STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
CANNABIS CONTROL BOARD

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IN THE MATTER OF
CROSS BAY SNACKS INC.,
APPELLANT-RESPONDENT,

-against-

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

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DECISION ON APPEAL

INSPECTION NO.:
105202405300001

Application by Appellant-Respondent, Cross Bay Snacks Inc. ("Appellant"), appealing from the decision and order of the Office of Administrative Hearings ("OAH") issued on June 11, 2024, extending an immediate sealing order against Appellant's business. The sealing order was issued by Appellee-Petitioner 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, § 133.25 of the Codes, Rules, and Regulations of the State of New York ("NYCRR"). 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 ("NYCRR").

BACKGROUND

Appellee OCM ("Appellee), conducted a regulatory inspection of Appellant's place of business. 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 NYCRR § 120, and 9 NYCRR § 114.14(d)(1). Appellee issued a Notice of Violation ("NOV"), an Order to Cease Unlicensed Activity ("Cease Order"), 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 NYCRR § 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.

Appellant submitted their appeal and the exceptions noted therein on July 11, 2024. In their appeal, Appellant asserts that the Order to Seal was erroneously extended because Appellee failed to establish sufficient service of the sealing order in accordance with jurisdictional mandates of Cannabis Law § 138-b. Specifically, Appellant argues that there was no evidence that the sealing order was mailed to the owner of Cross Bay Snacks or to the owner of the real estate where Cross Bay Snacks Inc. is located. 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. In Appellant's memorandum in support of its instant appeal, 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. Nor did Appellant mention any such 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 during the hearing. Appellant further argues that the ALJ improperly extended the Order to Seal because the evidence presented during the hearing failed to establish that Cross Bay Snacks, Inc. was the correct business named as a part of this proceeding. Particularly, Appellant asserts that the photos presented by Appellee during the hearing did not identify the name of the business being investigated pursuant to the regulatory inspection conducted on May 30, 2024.

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 reopen immediately.

ISSUES ON APPEAL

Whether the Order to Seal was erroneously extended 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 § 138-b, and because there was insufficient evidence establishing the name of the business that was the subject of the regulatory inspection.

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 Cross Bay Snacks Inc. at the premises located at 105-12 Cross Bay Blvd, Jamaica, New York 11417. On May 30, 2024, Appellee conducted a regulatory inspection, Inspection Number 105202405300001, of Appellant's business, Cross Bay Snacks Inc., at the above-mentioned location pursuant to Cannabis Law §§ 138-a 138-b, and 9 NYCRR § 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 NOV and Cease Order[1].

On June 5, 2024, Appellant, through Counsel, requested an emergency hearing, pursuant to Cannabis Law § 138-b and 9 NYCRR § 133.25(h)(1), regarding the Order to Seal issued by Appellee.

[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.

Administrative Hearing

The hearing was conducted on June 10, 2024, before ALJ Karen Lavery. 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.

Appellee called one witness, Investigator Jessica Jenkins. Investigator Jenkins testified she is employed as an investigative specialist with Appellee, has received online and hands on training in the field on how to conduct regulatory inspections, including training on how to identify elicit cannabis products, and has conducted approximately 10-12 regulatory inspections while working for Appellee. She also testified that prior to working for Appellee, she was a senior investigator for 3 years with the Division of Field Investigations for the New York State Department of Motor Vehicles ("DMV"). There, she investigated crimes related to DMV fraud and conducted regulatory inspections. She explained that when conducting a regulatory inspection with Appellee, there are things she looks for to determine if cannabis is being marketed and sold at an establishment.

Investigator Jenkins testified that she conducted the inspection of Appellant's business at the premises located at 105-12 Cross Bay Blvd, Jamaica, New York. She testified to conducting a check of business records to determine if Appellant was licensed to sell adult use cannabis and that no such license was found. She further testified that based on her observations during the inspection of Appellant's business there was evidence of marketing and a variety of cannabis products, including cannabis flower, edibles, vapes, pre-rolls, and other cannabis items without a cannabis license. She also determined that the premises was a commercial property. She stated that the premises did not have a kitchen, shower, dresser with any clothes, or anything else that would indicate that it was being used in part as a residence and pursuant to local law or ordinance, is zoned and lawfully occupied as a residence. During the inspection, Investigator Jenkins observed display cases with a large volume and variety of products that were marketed and labeled as cannabis. Investigator Jenkins identified numerous photographs that were taken during the inspection. The photographs included images of the business exterior and interior, the point-of-sale system, and a variety of cannabis and cannabis products that were observed, some of which depicted the State of California cannabis warnings. Investigator Jenkins also identified an NYS OCM property voucher she completed during the inspection documenting 114 THC edibles, 191 THC concentrates (vapes), 377 packages of THC flower, and 356 THC flower pre-rolls were seized from the location.

