

STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
CANNABIS CONTROL BOARD

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IN THE MATTER OF
THE REZZ,

APPELLANT-RESPONDENT,
-against-

DECISION ON APPEAL

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

Inspection No.:
112202306130016

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Application by Appellant-Respondent, The Rezz (“Appellant”) appealing from the decision and order of an Administrative Law Judge (“ALJ”) with the Office of Administrative Hearings (“OAH”) following an administrative hearing on a Notice of Violation (“NOV”) and an Order to Cease Unlicensed Activity (“Cease Order”) issued by Appellee-Petitioner, New York State Office of Cannabis Management (“OCM”). The ALJ determined that Appellant violated New York State Cannabis Law (“Cannabis Law”) Article 6 §§ 125 and 132 by offering for sale cannabis and cannabis products without a license, registration, or permit to do so and affirmed the Cease Order and ordered Appellant to pay a \$10,000.00 civil penalty. Appellant submits the instant appeal and the exceptions noted therein for review to the Cannabis Control Board (“Board”).

BACKGROUND

Appellant’s place of business, The Rezz, was the subject of a regulatory inspection conducted by Appellee-Petitioner OCM (“Appellee”), pursuant to Cannabis Law § 138-a and Title 9 of the Codes, Rules, and Regulations of the State of New York (“NYCRR”) § 133.25¹. Following the inspection, Appellee issued a NOV and a Cease Order for violating Cannabis Law §§ 125 and 132. A virtual hearing was held August 9, 2023, before the OAH and the decision of the ALJ was issued on November 20, 2023.

Appellant filed their appeal and the exceptions noted therein on December 20, 2023. In their appeal, Appellant requests that the ALJ’s decision be rejected, reversed, and the \$10,000.00 penalty vacated. Appellant asserts that the ALJ’s decision was untimely. Appellant argues that the amount of time between the hearing and issuance of the decision, approximately one hundred four (104) days, is inconsistent with other administrative law procedures. Appellant points to the New York State Administrative Procedure Act (“S.A.P.A.”) and other state agencies for their timelines.

¹ Formerly cited at § 133.23.

Appellant also argues that the regulatory inspection was a violation of the United States Constitution Fourth Amendment. Specifically, Appellant argues that there was evidence seized from drawers and bins that were opened during the regulatory inspection and would therefore not have been within plain view. Appellant also argues that the items seized were not tested and as a result cannot be used to determine penalties in an administrative setting because they would not be admissible into evidence in a criminal proceeding. Appellant contends that the exclusionary rule is applicable in administrative proceedings and cites Matter of Finn’s Liquor Shop v. State Liquor Authority, 24 N.Y.2d 647 (1969) and People ex rel. Piccarillo v. New York State Bd. of Parole, 48 N.Y.2d 76 (1979) for support. Appellant further contends that the \$10,000.00 penalty imposed by the ALJ is arbitrary and capricious by standards articulated in prior New York case law and because other similarly situated businesses had their violations withdrawn. Appellant asserts that an Article 78 proceeding, pursuant to New York’s Civil Practice Law and Rules, is not a fair remedy due to the high cost of legal fees in litigating an entire action.

Appellee filed an opposition to Appellant’s appeal on January 23, 2024. Appellee maintains that the ALJ’s decision was issued in a timely manner. Appellee argues that while ALJs at other agencies may have a time limit in issuing a decision, the Cannabis Law and implementing regulations are silent as to any time limit. Additionally, Appellee argues that OCM is authorized to seize cannabis and products marketed as such when found in the possession of someone found to offer for sale cannabis or cannabis products without a license, registration, or permit and there is nothing in the Cannabis Law requiring Appellee to test the products. Finally, Appellee argues that the penalty imposed was not arbitrary and capricious because the decision was based in reason and on a preponderance of the evidence in the record. Appellee request Appellant’s appeal be denied in its entirety.

ISSUES ON APPEAL

Whether the ALJ’s decision was untimely and whether the assessment of a penalty was arbitrary and capricious and a violation of the United States Constitution Fourth Amendment due to the reliance on untested cannabis products.

