STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
CANNABIS CONTROL BOARD

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IN THE MATTER OF

SHOPSMART CONVENIENCE DBA THE GARDEN,

APPELLANT-RESPONDENT,

-against-

NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT,

APPELLEE-PETITIONER.

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DECISION ON APPEAL

Inspection No.:
207202407170025

Application by Appellant-Respondent, Shopsmart Convenience Inc. dba The Garden ("Appellant"), challenging the decision of the Office of Administrative Hearings ("OAH") extending an immediate sealing order issued by Appellee-Petitioner, New York State Office of Cannabis Management ("OCM") pursuant to New York State Cannabis Law ("Cannabis Law") Article 6 § 138-b. 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, conducted a regulatory inspection of Appellant's place of business and determined Appellant was offering cannabis products and products marketed as cannabis for sale without a license, registration, or permit to do so in violation of Cannabis Law §§ 125 and 132 as well as 9 NYCRR 120(i). Appellee issued a Notice of Violation, 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). A hearing was held within three business days of the request and 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 August 19, 2024, submitted the instant appeal to the Board for review.

In their appeal, Appellant asserts that the ALJ erred in disregarding the jurisdictional requirements. Specifically, Appellant argues that there was no evidence presented during the hearing to show that the sealing order was mailed to Appellant, the business owner of the premises or to the owner of the real property. Appellant maintains that service requirements articulated within subdivisions (2) and (10) of Cannabis Law § 138-b are jurisdictional prerequisites that must be established before any sealing order pursuant to Cannabis Law § 138-b can be enforced, sustained, and/or extended to close a business.

Appellee maintains proper and sufficient service of the Order to Seal 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 Notice of Violation and Order to Cease, to the business owner. Additionally, Appellee contends 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 and that the statute indicates any such mailing constitutes "notice" not "service." Appellee asserts they were not required to establish mailing to the owner of the real estate as part of effectuating service on Appellant. Appellee also argues that because Appellant is not the real property owner, nor a party to the action, Appellant cannot raise a challenge with respect to notice to the property owner under subdivision (10) of Cannabis Law § 138-b.

ISSUE ON APPEAL

Whether the ALJ erroneously extended the Order to Seal, and accompanying Notice of Violation, because Appellee failed to establish proper and sufficient service in accordance with Cannabis Law § 138-b.

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 conducts business as Shopsmart Convenience dba The Garden at 370B 3rd Avenue, New York, New York, 10016. On July 17, 2024, Appellee conducted a regulatory inspection, Inspection Number 207202407170025, of Appellant's business. Based on observations during the inspection, Appellee issued: a Notice of Violation indicating that Shopsmart was in violation of Cannabis Law §§ 125 and 132 as well as 9 NYCRR 120(i); an Order to Cease Unlicensed Activity pursuant to Cannabis Law § 138-a and 9 NYCRR § 133.25; and an Order to Seal pursuant to Cannabis Law § 138-b. On July 19, 2024, Appellant, through counsel, requested an administrative hearing regarding the Order to Seal issued by Appellee. A virtual emergency hearing was scheduled for July 24, 2024.

Administrative Proceedings

On July 23, 2024, prior to the scheduled administrative hearing, Appellant submitted responsive pleadings, asserting as affirmative defenses a lack of personal jurisdiction and that any cannabis-related activities were a de minimis part of the business. Appellee submitted exhibits to Appellant and the OAH by e-mail the evening of July 23, 2024, and requested a 20-minute adjournment of the start time for the hearing.

The emergency hearing was held on July 24, 2024, before ALJ Laurie Cartwright. Both Appellant and Appellee were represented by counsel. The scope of the emergency hearing was

limited solely to whether the 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 two preliminary matters. First was a motion to preclude Appellee's exhibits, and witness based on the failure to provide the exhibits by close of business the day before the scheduled hearing. The ALJ, indicated she was unable to grant preclusion, but did have the power to grant an adjournment and offered counsel an adjournment to further prepare or speak with his client. Counsel replied he was not requesting an adjournment.[1] The second preliminary matter raised was specific to the service argument raised by Appellant in their responsive pleadings. The ALJ noted that Appellant's pleadings were conclusory and provided an opportunity for counsel to further expand on the claim raised. Counsel for Appellant responded he did not have anything additional to add at that time and preserved the record.

