission

during its investigation. In that statement, which was introduced in evidence at the hearing, he denied any involvement in the marijuana growing operation.

In a report and recommendation issued April 20, 2011, the administrative judge found that although Cangelosi was an unsavory character, his testimony was specific and credible. He also found that DiPasquale's hearsay testimony corroborated Cangelosi's testimony. However, the judge recommended that the Commission suspend defendant's registration for six months instead of revoking his registration. In its final decision, the Commission determined that his registration should be revoked because his continued "presence" on the waterfront presented "a danger to the public peace or safety, a cause which would permit his disqualification from inclusion in the Longshoremen's Register upon original application." See N.J.S.A. 32:23-29(c).

II

On this appeal, defendant argues that he was denied procedural due process because the complaint was amended ex parte, and in the middle of the hearing, to add a new charge. The Commission responds that the application was not made ex parte and did not concern a new allegation. We agree. Although the initial complaint only mentioned a grow house in Brooklyn,

defendant knew since June 18, 2009, when he gave his sworn statement during the Commission's investigation, that he was accused of working at grow houses in Manhattan's Canal Street, and in Brooklyn.

The allegation was not a surprise, and the amendment was not unfair. The Waterfront Commission regulation, N.J.A.C. 19 AA § 6.8, allows amendments to the charges during a hearing, subject to a defendant's right to request an adjournment to give time to meet the new charges. On the first day of the hearing, September 24, 2010, the Commission placed defendant on notice that its case included allegations about both grow houses, when the Commission's attorney included both allegations in his opening statement. Defendant's attorney objected to the Commission proceeding on the charge concerning the Manhattan grow house, arguing that the hearing notice only alleged that he worked at the Brooklyn grow house. However, he did not, at that time, request that the hearing be adjourned. The judge permitted Cangelosi, the State's only witness on September 24, to testify on direct examination concerning events at both locations. The hearing day ended before defendant's counsel cross-examined Cangelosi.

The Commission attorney then sent the administrative judge an October 5, 2010 letter with the attached proposed amended

complaint. The letter contained a "cc" to defendant's attorney and therefore was not submitted ex parte, although defense counsel contended that he did not receive it. Defendant's attorney filed objections to the amendment. The judge heard oral argument on the application at the next hearing date, November 12, 2010. At that point defense counsel asked for a "mistrial." The judge denied the mistrial motion and granted the application to amend the charges, reasoning that the new allegation concerned essentially the same offense, at a different location. He also reasoned that, due to the long adjournment of the hearing, defendant's counsel had several weeks to prepare to cross-examine Cangelosi concerning the allegations about the Canal Street activities. We agree.

Defendant's reliance on State v. Koch, 161 N.J. Super. 63 (App. Div. 1978), is misplaced. Unlike this case, in Koch, the trial judge amended the complaint after the trial was over and convicted defendant of an offense for which he was not charged and which was not a lesser included offense of the one designated in the complaint. Id. at 66-67. Here, defendant had ample notice of the amended charge and a fair opportunity to present a defense. See Jacobs v. Stephens, 139 N.J. 212, 218-19 (1995). We affirm on this point substantially for the reasons stated by the administrative judge.

Defendant also argues that the Commission's decision is not supported by substantial credible evidence and the Commission improperly relied on hearsay testimony. Neither contention is persuasive.

Our review of the Commission's decision is limited to determining whether there is sufficient credible evidence in the record to support the agency's findings. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 28 (1981). We must give "due regard to the opportunity of the one who heard the witnesses to judge of their credibility . . . and . . . [give] due regard also to the agency's expertise where such expertise is a pertinent factor." Close v. Kordulak Bros., 44 N.J. 589, 599 (1965). If we are satisfied upon conducting our review that the evidence and the inferences to be drawn therefrom support the agency head's decision, we will affirm even if we might have reached a different result had we decided the matter de novo. London Metals, supra, 86 N.J. at 28-29.

It is also firmly established that hearsay is admissible in administrative hearings, so long as the agency's factual findings are supported by a residuum of legally competent evidence. Weston v. State, 60 N.J. 36, 51 (1972); Application of Howard Sav. Bank, 143 N.J. Super. 1, 6-7 (App. Div. 1976). This "residuum rule" is codified in the Uniform Administrative

Procedure Rules, N.J.A.C. 1:1-15.5(a), (b). See also N.J.S.A. 32:23-49 (the Rules of Evidence do not apply in Commission hearings); N.J.S.A. 52:14B-10.

Based on our own review of the record, we find that the agency's decision is supported by substantial credible evidence and is consistent with the residuum rule. The administrative judge found Cangelosi to be a credible witness, and nothing in our review of the hearing transcript causes us to question that finding. Cangelosi was a somewhat combative witness on cross-examination, but his testimony was specific, detailed, and even through vigorous cross-examination, he remained consistent on the important points.

The judge only considered DiPasquale's hearsay testimony as corroboration, which was consistent with the residuum rule. Although the judge was concerned that defendant was unable to cross-examine Monteforte or Vincent Rispoli, he found that neither side was at fault for their unavailability to testify. We agree. There is no legally competent evidence in this record to support defendant's speculation that the federal government somehow conspired to make Rispoli unavailable as a witness. While counsel represented to the judge that the prison warden had ignored the subpoena, he did not indicate that he had made an effort to visit Rispoli, speak to him, or obtain a deposition

or even an interview at the prison. Nothing on this record suggests that Rispoli's hearing testimony would have been favorable to defendant.

Moreover, while defendant was not obligated to testify at the hearing, he waived that opportunity thereby giving up the chance to let the judge weigh his credibility against that of Cangelosi. In summary, we find no due process violation or other fundamental unfairness in the hearing. Defendant's remaining procedural arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Finally, we find nothing arbitrary or capricious in the agency's decision to revoke defendant's registration. See Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980); Knoble v. Waterfront Comm'n of N.Y. Harbor, 67 N.J. 427, 431-32 (1975). This was not a one-time offense. According to the facts, as found by the judge and adopted by the agency, over a period of several years defendant repeatedly participated in a major marijuana growing operation. His willingness to do so suggests that he would not be a trustworthy person to have working on the waterfront, an area where corruption has historically been a matter of serious concern. See N.J.S.A. 32:23-2 (legislative findings underlying the

creation of the Waterfront Commission); Knoble, supra, 67 N.J.
at 431-32.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



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