

STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
CANNABIS CONTROL BOARD

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IN THE MATTER OF
GIFT SHOP AND CANDY CORP.,
APPELLANT-RESPONDENT,

-against-

NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT,
APPELLEE-PETITIONER.

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DECISION ON APPEAL

INSPECTION NO.:
202202405220001

Application by Appellant-Respondent, Gift Shop & Candy Corp. (“Appellant”), appealing from the decision and order of the Office of Administrative Hearings (“OAH”) issued on June 7, 2024, extending an immediate sealing order against Appellant’s business. The sealing order was issued, pursuant to New York State Cannabis Law (“Cannabis Law”) Article 6 § 138-b and Title 9, § 133.25(k) of the Rules and Regulations of the State of New York (“NYRR”) by Appellee-Petitioner New York State Office of Cannabis Management (“OCM”) following a regulatory inspection. Appellant submits this administrative appeal and the exceptions noted therein for review to the Cannabis Control Board (“Board”) pursuant Cannabis Law § 17(8) and Title 9, 133.25(k), of the Rules and Regulations of the State of New York (“NYRR”).

BACKGROUND

Appellee OCM (“Appellee”), pursuant to Cannabis Law §§ 138-a and 138-b and 9 NYRR § 133.25, conducted a regulatory inspection of Appellant’s place of business at the premises located at 77 Christopher Street, New York NY, 10014. Following the inspection, Appellee determined Appellant was offering cannabis and cannabis products for sale without a license, registration, or permit in violation of Cannabis Law Sections 125, 132, and 101 as well as 9 NYRR § 120, and 9 NYRR § 114.14(d)(1). Appellee issued a Notice of Violation (“NOV”), an Order to Cease Unlicensed Activity, and an immediate Order to Seal for Appellant’s place of business because the unlicensed activity posed an imminent threat to the public health, safety, and welfare. Appellant requested an emergency hearing with the OAH pursuant to Cannabis Law § 138-b(3) and 9 NYRR § 133.25(h)(1). The presiding Administrative Law Judge (“ALJ”) issued a decision extending the Order to Seal for one year. Appellant takes exception to the ALJ’s decision and on June 7, 2024, submitted the instant appeal to the Board for review.

Appellant submitted their appeal and the exceptions noted therein on July 5, 2024. In their appeal, Appellant asserts that the ALJ erred in disregarding the jurisdictional requirements, which allowed her to issue a finding on the Order to Seal when the OAH did not have jurisdiction based on the failure of Appellee to establish proper and sufficient service of the Sealing Order, in accordance with the jurisdictional requirements mandated by Cannabis Law section 138-b. Specifically, Appellant argues that there was no evidence presented during the hearing to show that the sealing order was mailed to the owner of Gift Shop or to the owner of the real property.

Thus, Appellant maintains that service requirements articulated within Cannabis Law § 138-b subdivisions (2) and (10) are jurisdictional prerequisites that must be established before any order pursuant to section 138-b can be enforced, sustained, and/or extended to close a business. Appellant does not cite any case law or administrative decisions to support its conclusion that the ALJ's finding regarding service was not based on substantial evidence or a proper application of the law. Appellant further asserts that the NOV is legally insufficient on its face, making it defective as an accusatory instrument to prosecute against Appellant, because Appellee failed to check the appropriate boxes indicating that the unlicensed cannabis activity was more than a de minimis part of the business and that the sealing of the business would not close any part of a residence.

Appellant requests that the ALJ's decision be reversed, the Order to Seal and the accompanying NOV and Order to Cease Unlicensed Activity be vacated and rescinded, and the business permitted to immediately reopen.

