STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
CANNABIS CONTROL BOARD

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IN THE MATTER OF
ROLL UP NATION,

APPELLANT-RESPONDENT,

-against-

DECISION ON APPEAL

Inspection No.:
202202306070002

NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT,

RESPONDENT-APPELLANT.

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Application by Appellant-Respondent, Roll Up Nation ("Appellant"), appealing from the decision and order of an Administrative Law Judge ("ALJ") with the Office of Administrative Hearings ("OAH") affirming an Order to Cease Unlicensed Activity and ordering Appellant to pay a $10,000 civil penalty for the sale of cannabis and cannabis products without a license, registration, or permit to do so. Appellant submits the instant appeal and the exceptions noted therein for review to the Cannabis Control Board ("Board") pursuant to Title 9, § 133.25(k)[1] of the Rules and Regulations of the State of New York ("NYRR") and in accordance with New York State Cannabis Law Article § 17(8).

BACKGROUND

Appellant's place of business, Roll Up Nation, located at 738 Broadway, New York, N.Y. 10003, was the subject of a regulatory inspection conducted by Appellee-Petitioner, New York State Office of Cannabis Management ("OCM") pursuant to Cannabis Law § 138-a and 9 NYRR § 133.25.[2] Following the inspection, Appellee issued a Notice of Violation ("NOV") and Order to Cease Unlicensed Activity ("Cease Order") for violating Cannabis Law §§ 125 and 132. A hearing was scheduled for June 21, 2023, before OAH. A hearing was held on that date and the decision of the ALJ was issued on November 9, 2023.

Appellant filed their appeal and the exceptions therein on December 9, 2023. Appellant requests that the Board "decline to accept or approve the ALJ's decision, and instead equitably and evenly afford the business owner of Roll UP Nation the same relief from penalties afforded other unlicensed shop owners who were relieved of their violations and allowed to apply for a license."

[1] Title 9 NYRR has been amended since the submission of Appellant's appeal. Part 133.25, Actions Relating to Unlicensed Activities, was revised, renumbered. Formerly cited as 9 NYRR § 133.23(g)(5).

[2] Formerly cited as 9 NYRR § 133.23(g)(5).

In the appeal, Appellant asserts that the objections raised to the ALJ's decision are based on questions of procedure and policy, with an analysis of the arbitrary and capricious nature of the implementation of enforcement regulation by OCM. Appellant's first objection raised is the time between the conclusion of the hearing and the issuance of the ALJ's decision, approximately 141 (one hundred forty-one) days. Appellant argues that the ALJ's decision was untimely. Appellant's next objection is that the ALJ's order to pay $10,000 civil penalty was arbitrary and capricious because similarly situated unlicensed cannabis business owners had their NOVs withdrawn by Appellee between the date of the hearing and the date of the ALJ's decision. In support of their argument, Appellant cites Lynch v. N.Y.C. Civilian Complaint Review Bd., 2021 N.Y. Slip Op. 32233 (N.Y. Sup. Ct. 2021) and the factors the Court set forth for determining when an agency rule is invalid as arbitrary and capricious.

Appellee filed an opposition to Appellant's appeal on January 23, 2024. Appellee asserts the ALJ's decision was timely because the Cannabis Law and Title 9 NYRR are silent on the length of time that an ALJ must issue a decision. Appellee also asserts that the matters cited by Appellant as being withdrawn by OCM do not include a case in which an NOV was withdrawn following a hearing and as such there is no real argument of treating similarly situated businesses differently. Appellee further contends that because Appellant did not argue OCM's enforcement and withdrawal of other NOVs was arbitrary and capricious at the hearing the argument should not be considered on appeal (See Matter of Bernstein v. Department of State, Div. of Licensing Servs., 946 N.Y.S.2d 689 [3rd Dept. 2012]). Moreover, Appellee contends that Appellant improperly cites to Lynch, *supra*, as the factors therein are applicable when determining the reasonableness of an agency rule or regulation, and not when determining whether a single ALJ's determination or decision was arbitrary and capricious. Thus, Appellee argues the only issue that can be decided on appeal is whether the ALJ's order that Appellant pay a $10,000 civil penalty was arbitrary and capricious. Appellee maintains it was not arbitrary and capricious because it was based in reason and with regard to the facts and evidence in the record. In addition, Appellee pointed to several other decisions in which OAH has issued decisions assessing unlicensed illicit cannabis shops $10,000 in civil penalties for unlicensed activity and where there were similar amounts of illicit cannabis products seized during the regulatory inspection.