Appellee presented evidence, including by testimony of its witness, Investigator Coons, and the exhibits admitted into evidence, in support of its argument that the Order to Seal was properly issued. Investigator Coons identified the Order to Seal issued to Appellant and indicated he had prepared it after conducting the inspection of Appellant's business. Investigator Coons testified that upon arriving at the location there was one individual in the store when The Department of Tax and Finance first entered. Investigator Coons further explained that he believed this individual was the store's employee because the individual was inside when they first arrived, the individual identified themselves as an employee, and had the remote control to operate the gate on the storefront.

Investigator Coons also identified numerous photographs taken as part of the regulatory investigation. The evidence first showed that the premises was used solely for business purposes and that Appellant was not licensed to sell cannabis. Photos and testimony showed the presence of cannabis symbols on the premises, including the presence of three large cannabis leaves at the storefront and evidence of processing and sales of cannabis, including a machine for processing cannabis flower and a machine for creating cannabis "pre-rolls," and store-made labels added to the products. The evidence also showed a point of sales system and that Appellant' s display cases were filled with a variety of illicit cannabis products, with labels from other states, high levels of THC, and cartoon images.

Investigator Coons further testified that during the inspection he spoke with the individual who identified themselves as an employee, but the individual refused to provide any additional information. The employee refused to provide their name, the name of the business owner, and refused to provide an address for the business owner. Investigator Coons noted the refusal on the Order to Seal and provided a copy to the employee. The premises was closed, sealed, and a copy of the Order to Seal along with an illicit cannabis notice was posted by Investigator Coons on the front of the business.

Appellee attempted to enter into evidence an additional exhibit for proof of service as a business record through Investigator Coons. Appellant's counsel objected to the admission of the

[1] The discovery issue raised by Appellant and the resulting ruling from the ALJ were not raised by Appellant in the instant appeal.

document based on Appellee's inability to lay a proper foundation for a business record through Investigator Coons. Following a series of Voir Dire by both the ALJ and Appellant's counsel, the ALJ sustained the objection and did not admit the document into evidence.

Appellant did not call any witnesses or submit any exhibits. Appellant maintained in closing that the Order to Seal should not be continued because the service requirement, like any other provision under Cannabis Law § 138-b, is required to continue a sealing order. Appellee asserted that proper service was effectuated and mailing to the business owner was not required where no address was provided at the time of the inspection and personal delivery on Appellant's employee. With respect to certified mailing to the real estate owner, Appellee argued mailing to the real estate owner was not required for the hearing because they were not a party to the action.

ALJ Decision

On July 30, 2024, the ALJ issued a decision. In her decision, the ALJ ruled that any defect in service did not rise to the level to warrant dismissal. She reasoned that there was no dispute that Appellant was on notice of the Order to Seal. The ALJ rejected Appellant's argument that the case should be dismissed if one prong of the service requirement was not met. She further reasoned that "Courts have declined to dismiss cases due to imperfect service…" and when deciding if a defect 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."" (see Ruffin v. Lion Corp., 15 N.Y.3d 578, 582–83, (2010) *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]). Additionally, the ALJ considered the fact that Appellee was not provided with an additional address for the business owner and had already notified them via personal service on the individual who identified themselves as an employee and by conspicuously posting the Order to Seal and accompanying Notice of Violation at the business location.