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 at 312 Fourth Street, Ithaca, New York 14850. On June 13, 2023, Appellee, joined by members of the Enforcement Division from the New York State Department of Taxation and Finance (“DTF”), conducted a regulatory inspection, Inspection Number 112202306130016, of Appellant’s business, at the above location. Based on observations made during the inspection, Appellee issued the NOV, Cease Order and a Notice of Hearing, scheduling a

a virtual hearing for June 28, 2023. The hearing was rescheduled to August 9, 2023, following a Notice of Appearance filed by Appellant’s counsel.

Administrative Hearing

A virtual hearing was conducted on August 9, 2023, before presiding ALJ Thomas Kidera. At the hearing, Appellant and Appellee were represented by counsel. The scope of the hearing was to determine whether the Appellant violated Cannabis Law Article 6 §§ 125 and 132; whether the NOV and Cease Order should be enforced; and what penalties, if any, should be assessed against the Appellant. Prior to the hearing, Appellant filed a motion to dismiss this matter, and Appellee submitted a memorandum of law in opposition to the motion. The ALJ noted procedural issues with the motion to dismiss, including the lack of attached affidavits of fact, sworn statements from a witness, and an attorney’s affirmation. The ALJ did not dismiss the motion but allowed Appellant’s counsel to reserve and reargue at the end of the hearing.

Appellee called one witness, Investigative Specialist William McKay (“Investigator McKay”). Investigator McKay testified that he is employed by OCM and has training and experience in identifying cannabis and cannabis containing products. The regulatory inspection of Appellant’s business, according to Investigator McKay, was initiated following a complaint that Appellant’s business may be operating as an unlicensed cannabis shop. Investigator McKay also testified that there are certain characteristics he looks for when identifying cannabis products, which he found at Appellant’s business premises during the regulatory inspection. Investigator McKay further testified that during the inspection, he took several photographs of the cannabis products observed, which Appellee admitted as exhibits. Appellee also entered into evidence the NOV, Cease Order, a property voucher, and an affidavit to establish no license, registration, or permit was issued by, or was pending with, OCM to any individuals and/or establishments operating at the premises inspected.

Appellant called one witness, Yusuf Broaster (“Mr. Broaster”), who identified himself as the owner/operator of The Rezz. Mr. Broaster testified that he decided to offer cannabis products for sale due to community demand. He also testified that he did not have a license or permit from Appellee to sell cannabis, however, he did not know his actions were against the law. Appellant did not renew its motion to dismiss at the end of the administrative hearing.

ALJ Decision

On November 20, 2023, ALJ Thomas Kidera issued a decision. In his decision, the ALJ found that Appellant violated Cannabis Law Article 6 §§ 125(1), 138(a), and 132(1)(a).

The ALJ found that Appellee and DTF investigators entered Appellant’s business location for a regulatory inspection when the store was open. Prior to beginning the regulatory inspection, Appellee engaged in a search of their records and determined that the Appellant was not in possession of any registration, license or permit issued by OCM. The ALJ noted the initial observations of Investigator McKay, including display cases with cannabis products, including pre-rolls and vape

cartridges, price lists, and signs with QR codes that provided a listing of cannabis products with pricing. The ALJ further relied upon the evidence that Appellant was advertising cannabis, with pricing information, on an Instagram account RezzLife 420. The advertising included information for a Rewards Program and information indicating an online ordering system. Finally, the ALJ relied upon Appellee's photograph exhibits documenting the various cannabis products the investigator testified to observing.