ISSUES ON APPEAL

Whether the ALJ's decision was untimely and whether the assessment of a penalty was arbitrary and capricious based on the failure to withdraw the violation against Appellant and the assessment of a penalty by the ALJ.

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 was doing business at the premises located at 738 Broadway, New York, N.Y. 10003. On June 7, 2023, Appellee, joined by members of the Enforcement Division from the New York State Department of Taxation and Finance, conducted a regulatory inspection, Inspection Number 202202306070002, of Appellant business, Roll Up Nation, at the above-mentioned location. Based on observations during the inspection, Appellee issued a NOV and Order to Cease Unlicensed Activity with a scheduled hearing date.

Administrative Proceedings

A hearing was conducted on June 21, 2023. Both Appellant and Appellee were represented by counsel. The scope of the hearing was to determine whether the Appellant-Respondent violated Cannabis Law Article 6 §§ 125 and 132 and 9 NYRR §§ 116.2 -116.9; whether the NOV and Cease Order should be enforced; and what penalties (if any) should be assessed against the Appellant.

Appellee presented evidence, including the testimony of one witness and exhibits admitted into evidence. Senior Investigator, Wilhelmina Boxhoorn, testified she is employed with Appellee as a Senior Investigator and has training and experience in identifying cannabis and conducting regulatory inspections. She identified the NOV and Cease Order and indicated she had prepared the document after conducting a regulatory inspection of Appellant's business. She testified the NOV and Cease Order were personally delivered to an individual who identified themselves as an employee, Veronica Guerrero. She further testified that during the inspection she observed numerous types of cannabis products that were labeled as cannabis and in some instances included the amount of THC contained in each product. Loose cannabis flower, packaged cannabis flower, pre-rolls, cannabis edibles, including gummies and chocolate bars, and cannabis concentrate were all also observed at the location during the inspection. Appellee entered several photographs, inventory, and property receipts for the products observed and recovered during the inspection. Senior Investigator Boxhoorn further testified to observing menus containing prices for different strains of cannabis, a point of sales system, numerous receipts, as well as a sign offering delivery services by the Respondent, all of which were photographed and part of Appellee's exhibits.

Appellant called two witnesses. Roll Up Nation employee, Veronica Guerrero, and Roll Up Nation business owner, Omar Eid. Ms. Guerrero, an employee at Roll Up Nation, admitted that the business engaged in the indirect retail sale of cannabis whereby customers received cannabis products as a benefit of club membership. Ms. Guerrero further testified that Roll Up Nation also engaged in a commercial business selling artwork, clothing, hats, t-shirts, and handbags to the public including tourists and NYU students. Mr. Eid, the owner of Roll Up Nation, also testified that the business engaged in the indirect retail sale of cannabis, whereby customers received cannabis products as a benefit for club membership. Mr. Eid also testified that that after the regulatory inspection and the confiscation of the cannabis inventory, no income was generated, and the business closed.

At the conclusion of the hearing, the presiding Administrative Law Judge ("ALJ"), Thomas Kidera, indicated he would allow the parties an opportunity to submit proposed findings of fact and proposed conclusions of law before rendering his findings. The ALJ permitted three weeks from the date of the hearing for each party to submit proposed findings of fact and conclusion of law. No objections were raised by either party. On July 17, 2023, Appellant submitted Respondent's proposed statement of fact and findings of law. On July 26, 2023, Appellee submitted Petitioner's proposed findings of fact and conclusion of law. Appellant subsequently filed a response to Appellee's proposed findings of fact and conclusion of law on August 2, 2023. Appellee then filed Petitioner's Reply to Respondent's proposed findings and conclusions of law on August 4, 2023.

