

STATE OF NEW YORK  
OFFICE OF CANNABIS MANAGEMENT  
CANNABIS CONTROL BOARD

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IN THE MATTER OF

BMILLZ LLC,

APPELLANT-RESPONDENT,

DECISION ON APPEAL

-against-

Complaint Nos.:

NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT,

117 2023 0621 0026

APPELLEE-PETITIONER.

112 2023 0718 0055

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Application by Appellant-Respondent, BMillz LLC (“Appellant”), appealing from a decision and order of the Office of Administrative Hearings (“OAH”) issued after a hearing in which the presiding Administrative Law Judge (“ALJ”) determined Appellant was in violation of the New York State Cannabis Law (“Cannabis Law”).

Appellee-Petitioner New York State Office of Cannabis Management (“OCM”) conducted two separate regulatory inspections of Appellant’s place of business within approximately twenty-seven (27) days. After each inspection, Appellee issued a Notice of Violation (“NOV”) and an Order to Cease Unlicensed Activity (“Cease Order”) for violating Cannabis Law Article 6 §§ 125 and 132. The violation matters were consolidated, and a virtual hearing was conducted. After the hearing was held, the presiding ALJ issued a decision. The ALJ determined that Appellant was in violation of the Cannabis Law for offering for sale cannabis and cannabis products without a license, registration, or permit to do so and ordered Appellant to pay civil penalties.

Appellant takes exception to the ALJ’s decision and has submitted the instant appeal, and the exceptions noted therein to the Cannabis Control Board (“Board”) for review pursuant to Cannabis Law §§ 10(18) and 17(8) and Title 9 of the New York Codes, Rules and Regulations (“NYCRR”) § 133.25.<sup>1</sup>

BACKGROUND

In March 2021, New York enacted the Marihuana Regulation and Taxation Act (“MRTA”), legalizing the recreational adult use of marijuana and creating 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

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<sup>1</sup> Title 9 of the NYCRR was amended after Appellant submitted the instant appeal. Actions Relating to Unlicensed Activities was revised and renumbered. At the time Appellant filed the instant appeal it was cited at 9 NYCRR § 133.23. It is currently cited at 9 NYCRR 133.25 and will be cited as such throughout this decision.

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<sup>2</sup>, 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]).

Cannabis Law § 125 states that “[n]o person<sup>3</sup> shall cultivate, process, distribute for sale or sell at wholesale or retail or deliver to consumers any cannabis, cannabis product<sup>4</sup>, medical cannabis or cannabinoid<sup>5</sup> 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. Cannabis Law Article 1 § 3 (46) defines a “retail sale” as “to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell, made by any licensed person, whether principal, proprietor, agent, or employee, of any cannabis, cannabis product, cannabinoid hemp or hemp extract product to a cannabis consumer for any purpose other than resale.” Cannabis Law Article 1 § 3 (46-a) defines an “indirect retail sale” as “to give any cannabis, cannabis product, cannabinoid hemp, hemp extract product, or any product marketed or labeled as such by any person engaging in a commercial business venture or otherwise providing or offering goods or services to the general public for remuneration for such goods and/or services, where any such cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product

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<sup>2</sup> 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 of not more than three-tenths of a percent on a dry weight basis. (Cannabis Law § 3 [27]). Tetrahydrocannabinol concentration (“THC”) means Delta-9-THC; Delta-8-THC; Delta-10-THC and the optical isomer of such substances.” (Cannabis Law § 3[52]).

<sup>3</sup> 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.”

<sup>4</sup> 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]).

<sup>5</sup> Cannabinoid is defined as “the phytocannabinoids found in hemp and does not include synthetic cannabinoids as that term is defined in subdivision (g) of schedule I of section thirty-three hundred six of the public health law.” *Cannabis Law*, § 3(2). “Phytocannabinoid” means any of the chemical compounds, excluding terpenes or any other compounds set forth by the Office, that are the active principles of *cannabis sativa*, including, but not limited to, THC and cannabidiol (CBD), and does not include synthetic cannabinoids as that term is defined in subdivision (g) of schedule I of section thirty-three hundred six of the Public Health Law. *9 NYCRR § 128.1(r)*.

marketed or labeled as such, accompanies (a) the sale of any tangible or intangible property; or (b) the provision of any service, including but not limited to entry to a venue or event, or a benefit of a membership to a club, association, or other organization.”