Appellee submitted a memorandum in opposition to Appellant's appeal on August 4, 2024. Appellee asserts proper and sufficient service was demonstrated by a preponderance of the evidence in accordance with the jurisdictional requirements mandated by Cannabis Law § 138-b. Appellee contends that Appellant's argument regarding service by mail to the business owner must be denied in its entirety because there was no address provided for the business owner to the Investigator at the time the Order to Seal was personally delivered to the store employee, a person of suitable, age or discretion in apparent control of the premises at the time of the inspection. Thus, Appellee contends they were not required to mail the Order to Seal, or the accompanying NOV and Order to Cease Unlicensed Activity, to the business owner. Appellee cites support for this position in the decision of OCM v. MNG BK, LLC, Inspection No. 105202406200010 (2024), wherein it was held that no further steps were required by statute or regulations to complete service as the full name and address of the business owner was not supplied to the investigator at the time of the regulatory inspection. Additionally, Appellee asserts they were not required to establish service on the owner of the real estate at the hearing. Appellee argues that Appellant's argument is inapplicable as the owner of the real estate is not a party to the immediate sealing of Appellant's business. Moreover, Appellee argues that there is no evidence that Appellant is the real estate owner and thus has no standing to raise a challenge under Cannabis Law § 138-b(10).¹

Appellee further argues that while the term "accusatory instrument" is defined under criminal law, Cannabis Law § 138-b does not make any references to this term. Appellee asserts that while NY Criminal Procedure Law (NY CPL) § 1.20 defines an "accusatory instrument" under the criminal law, Cannabis Law § 138-b does not mention this term and appellant's argument is invalid as they seek to rely on an improper standard to challenge the Order to Seal. Appellee request the appeal be denied and the Order to Seal upheld.

¹ Appellee OCM seeks to place on the record that the statutorily required service was satisfied to the owner of the real estate as demonstrated by Exhibit 6, "AFFIRMATION OF SERVICE BY MAILING TO BUILDING OWNER," however, this affirmation of service was not entered into evidence during the hearing held on May 22, 2024.

ISSUE ON APPEAL

Whether the ALJ erroneously extended the Order to Seal, along with the accompanying Notice of Violation and Order to Cease Unlicensed Activity, because proper and sufficient service of the Sealing Order, in accordance with the jurisdictional requirements mandated by Cannabis Law § 138-b was not met and because the Order to Seal and Notice of Violation were facially insufficient and thus a defective accusatory instrument.

FINDINGS OF FACT

The Board accepts the credibility findings of the ALJ and finds no basis in the hearing record to depart from them here. Accordingly, we find the following facts.

Regulatory Inspection

Appellant is a conducts business as Gift Shop and Candy Corp. at the premises located at 77 Christopher Street, New York, NY, 10014. On May 22, 2024, Appellee conducted a regulatory inspection, Inspection Number 202202405220001, of Appellant's business, Gift Shop and Candy Corp., at the above-mentioned location pursuant to Cannabis Law § 138-a and 9 NYRR § 133.25. Based on observations during the inspection, Appellee issued an immediate sealing order and sealed the premises. The Order to Seal was issued simultaneously with an accompanying Notice of Violation and Order to Cease Unlicensed Activity².

On May 28, 2024, Appellant, through Counsel, requested an emergency hearing, pursuant to Cannabis Law § 138-b and 9 NYCRR § 133.25, challenging the Order to Seal issued by Appellee.

Administrative Hearing

The hearing was conducted on June 3, 2024, before OAH ALJ Laurie Cartwright. At the hearing, Appellant and Appellee were represented by counsel. The scope of the emergency hearing was limited solely to whether the padlocking provisions of Cannabis Law Article 6 § 138-b were met by a preponderance of the evidence.

Prior to the start of the hearing, Counsel for Appellant, raised the issue of ineffective service of the sealing order. The ALJ indicated that she can grant an adjournment for a day or two for service to be corrected. Counsel for Appellant indicated they did not need an adjournment, but that the onus was on Appellee to effectuate service and if the Appellee did not properly effectuate service this court does not have jurisdiction. Counsel for Appellee indicated that service was effectuated pursuant to the statute and that Appellee's witness and evidence will confirm such effectuated service.

Appellee called one witness, Investigator Paredes. Investigator Paredes testified he is employed with OCM and has received training and experience in the field on conducting

² Appellee OCM's NOV, Order to Cease Unlicensed Activity and Order to Seal are all contained on a single, 8 x14, page, one sided, document, along with a Certificate of Service. The first portion of the document is the NOV and Order to Cease Unlicensed Activity, the second the Order to Seal, and the last section is the Certificate of Service.

regulatory inspections, identifying hemp and cannabis products, and distinguishing between various cannabis products. He also testified that he has conducted approximately 70 regulatory inspections. He explained that when conducting a regulatory inspection, he looks for the display of cannabis products, price lists, the variety of items, and evidence that cannabis products are being marketed. Investigator Paredes testified that Gift Shop and Candy Corp. was selling cannabis edibles, vapes, pre-rolls, and other items without a cannabis license based on what he observed.

