STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
CANNABIS CONTROL BOARD

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IN THE MATTER OF
Z SNACKS INC.,

APPELLANT-RESPONDENT,

-against-

NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT,

APPELLEE-PETITIONER.

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DECISION ON APPEAL

INSPECTION NO.:
102202406050002

Application by Appellant-Respondent Z Snacks Inc. ("Appellant") appealing from a decision and order of the Office of Administrative Hearings ("OAH") wherein the presiding Administrative Law Judge ("ALJ") extended a sealing order against Appellant's business. The sealing order was issued by Appellee-Petitioner New York State Office of Cannabis Management ("OCM") pursuant to New York State Cannabis Law ("Cannabis Law") Article 6 §§ 138-a and 138-b and Title 9 of the Codes, Rules, and Regulations of the State of New York ("NYCRR") § 133.25.

Appellee- Petitioner OCM ("Appellee"), conducted a regulatory inspection of Appellant's place of business and determined Appellant was engaging in unlicensed activity of cannabis and products marketed as cannabis in violation of the Cannabis Law and implementing regulations. Following the regulatory inspection, Appellee issued a Notice of Violation ("NOV"), an Order to Cease Unlicensed Activity ("Cease Order") and an immediate Order to Seal ("OTS") for Appellant's place of business because the unlicensed activity posed an imminent threat to the public health, safety, and welfare. Appellant requested a hearing with the OAH. Following the hearing, the presiding ALJ issued a decision extending the Order to Seal for one year. Appellant takes exception to the ALJ's decision and has submitted the instant administrative appeal, and the exceptions noted therein, to the Cannabis Control Board ("Board") for review pursuant to Cannabis Law §§ 10(18) and 17(8) and 9 NYCRR § 133.25(k).

BACKGROUND

In March 2021, New York enacted the Marihuana Regulation and Taxation Act ("MRTA"). The MRTA legalized recreational adult use of marijuana and created a regulated cannabis industry. The Cannabis Law governs medical cannabis (Cannabis Law Article 3), adult-use cannabis (Cannabis Law Article 4), and cannabinoid hemp and hemp extract (Cannabis Law Article 5). The Cannabis Law also contains general provisions, (Cannabis Law Article 6), including the enforcement framework, that apply to the entire regulatory program. Appellee is the regulatory agency for the

cannabis industry in New York.

Cannabis Law § 3(5) defines cannabis as "all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. Cannabis does not include "the mature stalks of the plant" and it does not include "hemp, cannabinoid hemp or hemp extract as defined by this section or any drug products approved by the federal Food and Drug Administration." (Cannabis Law § 3[5]). Hemp is defined as the plant Cannabis sativa L. and any part of such plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration ("THC")[1] of not more than three-tenths of a percent on a dry weight basis. (Cannabis Law § 3 [27]). Cannabis product, or adult-use cannabis product, means cannabis, concentrated cannabis, and cannabis-infused products for use by a cannabis consumer. (Cannabis Law § 3[9]). A cannabis- infused product is defined as "products that have been manufactured and contain either cannabis or concentrated cannabis and other ingredients that are intended for use or consumption." (Cannabis Law §3[10]).

Cannabis Law § 125 states that "[n]o person[2] shall cultivate, process, distribute for sale or sell at wholesale or retail or deliver to consumers any cannabis, cannabis product, medical cannabis or cannabinoid hemp or hemp extract product, or any product marketed or labeled as such, within the state without first obtaining the appropriate registration, license or permit" that is required under the law. Appellee is authorized to conduct, without notice, site visits, inspections, or investigations of any person 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. (Cannabis Law § 138-a and 9 NYCRR § 133.25). In response to a violation of the Cannabis Law, and related regulations, Appellee is authorized to take various actions, including issuing a notice of violation, an order to cease unlicensed activities, and an immediate order to seal the premises. (Cannabis Law §§ 138-a and 138-b).