Investigator Jenkins further testified that there was one individual in the store, and they identified themselves as an employee. Investigator Jenkins testified that the employee provided the name of the business owner and their phone number. The employee also accepted and signed the Certificate of Service portion of the Order to Seal, NOV and Cease Order document. Investigator Jenkins identified the document and indicated she had prepared it after conducting the regulatory inspection. She further testified that a copy was given to the employee, the premises was sealed, and a copy was also posted on the front of the business. Appellee also entered an Affirmation of Service by Mailing to establish a copy of the Order to Seal, with the accompanying NOV and Cease Order, was mailed to Appellant's place of business on or about June 4, 2024.

Appellant did consent to the admission of the document but noted there was a different zip code then what was listed on another document entered into evidence by Appellee.[2]

ALJ Decision

On June 11, 2024, the ALJ issued a decision. In her decision, the ALJ ruled that the unlicensed activity constituted more than a “de minimis” part of the business activity and warranted a sealing order. A large variety and volume of illicit products were discovered during the inspection. 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. The ALJ found Appellee’s evidence, including Investigator Jenkin’s testimony to be credible. She noted that during the hearing there was ample evidence introduced that demonstrated the breadth and volume of the products offered at Appellant’s business. The ALJ cited the photographic evidence identified by the investigator depicting a volume of cannabis and products marketed and labeled as cannabis. The ALJ further determined 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 the Cannabis Law. 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. As such, the ALJ extended the Order to Seal for one year from the date of the decision.

The ALJ rejected Appellant’s argument that no evidence was presented to establish that the shop identified was the correct one, citing the credible testimony of Investigator Jenkins who identified the location inspected. Additionally, the ALJ rejected Appellant’s argument that service was not properly effectuated in compliance with the regulations, noting the NOV, Cease Order, and Order to Seal document was signed by someone who Investigator Jenkins testified identified themselves as an employee of Appellant’s business.

OPINION AND REASONING

Appellee is authorized, pursuant to Cannabis Law § 138-a and 9 NYCRR § 133.25, 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. Appellee 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 that there is 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 a sealing order be served by personal delivery to the

[2] The Affirmation of Service by Mailing indicated a copy of the Order to Seal, NOV and Cease Order were mailed to 105-12 Cross Bay Boulevard, Jamaica, NY 11414. Appellee’s property voucher Appellee listed 11417 as the zip code.
[3] “[P]erson” 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).

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 regulatory inspection; 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 the order was delivered pursuant to this subdivision. Cannabis Law § 138-b(10) 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 that such 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 § 138-b, an emergency hearing can be requested on the order to seal within seven (7) calendar days of the date of the sealing order. 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…." (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 a lack of jurisdiction based on a service defect and a lack of evidence establishing Appellant's business, Cross Bay Snacks Inc., as the business that was the subject of the regulatory inspection conducted. Appellee did not submit a reply in opposition to Appellant's appeal.

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. Following a review of the record on appeal[4] in this matter, the Board finds Appellant's argument regarding insufficient service to be unpersuasive.

To annul an agency determination made after a hearing directed by law at which evidence is taken, there must be a conclusion that the record as a whole lacks substantial evidence to support the determination (Mannino v. Dep't of Motor Vehicles of State Traffic Violations Div., 101 A.D.3d 880 (2nd Dept. 2012), citing Matter of Kelly v Safir, 96 N.Y.2d 32, 38 [2001]; Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 [1974]. Substantial evidence means "such relevant proof as a reasonable mind may accept as adequate to support a conclusion of ultimate fact." (see Gramatan Ave. Associates v. State Div. of Human Rights, 45 N.Y.2d 176, 180 [1978]). Substantial evidence is a "minimal standard." Matter of Cafe La China Corp. v. New York State Liq. Auth.,

[4] 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.

