STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
CANNABIS CONTROL BOARD

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IN THE MATTER OF
WORLD OF EXOTIC, INC.,

APPELLANT-RESPONDENT,

-against-

NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT,

APPELLEE-PETITIONER.

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DECISION ON APPEAL

Inspection No.:
205202405220002

Application by Appellant-Respondent, World of Exotic, Inc. ("Appellant"), challenging the decision of the Office of Administrative Hearings ("OAH") 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 9 NYCRR § 133.25(k).

BACKGROUND

Appellee OCM ("Appellee"), 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 NYRR 120(i). Appellee issued a Notice of Violation ("NOV") 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)[1]. A hearing was held, 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.

ISSUE ON APPEAL

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

[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 section the Order to Seal, and the last section is the Certificate of Service.

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 World of Exotic, Inc., at 184 7th Avenue, New York 10011. On May 22, 2024, Appellee, along with members of the New York State Department of Taxation and Finance ("DTF"), conducted a regulatory inspection, Inspection Number 205202405220002, of Appellant's business.[2] Based on observations during the inspection, Appellee issued the NOV, Cease Order, and Order to Seal. On May 29, 2024, Appellant, through counsel, requested an administrative hearing, pursuant to Cannabis Law § 138-b and 9 NYCRR § 133.25(h)(1), regarding the Order to Seal issued by Appellee.

Administrative Proceedings

The emergency hearing was held on June 3, 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 padlocking provisions set forth in Cannabis Law Article 6 § 138-b were met by a preponderance of the evidence. Shortly before the commencement of the scheduled administrative hearing, Appellee provided the proposed exhibits to counsel for the Appellant.[3] Counsel for Appellant raised two preliminary matters. First, a motion to dismiss the sealing order due to Appellee's failure to timely provide the proposed evidence, and if not dismissed, then the evidence should be precluded. The ALJ gave counsel for Appellant the opportunity to adjourn and have additional time to review, but after conferring with the Appellant, counsel decided to proceed with the hearing. The ALJ denied the motion dismiss stating the regulations do not allow an ALJ to dismiss the notice of charge. The ALJ also denied Appellant's request to preclude the evidence.[4] Appellant's second request was for the Order to Seal and NOV to be dismissed based on failure to properly serve the notice which Appellant argued required personal service, posting, and mailing to the business owner. The ALJ again indicated they do not have the ability to dismiss the notice and charges based on those issues but would provide Appellant an opportunity to raise objections to service after the testimony of the investigator.

Appellee presented evidence, including testimony of one witness, Investigator Warner, and the exhibits admitted into evidence. Investigator Warner established that she verified that the business was not licensed by the Office of Cannabis Management to operate as a dispensary prior to the inspection of the premises. Investigator Warner provided credible testimony regarding her

[2] The ALJ Decision dated June 7, 2024, contains a typographical error that cites June 22, 2024, as the date of inspection.
[3] Counsel for Appellee stated there was confusion regarding the location connected to the instant inspection number based on information contained in Appellant's Verified Statement, which delayed the disclosure of evidence. Counsel for Appellant acknowledged a typographical error with the business address noted on the Verified Statement but confirmed the Appellant was attesting to ownership and confirmed that 184 7th Avenue, New York, NY, 10011 was the business address and premises in which the regulatory inspection was conducted. No exception has been raised in the instant appeal with respect to the address of the premises that was the subject of the regulatory inspection.
[4] Appellant did not raise an exception to this ruling on the instant appeal.

observations upon entering the business and identified an oversize ornamental "spliff," or pre-roll, on display in the shop's window, the presence of smoke which she confirmed was cannabis in addition to THC concentrate, THC flowers, THC edibles, and pre-rolls also on display. Investigator Warner testified she observed an individual behind the counter of the store, whom she believed was smoking cannabis. The individual identified themselves as an employee. Investigator Warner testified the employee provided what she believed was a high school identification card with their name and age, which indicated he was seventeen (17) years old. Investigator Warner testified she was unable to authenticate the identification card and that the employee had no other form of identification or government issued document. Appellee proffered a copy of the identification card, however, counsel for Appellant objected to its admission due to the poor quality of the photograph. Investigator Warner further testified that the employee refused to sign a copy of the Order to Seal and NOV. She said he noted the refusal on the document in "Certificate of Service" portion by checking the box that delivery or signature was refused and a copy was left in the vicinity of the employee. Investigator Warner said no address was provided for the business owner. A copy of the Order to Seal and NOV was posted on the front door of the business.

