STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
CANNABIS CONTROL BOARD

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IN THE MATTER OF

OMAR HIDAIS, 360 GARDEN DELIGHT INC.,
APPELLANT-RESPONDENT,

DECISION ON APPEAL

-against-

Inspection No.:
207202407170025

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

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Application by Appellant-Respondent, Omar Hidais, 360 Garden Delight ("Appellant"), to challenge a decision of the Office of Administrative Hearings ("OAH"), rendered on June 6, 2024, wherein the Administrative Law Judge ("ALJ") extending an immediate sealing order against Appellant's business. The sealing order was issued by Appellee New York State Office of Cannabis Management ("OCM") following a regulatory inspection pursuant to New York State Cannabis Law ("Cannabis Law") Article 6 § 138-b and Title 9 of the Codes, Rules, and Regulations of the State of New York ("NYCRR") § 133.25. Appellant submits this administrative appeal and the exceptions noted therein for review to the Cannabis Control Board ("Board") pursuant to New York State Cannabis Law § 17(8) and 9 NYCRR § 133.25(k).

BACKGROUND

Following a regulatory inspection, Appellee issued a Notice of Violation, an Order to Cease Unlicensed Activity, and an immediate Order to Seal for Appellant's place of business, 360 Garden Delight, after determining that the unlicensed activity represented an imminent threat to the public health, safety, and welfare. An emergency hearing was requested by Appellant, pursuant to Cannabis Law § 138-b(3) and 9 NYCRR § 133.25(h)(1) and the proceeding took place before the OAH. The presiding ALJ issued a decision extending the Order to Seal for one year. Appellant filed the instant appeal challenging the ALJ's decision.

Appellant asserts that the ALJ erred in disregarding jurisdictional requirements because sufficient and proper service was not established. Specifically, Appellant argues that there was no evidence presented during the hearing to show that the sealing order was mailed to the owner of 360 Garden Delight or to the person holding ownership of the real estate. Thus, Appellant maintains that service requirements articulated within subdivisions (2) and (10) of Cannabis Law Section 138-b are jurisdictional prerequisites that must be established before any sealing order pursuant to Section 138-b can be enforced, sustained, and/or extended to close a business. Appellant further argues that Order to Seal was erroneously extended because the unlicensed cannabis activity within Appellant's business was a de minimis part of the overall business activity.

Appellee maintains proper and sufficient service of the Order to Seal was demonstrated by a preponderance of the evidence in accordance with the mandates of Cannabis Law §138-b. Appellee argues proper service was made through personal service when a copy was left in the vicinity of a store employee, a person of suitable, age or discretion in apparent control of the premises, and when a copy was conspicuously posted at the business premises. Thus, Appellee maintains the regulations do not require mailing a copy of the Order to Seal, NOV and Cease Order to the business owner when there is no address provided during the regulatory inspection and personal service is effectuated and a copy is conspicuously posted. Additionally, Appellee asserts they were not required to establish service on the owner of the real estate at the emergency hearing because the owner of the real estate is not a party to the sealing order against Appellant's business. Appellee also maintains that they demonstrated by a preponderance of the evidence that the illicit sales of cannabis constituted more than a de minimis part of the business activity through the testimony of the investigator and the photographs depicting signs and symbols indicating cannabis was sold at Appellant's business along with photographs depicting a sufficient volume and variety of cannabis products and products marketed and labeled as such.

ISSUES ON APPEAL

Whether the Order to Seal, and accompanying NOV and Cease Order, was erroneously extended based on insufficient evidence establishing proper and sufficient service on Appellant or that the unlicensed activity was more than a de minimis part of Appellant's business in accordance with the mandates of Cannabis Law § 138-b.

FINDINGS OF FACT

The Board finds the following facts.

Regulatory Inspection

On May 23, 2024, Appellee conducted a regulatory inspection of Appellant's business, 360 Garden Delight, premises located at 360 W. 42nd Street New York, New York, 10036. Based on observations during the inspection, Appellee issued: a Notice of Violation ("NOV") indicating that 360 Garden Delight Inc. was in violation of Cannabis Law §§ 125 and 132 as well as 9 NYCRR 120(i); an Order to Cease Unlicensed Activity ("Cease Order") pursuant to Cannabis Law § 138-a and 9 NYCRR 133.25(c); and an Order to Seal pursuant to Cannabis Law § 138-b and 9 NYCRR 133.25(f).[1]

On May 28, 2024, Appellant, through counsel, requested an emergency hearing on the Order to Seal pursuant to Cannabis Law §138-b and 9 NYCRR §133.25(h)(1). At the time of the request, Appellant also submitted a verified statement of ownership information, which is required as a condition to the scheduling of an emergency hearing. (9 NYCRR 133.25(h)(2). Appellant's

[1] Appellee's NOV, Cease Order and Order to Seal are all contained on a single, 8 x14, page, one sided, document. The document also contains a Certificate of Service. The first portion of the document is the NOV and Cease Order, the second the Order to Seal, and the last section is the Certificate of Service.

verified statement of ownership acknowledged they were the sole business owner with 100% ownership in the business.