The ALJ rejected Appellant's argument that he could not rely on untested cannabis product for his decision. To support this, the ALJ points to Investigative Specialist McKay's testimony and his training and experience in identifying cannabis products. The ALJ also relied on the evidence establishing Appellant lacked a license to sell cannabis and determined Appellant was offering products marketed as cannabis and products labeled as cannabis in violation of Cannabis Law Sections 125(1) and 132(1)(a). The ALJ also determined the Fourth Amendment challenges raised by Appellant were not relevant to the scope of the hearing and beyond the jurisdiction of an administrative tribunal. The ALJ reasoned that in the instant matter the scope of the hearing was to determine an administrative violation of the Cannabis Law and whether a penalty should be imposed. Additionally, the ALJ reasoned that in the instant matter, the testimony showed the regulatory inspection took place during regular business hours, when the investigators were free to enter, and in doing so, the investigators were able to observe the cannabis and cannabis products in plain view. The ALJ declined to opine on Appellant's argument that the Cannabis Law is unconstitutional. The ALJ reasoned that it has long been established that Administrative Law Judges lack the jurisdiction to determine the constitutionality of statutes and cited to relevant case law to support the position. (see Wang v Department of State Division of Licensing Services, 1 DOS APP. 01, 23 DOS 00, (2000); see also Cherry v. Brumbaugh, 7 NYS 2d 956 (2nd Dept., 1938).

On December 20, 2023, Appellant submitted the instant matter and the exceptions therein to the ALJ's decision. Appellee submitted their response in opposition on January 23, 2024.

OPINION AND REASONING

Pursuant to 9 NCYRR § 133.21(a)² following a hearing, an ALJ shall prepare the decision which shall include findings, of fact, legal conclusions, and a penalty, if any. The Cannabis Law and implementing regulations do not provide a timeframe an ALJ is required to follow when issuing a decision. Appellant contends that lacking direction from the Cannabis Law, the Board should look to what other state agencies do. Appellant notes a range among other state agencies from sixty (60) days to six (6) months and argues because Appellee sought injunctive relieve a shorter rather than longer time was warranted. However, while Appellant argues for a shorter timeframe to be utilized, they have not established that the ALJ's decision in this matter was untimely under the law. Appellant acknowledges the Cannabis Law and regulations are silent on the issue of timing. Although Appellant

² Formerly cited as § 133.19(a)

looks to S.A.P.A., it does not establish a time limit in which an agency must render a decision. (S. A.P.A. Law § 307). Thus, the Board finds no merit to Appellant's argument that the ALJ's decision was untimely.

The Board finds that the ALJ in this matter did not err or otherwise abuse their discretion in considering the evidence seized by Appellee during the regulatory inspection of Appellant's business. Appellee is authorized, pursuant to the Cannabis Law and regulations, to conduct, without notice, site visits and inspections of any premises selling or offering for sale cannabis, cannabis products, or those marketed or labeled as such, in violation of Cannabis Law § 125. (see Cannabis Law § 138(a); 9 NYCRR § 133.25). Additionally, Appellee is authorized to seize any cannabis and cannabis products, or those marketed or labeled as such when found in the possession of a person or business engaged in unlicensed activity. (Cannabis Law § 138(a)(2)). Having reviewed the record on appeal, the Board finds there was no indication that the evidence against Appellant was obtained illegally or that there was a prior suppression ruling precluding the use of the evidence Appellee offered at the hearing. Moreover, there is no indication that Appellant requested the ALJ preclude evidence or invoke the exclusionary rule, which Appellant raises in their appeal. Rather, Appellant challenged the overall constitutionality of Appellee's authority to conduct a regulatory inspection and requested the matter be dismissed. The ALJ correctly indicated that such a ruling was not only beyond the scope of the proceeding but was also beyond the jurisdiction of an administrative tribunal. (Cherry v. Brumbaugh, 7 NYS 2d 956 [2nd Dept., 1938]). An ALJ does not have the power to dismiss a notice of charges. (9 NYCRR § 133.17(e)(2)). An ALJ, does however, have the power to admit and exclude evidence, pursuant to 9 NYCRR § 133.17(d)(7). Appellant did not seek preclusion or invoke the exclusionary rule. As a result, the issue of whether or not the exclusionary rule was applicable is not part of the record or part of the ALJ's determination.