The ALJ concluded that based on the service methods established, the timing of Appellant's request for the emergency hearing and the appearance by counsel at the hearing on behalf of Appellant any service defect did not rise to the level in which it required dismissal due to lack of personal jurisdiction. The decision then set forth the factual findings that Appellant had offered cannabis products for sale without a license, the unlicensed activity posed an imminent threat to the public health, safety, and welfare, the unlicensed activity constituted more than a de minimis part the business activity at the premises, and no part of the premises was used as a residence.[2] 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

[2] Appellant's Appeal did not raise any exception with respect to the findings of the ALJ on the merits.

permit…" Appellee OCM is the regulatory agency for the cannabis industry in New York. OCM is authorized to conduct, without notice, site visits, inspections, or investigations of any person[3] 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 (see Cannabis Law § 138-a and 9 NYRR § 133.25). In response to any violation of the Cannabis Law, and other related regulations, OCM is authorized to take enforcement action or impose sanctions upon a person or business found to be engaging in unlicensed cannabis activities (9 NYRR § 133.25[b]).

OCM is further authorized "to issue an order to seal the building or premises of any business engaged in unlicensed activity, when such activity is conducted, maintained, or permitted in such building or premises, occupied as a place of business."[4] (Cannabis Law § 138-b(1); 9 NYCRR § 133.25[f]). Cannabis Law § 138-b(3) provides that OCM may issue an order to seal with an immediate effective date if such order is based upon a finding of an imminent threat to public health, safety, and welfare.[5] Upon finding such an imminent threat, an order to seal may be issued only if: (a) no part of the premises to be sealed is used in part as a residence and pursuant to local law or ordinance is zone and lawfully occupied as a residence; and (b) the unlicensed activity . . . is more than a de minimis[6] part of the business activity on the premises or in the building to be sealed pursuant to the order. (Cannabis Law § 138-b[6]).

Pursuant to Cannabis Law section 138-b(2), "[a]ny order to seal shall 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 at the time of the inspection and shall be posted at the building or premises that have been sealed, secured and closed." Section 138-b(2) further provides that "[a] copy of the order shall also be mailed to any address for the owner of the business at any address provided by the person to whom such order was delivered pursuant to this subdivision." In addition, subdivision (10) of Section 138-b provides that service of the sealing order shall be mailed, by certified mail, to the person currently holding ownership over the real estate affected by the sealing order, as recorded in the city register or county clerk. "Such mailing shall constitute notice to the owner and shall be deemed to be complete upon such mailing by the office." (§ 138-b[10]).

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

[3] "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 other entity. NY Cannabis Law § 3(40-a).

[4] "[P]lace of business" shall not include a residence or other real property not otherwise held out as open to the public or otherwise being utilized in a business or commercial manner or any private vehicle on or about the same such property, unless probable cause exists to believe that such residence, real property, or vehicle are being used in such business or commercial manner as described herein." N.Y. Cannabis Law § 10(8).

[5] N.Y. Cannabis Law § 138-b(4) provides the factors that determine an imminent threat to public health, safety, and welfare.

[6] Whether the unlicensed activity is de minimis in nature is similarly based on a list of factors contained in Cannabis Law § 138-b[7]).

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…." (9 NYCRR § 133.25[k]).

In this matter, Appellant has taken an exception to the ALJ's decision and submitted the instant appeal challenging the ALJ's decision to extend the Order to Seal because Appellee OCM did not establish at the hearing that the Order to Seal was mailed to either the business owner or to the real estate owner. Appellant further argues that the ALJ's decision was not in accordance with jurisdictional mandates for Cannabis Law § 138-b based on the defective service. Appellant maintains the service requirements of section § 138-b are jurisdictional prerequisites that must be established before an order to seal can be enforced, sustained, and/or extended. Appellee maintains proper service on Appellant was established. Appellee contends that notice to the real estate owner is not required to be established at the hearing because mailing is not part of effectuating service on Appellant.[7] Appellee further argued that even if any service elements were not met, there was no prejudice. Appellant was able to request a hearing, retain counsel, and had an opportunity to appear at the hearing. Appellee further argues that Appellant lacks standing to assert a challenge under this provision as they are not the owner of the real property.

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].) 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]).