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

[1] Tetrahydrocannabinol concentration ("THC") "means Delta-9-tetrahydrocannabinol; Delta-8-tetrahydrocannabinol; Delta-10-tetrahydrocannabinol and the optical isomer of such substances." *Cannabis Law § 3(52).*

[2] Cannabis Law § 3(40-a) broadly defines person "an individual, institution, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other entity."

building or premises, occupied as a place of business"[3] and upon a finding of an imminent threat[4] to public health, safety, and welfare. (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[5] part of the business activity on the premises or in the building to be sealed pursuant to the order.

When Appellee issues an immediate sealing order, Cannabis Law § 138-b(2) provides that 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 a copy of the sealing order shall be mailed, within five (5) days of being issued, 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 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. An emergency hearing must be requested within seven (7) calendar days of the date of the order to seal and shall be held within three business days of such request provided that the respondent has submitted a verified statement with the request. (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 facts 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]).

In this matter, Appellant timely filed the instant appeal. Appellant asserts that the ALJ

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[3] "[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." Cannabis Law § 10(8).

[4] In assessing whether there is an imminent threat to public health, safety, and welfare, Cannabis Law § 138-b(4) provides factors Appellee shall consider.

[5] In assessing whether unlicensed activity within a building or premises is more than a de minimis part of the business activity at the premises, Appellee shall consider the factors set forth in Cannabis Law § 138-b(7).

erroneously extended the Order to Seal because Appellee failed to establish proper and sufficient service of the sealing order.

ISSUE ON APPEAL

Whether the sealing order was erroneously extended because Appellee failed to establish proper and sufficient service in accordance with the mandates of Cannabis Law § 138-b.

FINDINGS OF FACT

The Board accepts the credibility findings of the ALJ and finds no basis in the hearing record to depart from them here. Accordingly, we find the following facts.

Regulatory Inspection

Appellant conducts business as Z Snacks Inc. located at 2102 Avenue Z, Brooklyn, New York 11235. On June 5, 2024, Appellee conducted a regulatory inspection of Appellant's business at the above-mentioned location pursuant to Cannabis Law § 138-a 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.[6]

On June 12, 2024, Appellant, through Counsel, requested an emergency hearing, pursuant to Cannabis Law § 138-b and 9 NYCRR § 133.25, challenging the Order to Seal issued by Appellee.

Administrative Hearing

The hearing was conducted on June 17, 2024, before OAH ALJ Laurie Cartwright. At the hearing, Appellant and Appellee were represented by counsel. The scope of the emergency hearing was to determine whether the padlocking provisions of Cannabis Law Article 6 § 138-b were met by a preponderance of the evidence.

Appellee called one witness, Bladimir Nunez, who identified themselves as an Investigator employed with Appellee. While working for Appellee, he has received instructive and hands-on training in the field on how to conduct regulatory inspections, including training on how to identify cannabis and products marketed as cannabis. He testified that he was trained to identify evidence of unlicensed sales of cannabis when he is conducting a regulatory inspection, including signage, menus for products, price list, cannabis products, scales, and other processing equipment. He testified further

[6] Appellee's NOV, Order to Cease Unlicensed Activity and Order to Seal are all contained on a single, 8 x14, page document, that also includes a Certificate of Service section. The first portion of the document is the NOV and Order to Cease Unlicensed Activity, the second the Order to Seal, and the last section is the Certificate of Service.

that based on his observations during the inspection of Appellant's business, Appellant was marketing and offering for sale a high volume and variety of cannabis products, including cannabis flower, edibles, vapes, concentrates, pre-rolls, and other cannabis items without a cannabis license. Investigator Nunez also testified that he did not observe any evidence that the premises were used as a residence.