Administrative Proceedings

An emergency hearing was conducted virtually on May 31, 2024, before presiding 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 Section 138-b were met by a preponderance of the evidence. Prior to hearing the merits, the ALJ addressed a discovery issue that was raised prior to the start of the hearing. Counsel for Appellant requested to enter two exhibits into evidence that were not timely provided to Appellee or to the OAH. Counsel said the exhibits were sent prior to close of business yesterday via email, however, unbeknownst to them there was a delivery issue. Appellee objected to the admission of the exhibits as untimely. The ALJ ruled the admission would be dependent on whether Appellant was able to enter them into evidence through Appellee's witness during the hearing.

Appellee then presented evidence, including by testimony of one witness, Investigator James Lawson, and the exhibits admitted into evidence, in support of its argument that the Order to Seal was properly issued. Investigator Lawson testified that he was employed by Appellee and was trained and experienced in identifying cannabis and cannabis products. Investigator Lawson identified numerous photographs taken as part of the regulatory investigation along with photographs of the Notice of Violation and Order to Seal. He also identified Appellant's place of business and said following the inspection he determined it was used solely for business purposes. Investigator Lawson also testified that Appellant's business was issued a Cannabinoid Hemp Retail License by Appellee, however, that license did not permit the sale of cannabis products or those marketed as cannabis products with more than .3% THC. Investigator Lawson identified photographs taken during the inspection that showed the presence of cannabis symbols on the premises, including the presence of a cannabis leaves on the sign outside the store, a cannabis leaf inside the store on the wall, other signs inside for "edibles" and "flower." The evidence also depicted display cases with a variety of illicit cannabis products, including loose flower with labels indicating the strain of cannabis and the price, some prepackaged products indicating high levels of THC, some products with labels from other states, and a point of sales system. Additionally, the evidence showed that there were no other products for sale in the store except cannabis and products marketed as cannabis.

Investigator Lawson also testified that during the inspection he spoke with an individual who was identified as a cashier of the store. The individual refused to provide their name, the name of the business owner, any address for the business owner, and refused to accept service. The refusal was documented on the Order to Seal, and a copy was left in the vicinity of the employee. The business was sealed, and a copy of the Order to Seal was posted on the front of the business. Appellee offered photograph exhibits depicting a copy of the NOV, Cease Order, and Order to Seal, with the included Certificate of Service, posted at the premises. The Certificate of Service section had a box checked indicating delivery was refused and service was completed by leaving a copy in the vicinity of the person to be served and by conspicuously posting a copy. The document was identified by Investigator Lawson, who confirmed he completed and signed the

form the day of the inspection. The document was entered into evidence by the ALJ without objection by Appellant.[2] On cross-examination, Appellant did not ask the investigator any questions regarding service of the NOV or the Order to Seal.

Appellant did not call any witnesses and did not submit any exhibits.[3] Appellant argued in summation that service of process was defective under Cannabis Law § 138-b because mailing to the business owner was required regardless of whether an address was provided at the time personal service was made on the store employee. Appellant also maintained that all products were being sold lawfully as Appellant was a licensed Hemp business and thus the Order to Seal should be vacated. Appellee asserted service was not defective because service was made on the cashier, a person in apparent control, and a copy was conspicuously posted at the premises. Appellee maintained no mailing was required because no address was provided for the business owner by the cashier. Appellee further argued that the products observed during the inspection exceeded the permissible levels of THC based on the observations made during the inspection. Appellee asserted that Appellant's Hemp license did not allow for the lawful sale of such products under the Cannabis Law and thus the unlicensed activity posed an imminent threat to public health, safety, and welfare.

ALJ Decision

On June 6, 2024, the ALJ issued a decision extending the Order to Seal against Appellant's business for one year from the date of the decision. The ALJ found that Appellant's place of business was not used or occupied as a residence, Appellant was offering cannabis and products marketed as cannabis for sale without a license, the unlicensed activity constituted more than a de minimis part of the business activity, and the unlicensed activity constituted an imminent threat to public health, safety, and welfare. The decision set forth the conclusions of law and the factual findings relied upon by the ALJ. Specifically, the ALJ relied upon the testimony of Investigator Lawson and photograph exhibits of Appellant's store depicting signs indicating cannabis and cannabis products were offered for sale, a large variety and volume of products, and the labeling of the products observed on display.

Appellant submitted the instant appeal on July 5, 2024. Appellee submitted a memorandum in opposition on August 5, 2024.