ALJ Decision

On November 9, 2023, the ALJ issued a decision. The ALJ's decision ruled upon the proposed findings of facts and made factual findings regarding the evidence presented. The ALJ held the NOV was properly served and indicated the date of the hearing. The ALJ disagreed with Appellant's argument that the regulatory inspection was a pretextual search as there was no support in the record. The ALJ also found Appellants arguments regarding the constitutionality of the Cannabis Law, as well as the constitutionality of the application of the law, to be outside the scope of the hearing and as such were not addressed. (See Cherry v. Brumbaugh, 7 NYS2d 956 [2nd Dept., 1938]).

The ALJ found Appellant engaged in both the direct and indirect sale of cannabis and cannabis products. The ALJ reasoned that while the business model may have been to aspire like a social club offering indirect access to cannabis products, the overall large-scale nature of the business indicated it operated primarily as a direct retail seller. In reaching the determination, the ALJ considered and weighed the evidence of multiple price lists, multiple display cases of pre-packaged cannabis products, existence of delivery service and most convincingly, the owner's testimony that after the inspection and product seizure, he had no source of income to pay his rent or his employees.

On December 9, 2023, Appellant submitted the instant matter and the exceptions therein to the ALJ's decision.

ANALYSIS

The Cannabis Law and the regulations are silent on the length of time that an ALJ must issue a decision. Title 9 NYCRR § 133.21(a)[3] simply states: "[t]he administrative law judge shall prepare the decision which shall include the administrative law judge's findings of facts, legal conclusions, and a penalty, if any, and shall submit it to all parties and the board." While the Appellant believes that a shorter, rather than a longer time is warranted, they have failed to demonstrate that the ALJ's decision was untimely or otherwise failed to meet the requirements mandated under the rules and regulations. Moreover, Appellant's argument that the ALJ's decision was issued 141 (one hundred

[3] Formerly cited as § 133.19(a)

forty-one) days after the hearing was concluded overlooks the time provided by the ALJ for the parties to submit written proposed findings of fact and conclusions of law. The ALJ stated, when extending the opportunity to the parties, that he would submit his findings and decision after receiving the parties' written submissions. Appellant raised no objection and submitted two memorandums, the last dated August 2, 2024. Factoring in the date of the last submission by Appellant on August 2, 2024, the decision was issued approximately 98 (ninety-eight) days. Appellant has failed to demonstrate the ALJ's decision did not meet the requirements mandated by the regulations. Accordingly, the Board finds the ALJ's decision was not untimely.

Appellant further argues that the failure to withdraw the violation by Appellee and the proposed penalty by the ALJ meet the definition of action that is arbitrary and capricious. Parties are permitted, pursuant to 9 NYRR § 133.22, to submit exceptions to the decision for the Board's review. Exceptions may include: (i) the administrative law judge's findings of fact, conclusions of law, penalty, or disposition with which the party disagrees, the reasons for disagreement and a substitute finding, conclusion or disposition; (ii) general comments on the appropriateness of the decision; and (iii) an alternative proposed decision for consideration by the board. Accordingly, the Board's review is limited to exceptions taken with respect to the ALJ's findings and the ultimate decision rendered. Additionally, Appellant did not raise this arbitrary and capricious argument against Appellee's enforcement at the hearing. Consequently, Appellee correctly argues the matter was not properly preserved and will not be considered on appeal. (See Matter of Bernstein v. Department of State, Div. of Licensing Servs., 946 N.Y.S.2d 689 [3rd Dept. 2012]).

The basis of Appellant's argument regarding the procedures and policies of Appellee would require this Board to rule upon the constitutionality of the laws under which it operates, which is beyond the power of an administrative agency. Cherry v. Brumbaugh, 255 AD 880 (2d Dept., 1938); Nassau Children's Home v. Board of Zoning Appeals, 77 AD2d 898 (2d Dept., 1980). Challenges to the procedures and policies of Appellee is beyond the scope of the Board's review. Thus, an administrative appeal is not the appropriate mechanism or means by which Appellant can challenge the overall constitutionality of Appellee rules and regulations or the constitutionality of the agency's implementation of its rules and regulations.