Investigator Nunez further testified that during the inspection he observed a large volume and variety of products on display that were unlawful to sell without a valid license issued by Appellee. He identified numerous photographs depicting display cases of various items, including, but not limited to, Flav cannabis infused edible products, boxes of ZAUCE live resin joints marketing 57.4% total active cannabinoids, various jars of Stizzy premium indoor cannabis pre-rolls, a large variety of STIIZY Premium THC vape pods, a variety of KYLE cannabis extracts, and a variety of other pre-rolls. Investigator Nunez testified to also observing products with no labels on them such as the large jars of what appeared to be cannabis flower. Each jar was labeled with the name for each strain of flower and pricing information. Additionally, under each jar was individual, empty packaging. Investigator Nunez identified other photographs that depicted items with cartoon characters, colorful imagery, and product brands that he described could be attractive to children. There was a photograph of what appeared to be a box of "Candy Smacks" cereal, boxes of what appeared to be a variety of Captain Crunch cereal, and bags of Cheetos that were labeled as containing 600mg of THC and depicted a California warning label. There was also evidence of other variety of cannabis products including a box that purported to be Motrin containing 28% THC as the active ingredient. Investigator Nunez also testified to observing evidence of on-site processing of cannabis. He observed three scales in a bathroom, a rolling tray with cannabis flower residue and a fourth scale, and a variety of empty packaging. He further identified photographs of various signs and symbols in the store that indicated cannabis was being sold on the premises, including a giant blow up joint, area rugs depicting skulls and cartoon imagery smoking bongs and joints, and other cannabis marketing materials.

When the inspection began, Investigator Nunez testified there was initially one individual whom he believed was the store employee. During the inspection, another individual came to the store and identified himself as the store manager. The individual provided his identification, which was photographed and identified by Investigator Nunez during the hearing. Prior to concluding the inspection, Investigator Nunez testified that he prepared the NOV, Cease Order, and Order to Seal. He served it on the individual who identified himself as the store manager, who accepted service and signed the Certificate of Service. Investigator Nunez testified that he asked the store manager for the address of the business owner, but he was not provided with that information. He further testified that after providing a copy of the sealing order to the store manager, the premises was sealed and a copy of the NOV, Cease Order, and Order to Seal, was posted to the front door. Appellee also presented

an Affirmation of Service by Mailing indicating service by mail was effectuated on or about June 14, 2024, on Appellant by mailing a copy of the order to the premises inspected, Appellant's business address.

Appellant did not present any evidence. In closing, Appellant argued that Appellee did not properly issue the sealing order because Appellee did not establish that the unlicensed activity was more than a de minimis part of Appellant's business activities.[7]

Hearing Decision

On June 24, 2024, the ALJ issued a decision. In her decision, the ALJ ruled that the evidence presented during the hearing demonstrated by a preponderance of the evidence that Appellant was offering cannabis products for sale without a license issued by Appellee.

The ALJ found there was no evidence presented during the hearing that indicated any part of the premises to be sealed is used as a residence or is zoned and lawfully occupied as a residence. The ALJ further found that the unlicensed activity occurring at Appellant's place of business constituted an imminent threat to public health, safety, and welfare because there was evidence of sales and offers to sell cannabis products not tested or labeled in accordance with New York State's Cannabis Law. The ALJ relied on Appellee's evidence, namely the Investigator's testimony. The ALJ noted the testimony along with the photographs depicting a volume and variety of cannabis and cannabis products. The ALJ also considered the presence of the California warning label on numerous items to support the sale or offer to sell products not tested or labeled in accordance with the Cannabis Law. The ALJ also found that there was evidence of unlicensed processing of cannabis occurring on the premises, including the scales and the rolling tray.

Further, the ALJ determined that the unlicensed activity constituted more than a de minimis part of the business activity after considering the variety and volume of cannabis, cannabis products, and those marketed as cannabis observed during the inspection in addition to signage advertising the sale of cannabis. The ALJ's decision did not make any findings with respect to service of the order. The Order to Seal was extended for one year from the date of the decision.