During the inspection, Investigator Paredes observed and photographed a large variety of various products marketed as cannabis on display. Based on his inspection of the premises he determined the location was a commercial property and the business was not licensed to sell cannabis. Investigator Paredes testified that no part of the premises that were sealed were used in part as a residence or pursuant to local law or ordinance, were zoned and lawfully occupied as a residence. Investigator Paredes stated that the premises did not have a shower, kitchen, clothes, or dressers, or anything else that would indicate that it was being used as a residence.

Investigator Paredes further testified that an individual identified themselves as an employee of Appellee Gift Shop and that the employee said he worked as a clerk. Investigator Paredes testified that the employee represented that he did not know who the business owner was and did not provide an address for the business owner. He identified the Order to Seal issued to Appellant Gift Shop and indicated he had prepared it after conducting the inspection of Appellant Gift Shop's business located at 77 Christopher Street, New York, NY. The employee was given a copy of the Order to Seal, the premises was closed, sealed, and a copy of the Order to Seal along with an illicit cannabis notice was posted by Investigator Paredes on the front of the business.

At the conclusion of the hearing the ALJ noted that the regulations under which this hearing is held does not allow her the ability to dismiss the NOV or the Order to Seal due to a service issue. She also noted that she gave counsel for Appellant the opportunity to have service corrected at the inception of the hearing, however, counsel for Appellant declined that opportunity.

ALJ Decision

On June 7, 2024, the ALJ issued a decision. In her decision, the ALJ ruled that the unlicensed activity which warranted an order to seal constituted more than a "de minimis" part the business activity. A large variety and volume of illicit products were discovered at Gift Shop and Candy Corp. The Cannabis Law Article 6 §138-b (7) and OCM Regulations part 133.25(f)(3) enumerate the factors to consider when determining if unlicensed activity occurring within a business is more than de minimis. During this hearing multiple exhibits were introduced that demonstrated the breadth and volume of the products offered at the business. As seen in Exhibits C and D, THC Vape cartridges, edibles, and cannabis flower were all observed at the business.

Moreover, the ALJ reasoned that the unlicensed activity constituted an imminent threat to public health, safety, and welfare in that: there were sales of, or offers to sell, cannabis products that were not tested or labeled lawfully in accordance with Cannabis Law Article 6. Appellee's photographic exhibits included cannabis products labeled with the California warning sticker, which are not permitted under New York Law. The other various products recovered were not

labeled in accordance with New York Law.³ As such, the ALJ extended the Order to Seal for one year from the date of the decision.

ANALYSIS

New York State Cannabis Law § 125 prohibits anyone to “...cultivate, process, distribute for sale or sell at wholesale or retail or deliver to consumers any cannabis, cannabis product, medical cannabis or cannabinoid hemp or hemp extract product, or any product marketed or labeled as such, within the State without first obtaining the appropriate registration, license or permit...”

Appellee is authorized, pursuant to Cannabis Law § 138-a and 9 NYRR 133.25, to conduct, without notice, site visits, inspections, or investigations of any person⁴ and any premises cultivating, processing, distributing, selling or offering for sale cannabis, cannabis product, cannabinoid hemp or cannabinoid hemp extract product, or any product marketed or labeled as such in this state, or engaging in an indirect retail sale, without obtaining the appropriate registration, license, or permit. Appellee OCM is further authorized to issue an immediate order to seal a building or premises of any business engaged in unlicensed activity based upon a finding of an imminent threat to public health, safety, and welfare and that the unlicensed activity was more than a de minimis part of the business. (Cannabis Law §138-b[3])

Cannabis Law § 138-b(2) requires any sealing order be served by delivery of the order to the owner of the business or other person of suitable age or discretion in actual or apparent control of the premises; the order must be posted; and a copy of the order shall be mailed to any address for the owner of the business at any address provided by the person to whom order was delivered pursuant to this subdivision.