Investigator Warner identified numerous photographs taken as part of the regulatory investigation. The exhibits included photographs of products that were observed on display with price tags, cannabis warnings, some products with the State of California cannabis logo, and some products included images of cartoon characters on edibles and chocolate bars in violation of the Cannabis Law. The exhibits also showed the presence of cannabis material and indication that processing was taking place on-site, including rolling paper, scales, grinders, empty packaging, loose cannabis flower, and a label maker. Finally, the exhibits depicted a point-of-sale system, a menu, and price list. Appellee also offered DTF property vouchers regarding the items seized during the regulatory inspection, which were detailed in the property vouchers. Appellee sought to lay the foundation of the reports and offer them into evidence following an objection from counsel for the Appellant. Although Investigator Warner testified the forms were completed on the premises and that she had no reason to believe the investigator from the DTF would falsely report the description of the items seized, the ALJ ultimately sustained Appellant's objection and precluded admission of the property vouchers. The ALJ reasoned that Investigator Warner had not prepared the property vouchers and could not authenticate the documents because she did not witness the weighing of the products seized.

On cross examination, counsel for Appellant questioned Investigator Warner about her training as an investigator for OCM, observations made during her regulatory inspection, and the service of process. Counsel questioned Investigator Warner as to how she determined the store employee was coherent and a person of suitable age. Investigator Warner testified that she determined the employee was of suitable age given the fact he was responsible for managing the store alone and she determined his coherence by his understanding and responses to her questions as well as his decision to refuse signing the notice and refusal to provide contact information for the business owner.

Appellant did not call any witnesses or submit any exhibits. Appellant maintained that the Order to Seal and NOV should be vacated and dismissed for failure to serve a person of suitable age and discretion, stating that the law requires a person be over the age of eighteen (18) and exhibit

mental competency.[5] Appellant also argued there was no mailing of the Order to Seal and NOV to the business owner as required under the statute. Additionally, Appellant stated that the Appellee failed to establish there was sale of cannabis and failed to establish there was processing on the premises.[6] Appellee argued that proper service was effectuated on a person of suitable age, and a copy was posted at the location. Appellee asserts no mailing was required because there was no address provided for the business owner, at the time of the inspection. Finally, Appellee contends that evidence and testimony make clear that processing was taking place on the premises and that there was evidence of cannabis and cannabis products being offered for sale.

ALJ Decision

On June 7, 2024, the ALJ issued a decision. In her decision, the ALJ found that the Appellant was offering cannabis product for sale without a license, and that such unlicensed activity posed an imminent threat to public health, safety, and welfare warranting the extension of the Order to Seal for one year pursuant to Cannabis Law Article 6 § 138-b(9).

The decision 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. The ALJ, relying on the credibility of the investigator, determined that the unlicensed activity was more than a de minimis part of the business activity as evident through the presence of a large variety and volume of cannabis products including items displayed as THC concentrate, flower, edibles with pricing. The ALJ also determined that the unlicensed activity constituted an imminent threat to public health, safety, and welfare as proven by the evidence of sales and/or offers to sell cannabis and products marketed and labeled as cannabis that were not tested or labeled lawfully in accordance with NYS Cannabis Law. The ALJ again cited to the investigator's testimony and the photograph exhibits depicting grinders, a label maker, products not labeled with the strain or other information required by law which could contain pollutants, and a display case with products labeled or marketed as cannabis. The ALJ's decision did not make any factual findings or conclusions of law with respect to service of the order.

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

OPINION AND REASONING

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

[5] Appellant did not renew this argument in the instant appeal.

[6] In the instant appeal, Appellant did not renew this argument or raise any exception to the ALJ's findings that Appellant was offering cannabis and cannabis products for sale without a license, that the unlicensed activity posed an imminent threat to the public health, safety, and welfare or that it was more than a de minimis part of the business activity.

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 a sealing order 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 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, based on the ALJ's findings of fact and conclusions of law. (9 NYCRR § 133.25[i][2]). 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]).

Appellant timely filed the instant appeal. In their appeal, Appellant asserts that the ALJ erroneously extended the Order to Seal and NOV because Appellee failed to establish proper and sufficient service of the sealing order in accordance with the jurisdictional requirements mandated by Cannabis Law § 138-b. Specifically, Appellant argues that Appellee failed to establish that a copy of the order was mailed to the business owner of World of Exotic and to the owner of the real estate. Appellant maintains the service requirements of subdivisions (2) and (10) of section 138-b are jurisdictional prerequisites that must be established before an order to seal can be enforced, sustained, and/or extended to close a business as is the case for establishing that the unlicensed activity was an imminent threat and was more than a de minimis part of the business activity.

