

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT

Matter of Joseph E. Lalima, Doing Business as Lalima's Barber Shop v. New York State Department of State et al.

2023 NY Slip Op 01121 (Appellate Division of the Supreme Court of the State of New York Third Department 2023) · No. 534906 · Decided March 2, 2023

SUMMARY

The New York Appellate Division, Third Department, reviewed a determination revoking Joseph E. Lalima's barber operator and barber shop licenses for violating COVID-19-related directives and barbering regulations. The court held that untrustworthiness may constitute incompetence under General Business Law § 441(a)(6), but concluded that permanent license revocation was disproportionate given Lalima's long, previously unblemished record and remitted the matter for imposition of a lesser penalty.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Third Department
WRITING FOR THE COURT	Egan Jr., J.P.; Lynch, J.; Clark, J.; Ceresia, J.; Fisher, J.
JURISDICTION	New York
DECIDED	March 2, 2023
DOCKET	534906
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	CPLR article 78 proceeding transferred to the Appellate Division to review the Special Deputy Secretary of State's determination revoking petitioner's barber operator license and barber shop license.
STANDARD OF REVIEW	The court reviewed the statutory interpretation issue de novo because it presented a pure question of statutory interpretation. It reviewed the administrative penalty under the rule that a penalty must be upheld unless it is so disproportionate to the offense as to be shocking to one's sense of fairness and therefore an abuse of discretion as a matter of law.

PRECEDENTIAL VALUE	Published New York Appellate Division opinion; precedential within the applicable New York courts subject to later treatment.
PARTIES	Joseph E. Lalima, doing business as Lalima's Barber Shop v. New York State Department of State, Special Deputy Secretary of State

TOPICS

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administrative law

statutory interpretation

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QUESTIONS PRESENTED

1. Whether untrustworthiness is an aspect of incompetence that may constitute a ground for discipline under General Business Law § 441 (a) (6).
2. Whether revocation of petitioner's barber operator and barber shop licenses was so disproportionate to his misconduct as to constitute an abuse of discretion as a matter of law.

HOLDINGS

1. Untrustworthiness constitutes incompetence within the meaning of General Business Law article 28 and may support discipline under General Business Law § 441 (a) (6).
2. Permanent revocation of petitioner's barber operator and barber shop licenses was too severe and constituted an abuse of discretion as a matter of law.

KEY QUOTATIONS

“A barber who cannot be trusted to do so — either because the barber lacks knowledge of the appropriate standards or does not comply with them because of a lack “of sufficiently good moral character” — is inadequate to and unsuitable for the job, in other words, and such untrustworthiness constitutes incompetence within the meaning of General Business Law § 441 (a) (6)” (at 3)

“An administrative penalty must be upheld unless it is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law” (at 4)

“Under these circumstances, and considering petitioner's otherwise unblemished record, revocation was too severe a penalty” (at 4)

FACTUAL BACKGROUND

Petitioner had been a licensed barber since 1963 and had operated a barber shop from his residence for approximately 45 years. After New York ordered barber shops to close in March 2020, he mistakenly believed that the order did not apply to his home-based shop and reopened, serving customers including first responders.

He later operated after reopening was permitted but failed to comply fully with COVID-19 guidance and was cited for sanitary-code violations. The ALJ found that he did not knowingly work while infected with COVID-19 but concluded that his conduct demonstrated incompetence and untrustworthiness.

PROCEDURAL HISTORY

The Division of Licensing Services filed a disciplinary complaint after petitioner reopened his barber shop during the COVID-19 shutdown and later operated without complying with applicable COVID-19 guidelines. Following a hearing, the ALJ found that petitioner did not knowingly practice while infected but committed sanitary-code violations and was incompetent and untrustworthy under General Business Law § 441 (a) (6), recommending revocation of both licenses. The Secretary affirmed, and petitioner commenced this article 78 proceeding.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The determination was modified by annulling the portion imposing revocation of petitioner's barber shop and barber operator licenses. The matter was remitted to the Special Deputy Secretary of State to impose a less severe penalty and conduct further proceedings not inconsistent with the court's decision.

CASES CITED

- Sullivan v. New York State Joint Commission on Public Ethics, 207 A.D.3d 117, 127 (3d Dep't 2022)
- Hollandale Apts. & Health Club, LLC v. Bonesteel, 173 A.D.3d 55, 67 (3d Dep't 2019)
- Matter of Purcell v. New York State Tax Appeals Trib., 167 A.D.3d 1101, 1103 (3d Dep't 2018), appeal dismissed, 33 N.Y.3d 999 (2019), lv. denied, 33 N.Y.3d 913 (2019)
- Matter of Sanchez v. Jacobi Med. Ctr., 182 A.D.3d 121, 124 (3d Dep't 2020)
- Samiento v. World Yacht Inc., 10 N.Y.3d 70, 78 (2008)
- Pettalino v. State of New York, 24 A.D.2d 524, 525 (3d Dep't 1965)
- Matter of Pond v. Lomenzo, 32 A.D.2d 887, 888 (4th Dep't 1969)
- Matter of Lewis v. New York State Off. of Children & Family Servs., 114 A.D.3d 1065, 1067-68 (3d Dep't 2014)
- Matter of Kelly v. Safir, 96 N.Y.2d 32, 38 (2001)
- Matter of Patel v. New York State Educ. Dept., 211 A.D.3d 1149, 1152 (3d Dep't 2022)
- Matter of Figueroa v. New York State Off. of Alcoholism & Substance Abuse Servs., 149 A.D.3d 1394, 1396 (3d Dep't 2017)
- Rob Tess Rest. Corp. v. New York State Liquor Auth., 49 N.Y.2d 874, 876 (1980)
- Matter of Diefenthaler v. Klein, 27 A.D.3d 347, 349 (1st Dep't 2006)

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