OPINION AND REASONING

Appellee is the regulatory agency for the cannabis industry in New York. Cannabis Law Section 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

[2] Appellee's Exhibit B contained 11 items in total. The NOV, Cease Order and Order to Seal was Exhibit B-1. Appellant raised no objection to Appellee's Exhibit B-1 or Appellee's B-6 and B-7, photograph exhibits of the premises depicting the posted NOV and Order to Seal. Appellant did object to admission of documents not personally completed by Investigator Lawson, including Exhibit B-9, an invoice from the NYS Department of Tax and Finance, which the ALJ sustained and excluded from the record.

[3] Counsel for Appellant did try to enter two exhibits through Appellee's witness, a photograph, and a video; however, they were unable to authenticate the photograph and unable to play the video audio. Counsel withdrew the request to enter the exhibits and proceeded with cross examination.

first obtaining the appropriate registration, license or permit…" Appellee is authorized to conduct, without notice, site visits, inspections, or investigations of any person[4] 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 NYCRR § 133.25). In response to any violation of the Cannabis Law, and other related regulations, Appellee is authorized to take enforcement action or impose sanctions upon a person or business found to be engaging in unlicensed cannabis activities. Appellee can issue an immediate "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"[5] and upon a finding of an imminent threat to public health, safety, and welfare.[6] (Cannabis Law § 138-b; 9 NYCRR § 133.25[f]). 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 part of the business activity on the premises or in the building to be sealed pursuant to the order.

In assessing whether unlicensed activity within a building or premises is more than a de minimis part of the business activity at the premises, Cannabis Law § 138-b (7) states: Appellee "shall consider factors such as any one or more of the following: (a) the presence of signs or symbols, indoors or out, advertising the sale of cannabis or otherwise indicating that cannabis is sold on the premises; (b) information shared in any advertisements or other marketing content in connection with the unlicensed business activity and any direct or indirect sales of cannabis or other conduct in violation of this chapter; (c) the volume of illicit cannabis products on site; and (d) the variety of illicit cannabis products on site."

Pursuant to Cannabis Law § 138-b(2), when Appellee issues an immediate sealing order, a copy "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." 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 , and such

[4] "Person" is defined in 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. N.Y. Cannabis Law § 3(40-a).

[5] "[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).

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

mailing "shall constitute notice to the owner and shall be deemed to be complete upon such mailing by the office."

After the issuance of an order to seal pursuant to Cannabis Law Section 138-b, an emergency hearing can be requested on the order to seal within seven (7) calendar days of the date of the order to seal. 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 NYCRR § 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 timely filed an appeal and has taken exception with the ALJ's decision to extend the Order to Seal against Appellant's business. Appellant asserts that the ALJ erred in extending the Order to Seal because Appellee failed to establish sufficient service in accordance with jurisdictional mandates of Cannabis Law Section 138-b and failed to establish that the unlicensed cannabis activity was more than a de minimis part of Appellant's business activity.

Following a review of the record on appeal[7], the Board finds Appellant's arguments without merit and that the ALJ did not err in extending the Order to Seal. Although Appellant argued there was improper service at the hearing due to the lack of a mailing to the business owner, Appellant did not argue improper service as to the real estate owner at the hearing. Appellant also raises a jurisdictional argument based on improper service for the first time on appeal. 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]). The 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 through the service of administrative law judges. (9 NYCRR 133.16) Here, the adjudicatory proceeding was indeed required by statute and thus the OAH had subject matter jurisdiction over the proceeding. The proceeding was a hearing on the Order to Seal issued against the business operating at the location inspected, 360 Garden Delight Inc. The hearing was scheduled at Appellant's request and included a verified statement in which Appellant acknowledged full ownership of the business. Appellant appeared and participated at the hearing through counsel.

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, 83 Misc.3d 1230(A) [2024]; Lehman Brothers Bank v Hickson, 186 A.D.3d 1348 [2d Dept. 2020]; Rhoe v Reid, 166 A.D.3d 919 [2d Dept. 2018]; Rhoades v Westchester County Bd. of Elections, 115 A.D.3d 958 [2d Dept. 2014]; Wells Fargo Bank, N.A. v Bowie, 985 N.Y.S.2d 576 [2d Dept. 2014]; Home Sav. of America, F.A. v Gkanios, 650 N.Y.S.2d 756 [2d Dept. 1996]). Therefore, Appellant improperly asserts defective service on behalf of another, here the real estate

[7] The record on appeal included the parties' pleadings, consisting of Appellant's Memorandum in Support of Respondent's Appeal and Appellee's Response and Opposition to Appellant's Appeal, Appellant's verified statement, the ALJ's decision, the hearing transcript, and the evidentiary exhibits.

owner. Appellant's verified statement acknowledged ownership of the business located at the premises. Appellant did not assert ownership of the real estate. Moreover, because Appellant failed to raise this argument to the ALJ, it was not part of the record on appeal nor part of the ALJ's determination to which the Appellant now takes exception to.