When an order to seal with an immediate effective date based upon a finding of an imminent threat to the public health, safety, and welfare is issued by OCM, a hearing shall be held within three business days of a request for such hearing. (see Cannabis Law § 138(b)(3); 9 NYCRR § 133.25[h][3]). Following the hearing, the presiding ALJ shall prepare a written decision, pursuant to 9 NYRR § 133.21. Within thirty (30) days of the issuance of the ALJ’s determination, any party may submit an appeal of the ALJ’s determination to the Board and such appeal shall be “based solely on the record on appeal....” (see 9 NYCRR § 133.25[k]).

Here, Appellant timely filed an appeal and has taken exception with the ALJ extending the Order to Seal against Appellant’s business arguing the OAH lacked jurisdiction based on a service defect and a defective accusatory instrument.

In an administrative proceeding the standard for service is whether the notice under all the circumstances is reasonably calculated to make the parties aware of the proceeding so that they have an opportunity to be heard. (Reda v. Dep’t of Health of City of New York, 137 Misc. 2d 61, 63, (Sup. Ct. 1987), aff’d, 143 A.D.2d 1073 (1988) *citing* Matter of Infante v Donohue, 42 Misc 2d 727 [Sup Ct, Albany County 1964].) Here, there is no dispute that Appellant was on notice of the hearing. In fact, there was no allegation that Appellant did not receive the Order to Seal. Rather,

³ Appellant did not raise any exceptions with respect to the findings of the ALJ on the merits.

⁴ “person” is defined in subdivision 40-a of section 3 of the Cannabis Law as an individual, institution, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any entity. NY Cannabis Law §3 (40-a).

Appellant's argument is that Appellee did not establish mailing of the Order to Seal to the business owner or the real property owner during the hearing and as a result any service that was effectuated was improper and consequently the ALJ had no jurisdiction over the matter.

A review of the instant record, including the hearing transcript, the ALJ's decision, and memorandum submitted by the parties, reflects that the ALJ considered the arguments and all the requisite factors to support the decision in the case. When deciding if a defect in service is merely technical "courts must be guided by the principle of notice to the defendant—notice that must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" (Ruffin v. Lion Corp., 15 N.Y.3d 582–83, *citing* Raschel v. Rish, 69 N.Y.2d 694, 696 [1986], *quoting* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, [1950]). In an administrative proceeding the standard for service is whether the notice under all the circumstances is reasonably calculated to make the parties aware of the proceeding so that they have an opportunity to be heard. (*see* Reda v. Dep't of Health of City of New York, 137 Misc. 2d 61, 63, (Sup. Ct. 1987), *aff'd*, 143 A.D.2d 1073 (1988) *citing* Matter of Infante v Donohue, 42 Misc 2d 727 [Sup Ct, Albany County 1964].)

In this matter, at the start of the hearing, following Appellant's objection to ineffective service of the sealing order, the ALJ offered an adjournment of the hearing for service to be corrected. However, Appellant refused the ALJ's offer of an adjournment and proceeded with the hearing. At the close of the hearing, Appellant again raised the issue of ineffective service. The ALJ indicated that Appellant had notice of the Order to Seal, and the NOV, and was not prejudiced. The ALJ reasoned that Appellant was able to retain counsel, timely request an emergency hearing, and appear for the hearing with counsel. While a party's appearance at a hearing should not deem service requisites satisfied, here there appears to be no dispute that Appellant was on notice of the Order to Seal. The evidence submitted at the hearing established that two methods of service were made on Appellant. Personal service was effectuated by Appellee on Appellant through a person of suitable age and discretion who identified themselves as an employee. Appellee also effectuated service under the statute by conspicuously posting the Order to Seal and the accompanying NOV at Appellant's business. Moreover, Appellee established that at the time personal service was effectuated on Appellant's employee, who identified themselves as a clerk of the business, no additional information or address was provided for the business owner. The subsequent reliance on technicalities to overcome service is not persuasive, particularly where no allegations of prejudice have been asserted by Appellant either at the hearing or in the exceptions noted in the instant appeal. (See, e.g., Buscher v. Ehrich, 12 A.D.2d 887, 888 [1961]).