Appellant further contends the Oder to Seal was erroneously extended because the ALJ considered untested products seized by Appellee. Appellant asserts that the seized, untested, products would not be admissible evidence in a criminal proceeding and thus cannot be used for consideration of penalties in an administrative proceeding. The Board finds this argument without merit. The Cannabis Law seeks to regulate cannabis products and products that have been marketed or labeled as cannabis to the public. Activity conducted in violation of Cannabis Law Sections 125(1) and (1-a) presents a danger to public health, safety, and welfare. (see Cannabis Law §§ 125(1-b)). When a non-licensed business, such as Appellant, is found to offer for sale, directly or indirectly, products marketed or labeled as cannabis, they have violated the Cannabis Law. (see Cannabis Law §§ 125 and 132-a). Here, the scope of the matter before the ALJ was in fact whether Appellant had violated the Cannabis Law. Evidence may be admitted at an administrative hearing without regard to technical or formal rules or laws of evidence applicable in the courts of the State of New York. (9 NYCRR §133.18(d)(10); S.A.P.A. § 306(1)). Nothing in the Cannabis Law requires Appellee to test the cannabis and cannabis products before they are seized. In fact, Appellee is authorized to seize any cannabis and cannabis products, or those marketed or labeled as such when found in the possession

of a person or business engaged in unlicensed activity. (Cannabis Law § 138(a)(2)). The ALJ noted in his decision that while the products were not tested, he relied on the credible testimony of the investigator, who was trained in identifying cannabis and products marketed and labeled as cannabis. The ALJ also relied upon Respondent's own testimony admitting that he was engaged in the sale of cannabis and cannabis products without a license. Thus, the Board finds that the ALJ did not err or abuse their discretion in considering the untested products, that were marketed and labeled as cannabis, in determining whether Appellant violated the Cannabis law; and whether a penalty should be assessed.

Appellant improperly relies on Matter of Finn's Liquor Shop., 24 N.Y.2d 647, supra, for support of a Fourth Amendment violation. The matter is distinguishable from the instant case. In that case the State Liquor Authority ("SLA") sought to revoke an individual's liquor license after a regulatory inspection in which he was found in possession of illegal gambling material. However, the defendant won suppression of the materials in a criminal case before the SLA sought to use the evidence. The Court of Appeals applied the doctrine of issue preclusion and estopped the liquor authority from attempting to prove otherwise as it had already been decided upon in the criminal case. Here, there was no criminal proceeding and no prior ruling that the evidence in question was obtained in violation of Appellant's constitutional rights.

Appellant further argues that Appellee's enforcement and the assessment of a \$10,000 penalty was arbitrary and capricious because similarly situated businesses had their NOV's withdrawn by OCM. The Board disagrees with Appellant and finds the \$10,000 penalty assessed by the ALJ was not arbitrary and capricious. 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 ALJ relied on the investigator's testimony, photograph exhibits documenting various cannabis and cannabis products that were seized, a digital scale, grinders, large bags of loose cannabis flower, signs with QR codes that provided price lists when scanned, and evidence Appellant was advertising cannabis with prices and offering a reward program. In addition to Appellee's evidence, the ALJ relied on Appellant's testimony admitting to offering cannabis and cannabis products for sale at the business location inspected by Appellee. The ALJ's decision was made with regard to the facts and evidence presented and sufficiently detailed those in which it weighed most heavily in its determination.

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 Board finds that the ALJ properly sustained a violation of the Cannabis Law 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.

Appellant also misplaces reliance on Lynch v. N.Y.C. Civilian Complaint Review Bd, 2021 N.Y. Slip Op. 32233 (N.Y. Sup. Ct. 2021) to support its argument that Appellee’s enforcement and the ALJ’s decision to assess a penalty were arbitrary and capricious. In that matter, the Court set forth factors for determining the reasonableness of an agency rule or regulation, not for determining whether a single ALJ’s decision was arbitrary and capricious. (*Id.*). Additionally, constitutional challenges to the overall procedures and policies of Appellee are beyond the scope of the Board’s review. An administrative appeal is not the appropriate mechanism or means by which Appellant can challenge the constitutionality of Appellee’s rules and regulations, or the constitutionality of Appellee’s implementation of its rules and regulations. Appellant argues that the typical route for challenging the constitutionality of a New York statute or agency action, through Article 78 of New York’s Civil Practice Law and Rules, is inordinately expensive. However, this argument is also not suited for an administrative law proceeding.

CONCLUSION

Based on the foregoing, the Board finds the ALJ’s decision was in accordance with the mandates of Cannabis Law and Title 9 of the 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.

DATED: December 10, 2024