43 A.D.3d 280, 280 (1st Dept. 2007). It requires less than "clear and convincing evidence" (Matter of Carriage House Motor Inn, v. City of Watertown, 136 A.D.2d 895, 896 (4th Dept. 1988), aff'd Carriage House Motor Inn, Inc. v. City of Watertown, 72 N.Y.2d 990, (1988), and less than proof by "a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt," (300 Gramatan Ave. Assocs. v State Div. of Human Rights, 45 N.Y.2d, at 180). A "reviewing court should review the whole record to determine whether there is a rational basis in it for the findings of fact supporting the agency's decision." (see Matter of Pell v. Board of Educ., 34 N.Y.2d at 231). On review, the court must defer "to the fact-finding and credibility determinations of the agency." (Matter of Nelke v. Department of Motor Vehs. of the State of N.Y., 79 A.D.3d 433, 434 [1st Dept. 2010]). "[C]ourts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists." (Matter of Cafe La China Corp., 43 A.D.3d at 281).

In this matter, the ALJ rejected the assertion of improper service and relied upon Appellee's evidence in doing so. There is substantial evidence in support of the ALJ's determination that service was properly effectuated on Appellant. The ALJ determined Appellee's evidence presented was credible. The evidence submitted at the hearing established that Appellee utilized three methods of service, personal delivery, posting at the business premises, and mailing to the business. Although there was an issue with respect to the zip code on the affirmation of mailing and whether it was correct, the ALJ rejected Appellant's argument and reasoned that service was appropriate. The ALJ found the service on the store employee, whose name was visible on the computer screen of the cash register, was proper and sufficient. The ALJ further reasoned Appellee's mailing to the business owner was appropriate. Finally, the ALJ reasoned there was no evidence of improper service, no evidence Appellant was prejudiced by any service issue, and Appellant appeared through counsel as a representative of the named business. 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]). 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.

Appellant also asserts a jurisdictional argument based on 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]). 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, an administrative hearing on an order to seal issued by Appellee against Appellant's business, was indeed required by statute and thus the OAH had subject matter jurisdiction over the proceeding. Appellant improperly asserts defective service on behalf of another, here the real estate owner. 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]). Appellant's hearing request acknowledged ownership of the business located at 105-12 Cross Bay Boulevard, Jamaica, New York 11417. Appellant did not assert ownership of the real estate.

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]). Appellant requested the hearing and had their "day in court" during which they were represented by counsel, was aware of the proceeding, appeared at the hearing and was represented by counsel, had an opportunity to cross-examine witnesses and an opportunity to present evidence. (Reda, 137 Misc.2d at 63). Appellant has not asserted they were unaware of the proceeding or did not receive the Order to Seal that was personally delivered to Appellant's employee, posted at the business location, or mailed to the business owner. Thus, any defect in service here was "merely technical" (Ruffin, 15 N.Y.3d at 582). Under these circumstances, the Board rejects Appellant's argument that the Order to Seal was erroneously extended because there was insufficient evidence establishing service in accordance with the jurisdictional mandates of Cannabis Law 138-b. 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 NYCRR § 133.16. The ALJ's decision reflects that they considered the arguments and included factual findings that weighed most heavily in its determination.

Appellant further argues that there was insufficient evidence during the hearing to establish that Appellant's business, Cross Bay Snacks, Inc., was the appropriate business name to charge in the proceeding. This argument is also unpersuasive. In the decision, the ALJ rejected this argument relying on the credible testimony of the investigator. The ALJ noted how the investigator stated the address was located using the address numbers on the building at issue as well as the buildings on either side. The record also established that the only person in the location at the time of the inspection identified themselves as an employee and provided their name. The investigator also testified that the employee provided the business owner's name and phone number. Moreover, the employee accepted service and signed the Order to Seal, accompanying NOV and Cease Order, which indicated the name of the business as Cross Bay Snacks, Inc. Appellee's evidence also included property vouchers with the business name Cross Bay Snacks, Inc. and the business address, which was also signed, and dated, by the employee at the time of the regulatory inspection. The ALJ's decision was supported by substantial evidence in the record and the decision includes the basis for the determination, including the facts relied upon. Therefore, Board finds the Order to Seal was not erroneously extended due to insufficient evidence establishing the name of the business that was the subject of the regulatory inspection conducted by Appellee on May 30, 2024.

Conclusion

Based on the foregoing, the Board finds that the Order to Seal was not erroneously extended. 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 Cannabis Law § 138-b and the preponderance of the evidence.

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

DATE: December 10, 2024