Appellant had their "day in court" during which they were represented by counsel who had a full and meaningful opportunity to cross-examine witnesses and to object to the admission of evidence by Appellee. (Reda, 136 Misc. 2d. at 61). Thus, any defect in service here was "merely technical" (Ruffin, 15 N.Y.3d at 582). Under these circumstances, given that no substantial right of the Appellant was prejudiced, the decision of the ALJ that the assertion of improper service did not render the court without jurisdiction nor warrant dismissal was within their authority and discretion, pursuant to 9 NYRR § 133.16. The ALJ addressed many factors and principles considered and sufficiently detailed those that ultimately weighed most heavily in its deliberations in the decision.

Appellant also argues lack of jurisdiction based on the failure of Appellee to establish service on the real property owner at the hearing. However, the defense of lack of jurisdiction based on improper service is personal in nature and may only be raised by the party improperly served (see Advance Serv. Grp., LLC v. Vision Home Builders LLC, 212 N.Y.S.3d 918 (2024); Lehman Brothers Bank v Hickson, 186 AD3d 1348 [2d Dept. 2020]; Rhoe v Reid, 166 AD3d 919 [2d Dept. 2018]; Rhoades v Westchester County Bd. of Elections, 115 AD3d 958 [2d Dept. 2014]; Wells Fargo Bank, N.A. v Bowie, 89 ad3D 931 [2d Dept. 2011]; Home Sav. of America, F.A. v Gkanios, 233 AD2d 422 [2d Dept. 1996]). Therefore, Appellant cannot raise a challenge based on improper service on behalf of another party, here the real property owner. Additionally, there is no merit to the argument that the ALJ lacked jurisdiction to adjudicate the matter due to improper service. The jurisdiction and powers of an administrative body derives from the statute which created it. (Drolet v. New York State Racing & Wagering Bd., 115 Misc. 2d 7, 10 (1982) *citing* Foy v. Schechter, 1 N.Y.2d 604 [1956]). In the instant matter, OAH was established for the purpose of conducting all adjudicatory proceedings which devolve upon the Board by requirement of statute and all proceedings shall be conducted by OAH through the service of administrative law judges. (9 NYRR 133.16) Here, the adjudicatory proceeding, an emergency hearing requested by Appellant, was indeed required by statute and thus OAH had jurisdiction over the subject matter of the proceeding. (see Cannabis Law § 138-b and 9 NYRR § 133.25[k]).

Appellant further asserts that the NOV and Order to Seal were erroneously extended because the NOV was legally insufficient in that the investigator failed to check a box on the document indicating the unlicensed activity was more than a de minimis part of the business activity. As a result, Appellant argues that the NOV, and Order to Seal, are rendered a defective accusatory instrument. This argument was raised for the first time in Appellant's appeal and was not raised at the hearing before the presiding ALJ. Thus, the ALJ's decision did not rule on the issue. However, in this matter, Appellant has taken an exception to the ALJ's decision and submitted the instant appeal challenging the ALJ's decision. Title 9 NYRR § 133.25(k) requires Appellants to set forth the specific questions of procedure, fact, law, or policy to which they take an exception, to identify that part of the ALJ's decision and order to which the objection is made. Here, Appellant did not raise the argument that the NOV was legally insufficient to the ALJ during the hearing. By not having raised the argument at the hearing to the ALJ, the decision of the ALJ did not and could not address Appellant's argument that the NOV was legally insufficient. Thus, the ALJ's decision did not rule on that matter leaving Appellant unable to identify a part of the ALJ's decision addressing this argument or the exception to it. Consequently, these arguments cannot be considered by the Board on appeal. (see Matter of Bernstein v. Department of State, Div. of Licensing Servs., 946 N.Y.S.2d 689 (3rd Dept. 2012) [holding that issues not raised at the administrative hearing level are unpreserved for consideration on administrative appeal or by the court on judicial review]; see also State Administrative Procedure Act § 306(1) [placing burden of proof on party who initiated the proceeding]).

CONCLUSION

Based on the foregoing, the Board finds that the ALJ did not err in refusing to dismiss the matter for lack of personal jurisdiction based on the claim of a defect in service. The review of the record on appeal supports a finding that the ALJ's decision to extend the Order to Seal was in accordance with the jurisdictional mandates for Cannabis Law § 138 and the preponderance of the evidence.

Accordingly, the decision of the Administrative Law Judge is affirmed.

DATE: November 12, 2024