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, the evidence in the record, and relevant case law to support the decision in the case. While a party's appearance at a hearing should not deem service requisites satisfied, here there appears to be no dispute that service of the Order to Seal was effectuated on Appellant. In fact, there was no allegation that Appellant did not receive a copy of the sealing order or was otherwise unaware. Concededly, two methods of service were made herein. Personal service was effectuated by Appellee on Appellant through a person of suitable age and discretion who identified themselves as an employee and was in apparent control of the premises. Appellee also effectuated service

[7] As part of their Opposition to Appellant's appeal, Appellee attached, as Exhibit 6, an Affirmation of Service affirming a copy of the Order to Seal was sent by mail to the purported real estate/building owner on July 19, 2024. The affirmation was dated July 26, 2024. The document was not introduced at the hearing, which was held July 24, 2024. Thus, it was not before the ALJ nor part of the ALJ's consideration when issuing the decision Appellant now appeals from. As a result, it is not part of the record on appeal.

under the statute by conspicuously posting the Order the Seal and the accompanying Notice of Violation at Appellant's business. Appellee also established that at the time of personal service on Appellant's employee, the individual refused to provide any information to the investigator, including the business owner's name and an address. Thus, the subsequent reliance on technicalities to overcome the service methods that were effectuated 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]).

To the extent that Appellant has raised a lack of jurisdiction due to defective service, the Board disagrees with the argument. 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 this case, the OAH, through the service of ALJs, is authorized pursuant to 9 NYRR § 133.16 to conduct all adjudicatory proceedings which devolve upon the Board by requirement of statute. Thus, there is no question the OAH and the presiding ALJ had subject matter jurisdiction over the proceeding.

Finally, Appellant's reliance on Bell Corp, v. City of New York, et *al* (Index No. 715613/2024) in support of their argument that the ALJ's conclusion was not based on substantial evidence, or a proper application of the law is misplaced. In Bell, the petitioner filed an Article 78 challenging a decision issued by the New York City Office of Administrative Trials and Hearings ("OATH") and a final determination issued by the Office of the City Sheriff ("Sheriff"). In deciding the matter, the reviewing Court relied not only on the mandates under Cannabis Law § 138, but on the New York City Administrative Code § 7-551(c), the New York City Charter, Section 1049-a(2)(a)(I) and Article 3 of the CPLR. The review of the instant matter, as framed by Appellant in their Appeal, is whether the ALJ erred in extending the Order to Seal based on the failure of Appellee to meet the jurisdictional mandates of Cannabis Law § 138-b. Moreover, in Bell, the summons was dismissed by OATH following a hearing, however, the sealing order was subsequently extended by the Sheriff. Thus, the instant matter is quite distinguishable from the process and service mandates reviewed in Bell.

Following a review of the record on appeal, the Board finds that the ALJ's decision to extend the Order to Seal was in accordance with Cannabis Law § 138 and the preponderance of the evidence at the hearing. The ALJ addressed the issues presented below, properly analyzed the evidence presented, and correctly applied the relevant law to the facts of this case. The ALJ's decision considered relevant factors in determining whether service was properly effectuated,

including whether any delay resulted and whether there was any prejudice to Appellant. Next, the ALJ reviewed case law related for determining whether there was a service defect and if so, whether it required dismissal for lack of jurisdiction. The ALJ's determination was also based, in large part, on the credibility determination of Appellee's witness and the evidence presented. The testimony of Investigator Croons was duly credited by the ALJ. The Court of Appeals has long held "the credibility of witnesses is a determination within the domain of the trier of the facts, the person who has the opportunity to view the witnesses first hand and evaluate the relevance and truthfulness of their testimony (*see* Berenhaus v. Ward, 70 NY2d 436 [1987]; Collins v. Codd, 38 N.Y.2d 269 [1976]). Here, there is nothing in the record to support disturbing the ALJ's findings as to witness credibility.

CONCLUSION

Based on the foregoing, the Board finds that the ALJ did not err in refusing to dismiss the matter for lack of jurisdiction based on a claim of defective service and thus the Order to Seal was not erroneously extended. Accordingly, the decision of the Administrative Law Judge is affirmed.

The foregoing constitutes the final decision of the Board.

DATE: November 12, 2024