Appellee is authorized to conduct regulatory inspections 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 without obtaining the appropriate registration, license, or permit and order that such person cease the prohibited conduct. (Cannabis Law §§ 11[3][a] and 138-a[1]). An administrative proceeding may be initiated to enforce the order to cease unlicensed activity and to seek a penalty be assessed for the violation. (Cannabis Law §§ 138-a[3]; 9 NYCRR § 133.25[c]<sup>6</sup>). 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]<sup>7</sup>). Within thirty (30) calendar days of receipt 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]). The failure of a party to respond to an appeal cannot be deemed a waiver or admission. (9 NYCRR § 133.25[k]).

In this matter, Appellant filed the instant appeal, and the exceptions noted therein on December 9, 2023, approximately thirty-two (32) days after the issuance of the ALJ’s decision.<sup>8</sup> Appellee did not file an opposition.

#### ISSUES ON APPEAL

Whether the ALJ’s decision was untimely, whether the enforcement against Appellant’s business and the assessment of a monetary penalty against Appellant’s business was arbitrary and capricious and violative of the Eight Amendment of the United States Constitution and the New York State Constitution Article I § 5.

#### 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.

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<sup>6</sup> Cited at 9 NYCRR § 133.23(a) when Appellant submitted the instant appeal.

<sup>7</sup> Cited at 9 NYCRR § 133.23(c)(4) when Appellant submitted the instant appeal.

<sup>8</sup> Although Appellant’s appeal was not submitted within 30 calendar days of the issuance and service by email of the ALJ’s decision, Appellant’s counsel did send a request for an extension, by email on December 7, 2023. The instant appeal was submitted two days after the request for the extension was made and indicated was on consent from Appellee. Having no opposition from Appellee and no response from the ALJ to the request as part of the record on appeal, the Board will proceed with the review of Appellant’s appeal and the exceptions noted therein.

### Regulatory Inspections

Appellant conducts business at 122 Washington Avenue, Endicott, New York. On June 21, 2023, Appellee, conducted a regulatory inspection, Inspection 117 2023 0621 0026, of Appellant's business at the above location. The inspection was conducted by members of Appellee's Enforcement Unit in addition to members of the New York State Department of Taxation and Finance ("DTF") Enforcement Unit. Based on observations made during the inspection, Appellee issued a NOV and Cease Order because Appellant was in engaging in the unlicensed sales of cannabis in violation of Cannabis Law §§ 125 and 132. Appellee also issued a Notice of Hearing with a scheduled hearing date of June 28, 2023.

On July 18, 2023, a second inspection, Inspection 112 2023 0718 0055, of Appellant's business was conducted by Appellee's Enforcement Unit and members of DTF's Enforcement Unit. Appellee determined that Appellant was still engaging in the unlicensed sale of cannabis based on observations during the reinspection. As a result, a second NOV and Cease Order was issued to Appellant for violating Cannabis Law §§ 125 and 132.

### Administrative Hearing

The hearing was held on August 4, 2023. At the hearing, both Appellant and Appellee were represented by counsel. Pursuant to 9 NYCRR § 133.18(b)(1)<sup>9</sup>, for purposes of judicial economy, the ALJ consolidated the matters for a joint hearing because they both involved a common question of law, fact, and common parties.

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Appellee presented evidence, including the testimony of one witness and exhibits admitted into evidence. OCM Investigative Specialist James Schlipmann ("Inspector Schlipmann") testified that members of the OCM and DTF Enforcement Units were also accompanied by one or two members of the Endicott Police Department, but the officers did not take part in the inspection and remained outside of Appellant's business. He also testified that he was familiar with BMillzz based upon prior interactions with other BMillzz sites in which Cease and Desist Letters had been issued by Appellee. At the time of this inspection, he testified to entering the store during normal business hours, observed cannabis products on display and commenced a regulatory inspection of the premises. Prior to the regulatory inspection, he testified it was verified that Appellant was not in possession of a registration, license or permit to sell or store cannabis. Inspector Schlipmann further testified there was one individual in the store, Eboni Bryant, who identified themselves as the store manager.

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<sup>9</sup> Formerly cited at 9 NYCRR § 133.16(4)(b)(1)

Inspector Schlipmann testified that he did observe a few clothing items during the inspection that appeared to be for sale. He observed some socks, sneakers, and a minimal number of t-shirts. Inspector Schlipmann identified numerous photograph exhibits taken during the regulatory inspection. The photographs included a variety of items that were identified as cannabis products on display in the store. Inspector Schlipmann testified to a variety of products including cannabis edibles, concentrates, and pre-rolls. He also testified to observing items with prices, a price list for other products, and other marketing material for cannabis products including signage that read “Daily Deals.” At the conclusion of the inspection, Inspector Schlipmann prepared the NOV and Cease order and provided a copy to the Ms. Bryant, who signed the NOV. Inspector Schlipmann testified he then affixed a copy of the NOV and a warning sticker to the front of Appellant’s business.