Thus, the only remaining issue is whether the ALJ's assessment of a $10,000 penalty was arbitrary and capricious. The Board finds it was not. An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts (Matter of Costco Wholesale Corp. v New York State Liq. Auth., 125 AD3d 775 [2d Dept., 2015]; see Matter of Murphy v New York State Div. of Hous. & Community Renewal, 21 N.Y.3d 649, 652 [2013]; Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]). A decision by an administrative hearing officer to credit the testimony of a particular witness is entitled to great weight because he or she had the opportunity to observe the demeanor of the witness (see Matter of Alegre Deli v New York State Liq. Auth., 298 A.D.2d 581 [2002]; Matter of Kelly v. Murphy, 20 N.Y.2d 205, 209–210, [1967]). Here, the administrative law judge relied on

testimony, photograph exhibits illustrating various cannabis and cannabis products, a price menu labeled "Dispensary Flower Menu," a point-of-sale system, signage for delivery services, and property vouchers indicating a large quantity of cannabis and cannabis products were seized[4]. Indeed, the most convincing testimony considered and relied upon by the ALJ was the testimony of Appellant's witnesses. Each witness called by Appellant admitted to providing cannabis and cannabis products to members of what they referred to as a social club in exchange for membership dues or other donations. Additionally, the ALJ's decision referenced the owner's testimony that after this inspection and product seizure, he had no source of income to pay his rent or his employees. The ALJ reasoned that the large-scale nature of the operation made clear Appellant was operating primarily as a direct retail seller. The decision ordering Appellant to pay a $10,000 civil penalty is based in reason and is supported by the facts.

Furthermore, for a penalty imposed by an administrative agency to be overturned, it must be "so disproportionate to the offense, in the light of all circumstances, as to be shocking to one's sense of fairness." (Matter of Stolz v. Board of Regents, 4 A.D.2d 361, 364[3rd Dept., 1957]; Matter of Pell v. Board of Education, *supra*; Matter of Butterly & Green, Inc., et al. v. Lomenzo, 36 N.Y.2d 250[1975]). Here, the ALJ The Board finds that the violation was properly sustained by a preponderance of the evidence in the record and the penalty imposed was not so disproportionate to the offense under the circumstances as to be shocking to one's sense of fairness.

Finally, Appellant's argument that the assessment of the $10,000 civil penalty is excessive, and a new iteration of complex generational trauma is without merit or factual support in the record. To the extent that Appellant raised other policy and constitutional arguments regarding the implementation and enforcement practices of OCM, they were not based in the facts or evidence before the ALJ and thus beyond the scope of the administrative proceeding. 9 NYRR § 133.22; see also Cherry v. Brumbaugh, *supra*. An Administrative Law Judge shall have the power to "conduct the hearing in accordance with the requirements of due process." 9 NYRR § 133.17(d)(11). The due process clause of the Fourteenth Amendment to the United States Constitution affords one who is a party in an administrative hearing the opportunity to be heard with timely and adequate notice advising as to the reasons for the hearing, the opportunity to cross-examine witnesses and to call witnesses on its behalf, and the opportunity to present arguments and evidence. (See, Goldberg v. Kelly, 397 U.S. 254 [1970]). In the instant matter, Appellant had timely and adequate notice of the nature of the proceedings, an opportunity to appear, cross-examine witnesses and to call witnesses. A review of the record demonstrates that the ALJ's determination to impose a $10,000 penalty was a result of the evidence presented at the hearing, was within their authority pursuant to Cannabis Law 132 and 9 NYRR § 131.21(a) and was not shocking to one's sense of fairness.

[4] Based on the inventory and property vouchers, approximately 158 separate cannabis concentrates, 71 packages of THC edibles, and 3.55 pounds of cannabis flower were seized from the location.

CONCLUSION

Based on the foregoing, the Board finds that the ALJ's decision was in accordance with the mandates of the Cannabis Law and Title 9 of the Official Compilation of Codes, Rules, and Regulations of the State of New York. The decision was not untimely and $10,000 civil penalty imposed against Appellant was not arbitrary and capricious. Accordingly, the decision of the ALJ is affirmed.

The foregoing constitutes the final decision of the Board.

DATE: November 12, 2024