Appellee maintains proper and sufficient service was demonstrated by a preponderance of the evidence in accordance with the mandates of Cannabis Law § 138-b. Appellee contends that Appellant's arguments regarding service by mail to the business owner and service by mail to the building owner must be denied in its entirety. First, there was no address provided for the business owner to the investigator at the time the Order to Seal was issued and 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 a copy to the business owner. Appellee further contends that Appellant's argument regarding notice to the real estate owner is unfounded and inappropriate because mailing is not part of effectuating service on Appellant.[7] Appellee argues that Appellant lacks standing to assert a challenge under this provision because they are not the owner of the real estate, and the real estate owner is not a party to the action. Appellee asserts 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.

[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 May 24, 2024. The affirmation was dated June 14, 2024. The document was not introduced at the hearing, which was held June 3, 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.

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]). Here, Appellant does not assert they did not receive a copy of the order or were otherwise unaware of the order. Rather, Appellant argues that because the Appellee did not establish a copy of the order was mailed to either the business owner or the real estate owner, any service effectuated was improper and did not comply with jurisdictional mandates of Cannabis Law § 138-b. Appellant requested the emergency proceeding and appeared through counsel. Appellant had their "day in court" during which they were represented by counsel who had a full and meaningful opportunity to cross-examine witnesses and to object to the admission of evidence by Appellee. (Reda, 136 Misc. 2d. at 61).

Appellant also argues lack of jurisdiction based on the failure of Appellee to establish service on the real property owner at the hearing. 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]). Thus, Appellant cannot raise a challenge based on improper service on behalf of another party, here the real property owner. Additionally, the argument that the ALJ lacked jurisdiction to adjudicate the matter due to improper service is also unpersuasive. 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 by the OAH through the service of administrative law judges. (9 NYCRR 133.16) The adjudicatory proceeding in this matter was indeed required by statute and was initiated with the OAH at Appellant's request.

The record in this matter includes evidence that personal service was effectuated on an individual who identified themselves as an employee and was in apparent control of the premises at the time of the inspection and a copy of the order was conspicuously posted on the exterior of Appellant's place of business. During the hearing, Appellant questioned how the investigator determined that the seventeen (17) year old individual who identified themselves as an employee was coherent and of suitable age and discretion. In response, the investigator testified to relying on his conversation with the individual who was aware of the conversation. He also testified to relying on the individual being left alone to manage the store and collect funds in Appellant's absence. The record also includes evidence that Appellee conspicuously posted the order at Appellant's business,

the address of which counsel for Appellant confirmed at the start of the hearing. On appeal, Appellant does not challenge the service effectuated at the time of the inspection. The ALJ should have made findings of fact and conclusions of law as to the methods of service testified to by the investigator. However, in this case the failure to do so is not reversible error. Based on a review of the record, the testimony of Investigator Warner, if accepted as true, established Appellee effectuated two methods of service that were reasonably calculated to put Appellant on notice of the Order to Seal and provide an opportunity to be heard.

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. While the ALJ did not make factual findings or conclusions of law with respect to service, there was substantial evidence at the hearing to support a finding that service was effectuated on Appellant that was reasonably calculated to provide notice. "Substantial evidence" means "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." (300 Gramatan Ave. Assocs. v. State Div. of Human Rights, 45 N.Y.2d 176, 180 [1978]). The standard is a deferential one that "demands only that a given inference is reasonable and plausible, not necessarily the most probable." (Matter of Café, La China Corp. v. N.Y.S. Liquor Auth., 43 A.D.3d 280, 281 [1st Dept. 2007]). This "minimal" threshold is lower than the preponderance of the evidence standard. (Matter of Haug v. State Univ. of N.Y. at Potsdam, 87 N.Y.S.3d 146 [2018]). It requires only that the agency's finding be based upon more than mere surmise, conjecture, speculation, or rumor. (300 Gramatan Ave. Assocs., 42 N.Y.2d at 180-81). Appellant does not raise a challenge on appeal to the service testified to at the hearing by the investigator. The testimony of the investigator was credited by the ALJ in the decision and the factual findings that were made. 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]). If the agency's decision finds support in the record, its determination is conclusive even where "the evidence is conflicting and room for choice exists." (Berenhaus, 70 N.Y.2d at 444). Appellee's evidence was credited and relied upon by the ALJ in their decision. Contrary, to Appellant's argument the record supports the inference that Appellee effectuated proper and sufficient service on Appellant.

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.

DATED: December 10, 2024