Arguments on Appeal

Appellant submitted their appeal, and the exceptions noted therein on July 17, 2024. In their appeal, Appellant asserts that the ALJ erroneously extended the Order to Seal because there was no evidence presented during the hearing to show that the sealing order was mailed to the owner of the real property where Appellant's business is located. Appellant contends that the mailing to the real

[7] Appellant did not renew this argument or take exception to this portion of the ALJ's findings in the instant appeal.

estate owner pursuant to Cannabis Law § 138-b(10) is a jurisdictional prerequisite that must be established before a sealing order can be enforced, sustained, and/or extended to close a business. Appellant argues that service on the real estate owner, should be established in the same way Appellee has to establish that there was unlicensed activity that posed an imminent threat. Appellant request that the ALJ's decision be reversed, the Order to Seal and the accompanying NOV and Cease Order be vacated and rescinded, and the business permitted to reopen immediately.

Appellee asserts proper and sufficient service was demonstrated by a preponderance of the evidence in accordance with Cannabis Law § 138-b. Appellee contends that Appellant's argument regarding service by mail to the owner of the real estate should be denied in its entirety because Appellee was not required to establish service on the owner of the real estate at the hearing. Appellee argues that Appellant is not the real estate owner, and the real estate owner is not a party to the sealing order issued against Appellant's business. Appellee further argues, that if there was any service defect, the Appellant was not prejudiced in any way. Appellee request the appeal be denied, the ALJ's decision affirmed and the Order to Seal upheld.

OPINION AND REASONING

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 the mandates of Cannabis Law § 138-b. The record in this matter includes evidence of service on Appellant by three methods. Personal service was effectuated on an individual who identified themselves as the store manager, provided identification, signed the certificate of service, and accepted a copy of the order from the Investigator. The record also includes evidence that Appellee conspicuously posted the order at the time of the inspection on the front door of the premises. Service on Appellant by mail was also established by means of an Affirmation of Service by Mailing submitted by Appellee documenting a copy of the order was mailed to Appellant's business address, the premises inspected.

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]). In this matter, there was substantial evidence at the hearing establishing 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]). It requires only that the agency's finding be based upon more than mere surmise, conjecture, speculation, or rumor. (Id. at 180-81). Appellee effectuated three methods of service that were reasonably calculated to provide Appellant, the owner of the business that was the subject of the regulatory inspection and resulting sealing order, with notice of the action and the ability to request a hearing where they have an opportunity to be heard. Indeed, Appellant, through counsel, timely requested an emergency hearing before the OAH and appeared at the scheduled hearing through counsel. While a party's appearance at a hearing should not deem service requisites satisfied, here there was evidence in the record of three methods of service being effectuated on Appellant. Additionally, Appellant has not asserted they did not receive a copy of the order or were otherwise unaware of the proceeding. Appellant's argument, rather, is premised on asserting an objection to the lack of evidence establishing service of the sealing order on the real estate owner. Appellant does not assert to be the real estate owner.

A review of the timing set forth in Cannabis Law § 138-b suggests that the legislature did not intend to require evidence of mailing to the real estate owner at the hearing as a as jurisdictional prerequisite or otherwise necessary element at an emergency hearing on a sealing order. When taken as a whole, the timing set forth in Cannabis Law § 138-b could result in an emergency hearing taking place within five calendar days following the issuance of a sealing order. An order to seal issued pursuant to § 138-b shall state the procedure to request a hearing within seven (7) days.[8] (Cannabis Law § 138-b[2]). The hearing is required to be held within three (3) business days of the request. (Cannabis Law § 138-b[3]). The mailing to the real estate owner shall be sent within five (5) days[9]\ following the issuance of a sealing order. (Cannabis Law § 138-b [10]). This timing would suggest that evidence of mailing to the real estate owner was not intended to be a necessary element established at a hearing on an order to seal issued pursuant to Cannabis Law § 138-b. For example, a hearing could be requested the same day a sealing order is issued and the hearing then held within three business days. This would result in a hearing being held before service to the real estate owner is mandated under the law. Moreover, the Cannabis Law provides separate relief where a real estate owner, or building owner, can file a request to vacate a sealing order with providing information that the issue has been abated. If at any time a respondent vacates the building or premises subject to an order to seal issued by the office or board, or if the building owner provides sufficient proof thereof,