Additionally, the Board finds that any defect in service in this matter was merely technical and does not require reversal. 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 provided under 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 the instant matter, the record supports a finding that Appellant was on notice of the Order to Seal, the accompanying NOV, and the subsequent hearing date. While a party's appearance at a hearing should not deem service requisites satisfied, here there was evidence in the record that personal service was made at the time of the inspection on Appellant's employee, a person of suitable age and discretion, and a copy was conspicuously posted on the exterior of Appellant's business. Additionally, the record contains a Certificate of Service that was identified by Investigator Lawson. He testified he was the individual to complete the form and that he had checked the box reflecting delivery or signature of the Order to Seal was refused and a copy was left in the vicinity of the person to be served and a copy was conspicuously posted. The document was signed and dated by Investigator Lawson at the time of the inspection. The record supports a finding that the service methods employed by Appellee reasonably calculated to provide notice of the proceeding and an opportunity to be heard. Appellant was represented by counsel and had a meaningful opportunity to participate at the hearing. 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]). Consequently, the Board finds that any defect in service was merely technical and does not warrant reversal of the ALJ's decision.

Appellant also contends that the record does not support the ALJ's determination that the unlicensed cannabis activity was more than a de minimis part of Appellant's business activity. Appellant asserts that the vast majority of products sold were legal products covered by Appellant's Hemp License issued by Appellee. Appellant, however, fails to point to any evidence to support that assertion. Additionally, Appellee's evidence showed the presence of a large quantity of cannabis products or those marketed and labeled as cannabis. As the finder of fact, an ALJ must weigh the evidence and decide whether relevant and probative proof has been adduced to a level which, at minimum, is slightly "less than a preponderance of the evidence" (300 Gramatan Ave. Assocs. v State Div. of Human Rights, 45 NY2d 176, 180-181 (1978). In reviewing a determination of an ALJ, the Board retains the authority to reverse or modify decisions but accords due deference

to the ALJ in terms of factual findings and credibility assessments (see e.g., Matter of Simpson v Wolanski, 38 NY2d 391, 394 (1975); see also Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, 34 NY2d 222, 230[1974]).

There is substantial evidence in support of the ALJ's determination that the unlicensed cannabis activity was more than a de minimis part of Appellant's business activity. Here, the record establishes that Investigator Lawson observed multiple signs on the interior and exterior of Appellant's business that were visible from the exterior of the store, which indicated that cannabis was being sold at the premises, including a sign depicting a cannabis leaf, a neon sign with the word "flower," and another neon sign with the word "edible" and the image of a piece of candy. In addition to the signage at Appellant's business, Investigator Lawson testified to observing a large variety and volume of cannabis products and products labeled as such ranging from a variety of brands of flower, pre-rolls, and edibles.[8] He testified to observing the products in display cases with price listings. Further the record shows, that the ALJ considered relevant factors set forth in the Cannabis Law, including whether any part of the premises was used as a residence, whether the unlicensed activity was a de minimis part of the business activity, and whether it constituted an imminent threat to public health, safety, and welfare. Specifically, the ALJ considered the evidence supporting offers to sell cannabis products and those marketed as such, the point-of-sale system, and that the products were not labeled in accordance with the Cannabis Law. Thus, substantial evidence supports the ALJ's finding that the unlicensed cannabis activity at Appellant's place of business, 360 Garden Delight Inc., was more than a de minimis part of the business activity and that it constituted an imminent threat to public health, safety, and welfare.

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-b and was supported by substantial evidence. The ALJ 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 the unlicensed cannabis activity was more than a de minimis part of Appellant's business activity. The ALJ relied on the credibility determination of Appellee's witness and the evidence presented. 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 firsthand 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]). As noted above, the Board accords due deference to the ALJ in terms of factual findings and credibility assessments. Appellant has not demonstrated a basis, nor does a review of the record suggest a basis to disturb the ALJ's credibility determinations.

[8] In addition to photograph exhibits, Appellee offered (3) NYS OCM property vouchers regarding items seized during the inspection at the hearing, Exhibits B-3 – B-5. Appellant objected on the basis that Investigator Lawson had not completed the forms. The ALJ admitted the documents over objection based on the investigator testimony that he was familiar with the items seized, the vouchers fairly and accurately described the items seized during the inspection, and that he was present at the time the vouchers were completed. Based on the property vouchers, approximately 153 separate THC A concentrate vape cartridges, 167 packages of edibles labeled as THC A, 21 THC A pre-rolls, 25 Delta 8 concentrate vape cartridges, 40 packages of edibles labeled as Delta 8, 11 hemp-derived cannabinoid edibles, and 14 hemp-derived cannabinoid concentrates were seized from the location.

CONCLUSION

Based on the foregoing, the Board finds that 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.

DATED: December 10, 2024