[8] Cannabis Law § 138-b(2) does not specify whether the request must be made within seven (7) calendar days or business days. Whereas, § 138-b(3) specifies that the requested hearing must be held within three (3) business days.
[9] Cannabis Law § 138-b(10) does not specific calendar or business days.

any action or proceeding filed in accordance with these procedures relating to such building or premises shall be withdrawn by the office or the board without prejudice, and any order to seal shall be vacated. (Cannabis Law § 138-b[11]).

Moreover, 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 Lehman Brothers Bank v Hickson, 186 AD3d 1348 [2d Dept. 2020]; Rhoe v Reid, 166 AD3d 919 [2d Dept. 2018]; Rhoades v Westchester County Bd. of Elections, 115 AD3d 958 [2d Dept. 2014]; Wells Fargo Bank, N.A. v Bowie, 89 ad3D 931 [2d Dept. 2011]; Home Sav. of America, F.A. v Gkanios, 233 AD2d 422 [2d Dept. 1996]; Advance Serv. Grp., LLC v. Vision Home Builders LLC, 83 Misc.3d 1230(A), 2024 N.Y. Slip Op. 50843(U) [Sup Ct, Kings County 2024]). Appellant, therefore, cannot raise a challenge based on improper service on behalf of another party, here the real estate owner.

Additionally, there is no merit to the argument that the ALJ lacked jurisdiction to adjudicate the matter due to improper service. The jurisdiction and powers of an administrative body derives from the statute which created it. (Drolet v. New York State Racing & Wagering Bd., 115 Misc. 2d 7, 10 (1982) citing Foy v. Schechter, 1 N.Y.2d 604 [1956]). In the instant matter, 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 OAH through the service of administrative law judges. (9 NYCRR 133.16) Here, the adjudicatory proceeding, requested by the Appellant, was indeed required by statute and thus the OAH had jurisdiction over the subject matter of the proceeding. Appellant appeared through counsel who had a full and meaningful opportunity to cross-examine witnesses and to object to the admission of evidence. (Reda, 136 Misc. 2d. at 61). Any defect in service here was "merely technical" (Ruffin, 15 N.Y.3d at 582). Therefore, contrary to Appellant's arguments, the Board finds that the Order to Seal was not erroneously extended.

While the ALJ should have made findings of fact and conclusions of law as to the methods of service established by Appellee, the Board finds that, here, the failure to do so is not reversible error. Appellant did not raise the lack of findings and conclusions of law regarding service in the instant appeal as an exception to the ALJ's decision. Rather, Appellant argues that the Order to Seal was erroneously extended because the Appellee failed to establish proper and sufficient service in accordance with Cannabis Law § 138-b by not establishing service by mail on the real estate owner; an argument Appellant raises for the first time on appeal. Appellant did not object or raise any challenge to service to the ALJ during the hearing and, therefore, cannot now raise it for the first time on appeal. (see, Schissler v. Athens Associates, 19 A.D.3d 979 [3d Dept. 2005]; Bonner v. Lee, 255 A.D.2d 1005 [4th Dept. 1998]; Kocher v. Baird, 174 A.D.2d 1042 [4th Dept. 1991]). Appellant has not asserted they did not receive a copy of the order or were otherwise unaware of the action. At any rate, the record on appeal contains substantial evidence that supports a finding that service was

effectuated on Appellant. Based on the totality of these circumstances, the lack of findings regarding service in the decision does not require reversal.

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, and Appellant's appeal is denied.

The foregoing constitutes the final decision of the Board.

DATED: February 14, 2025