Appellant called two witnesses, Eboni Bryant and Bartholomew Miller, Jr. Ms. Bryant identified herself as the store manager. Ms. Bryant testified that she was the only store employee at the location during the inspection. Ms. Bryant testified that the store sold a few different products, some of which included a gift of cannabis product at the time of purchase. Ms. Bryant testified that prior to the inspection, the Appellant had received a Cease-and-Desist letter a few months before the regulatory inspection. Ms. Bryant also testified that during the inspection, there were a number of inspectors in the store and two police officers standing in front of the business. She further testified that she was searched and so was her bag when it was brought to her. Ms. Bryant testified she did sign and accept a copy of the NOV and Cease Order that resulted from this inspection.

Bartholomew Miller, Jr. also testified on behalf of Appellant. Mr. Miller testified that he is the owner of BMillz and described his business as having a gifting model business. He testified that after New York legalized marijuana he did research on cannabis businesses in other states that already had existing adult use markets and that is where he learned of the gifting model. Mr. Miller testified that he believed this was legal and that he paid taxes similar to other gift shops because he was not selling cannabis. Mr. Miller described the cannabis products distributed by the store as gifts or promotional items following the purchase of other items such as patches, stickers and t-shirts. He further testified that he was not engaging in indirect sales because he gives away the cannabis product as a promotional item in furtherance of his business. He also testified that BMillz had previously offered a cannabis product with the purchase of a t-shirt, then a sticker, and currently with custom patches which he designs. According to Mr. Miller, the cannabis product offered with the purchase is anything that the buyer chooses from the box which is offered to people 21 years or older. He testified that price lists and other marketing materials throughout the store were not related to cannabis sales, but instead related to the other merchandise sold at his

store.

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Appellee introduced evidence and had one witness appear on its behalf, OCM Investigative Specialist William McKay (“Inspector McKay”). Inspector McKay testified that he conducted a full regulatory inspection upon his arrival at the location, beginning with an interview of the individual in the store, Autumn Walters, who identified herself as an employee. Inspector McKay testified that Ms. Walters responded affirmatively to his questions about the sale of cannabis products, and she indicated that Appellant was selling many different forms of cannabis. Inspector McKay also identified numerous photographs of the various types of cannabis and cannabis products found during the inspection. Inspector McKay testified that he completed the NOV and Cease Order documenting the inspection. During the hearing, Inspector McKay acknowledged that he had made an error when recording the address of the business on the NOV. He further testified that a copy was given to Ms. Walters and a copy affixed to the store front along with a warning sticker.

Appellant called one witness, Bartholomew Miller, Jr. Mr. Miller testified that he was not present for the July 18, 2023, inspection, but was on the phone with Ms. Walters while the inspection was taking place. Mr. Miller testified that he did not expect a second inspection before the scheduled hearing date resulting from the first inspection. He acknowledged that he had read the language of the NOV and warning sticker issued June 21, 2023, which ordered the business to immediately cease the unlicensed and unlawful sales of cannabis products. However, he continued operating his business as usual because he believed that he had a right to be heard in court before any charges were sustained. He testified that between the June 21, 2023, inspection and the July 18, 2023, inspection, he continued business as usual and gifting cannabis because it was not financially feasible for him to close the business. He further testified that if he was given the opportunity to obtain a cannabis retail license, he would be interested in doing so.

ALJ decision

On November 7, 2023, the ALJ issued a decision. The ALJ’s decision ruled upon the proposed finding of facts and made factual findings regarding the evidence presented.

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The ALJ held the NOV was properly served and indicated the date of the hearing. The ALJ disagreed with Appellant’s argument that he detrimentally relied on cannabis gifting legislation from states other than New York. The ALJ found Appellant engaged in the direct sale of cannabis and cannabis products. While Appellant argued its business was giving out cannabis as promotional gifts, the ALJ found that the business operated as a direct retail seller. In reaching this

determination, the ALJ indicated the finding was based upon the totality of the testimony and evidence. The ALJ considered and weighed the evidence of price lists, display cases of cannabis products, existence of marketing materials, and the testimony of Appellant's witnesses. The ALJ found Appellee's witness credibly testified to observing cannabis products on display and that the Appellant's witnesses further supported the finding that cannabis products were offered for retail sale.

Appellant was ordered to pay a \$10,000.00 fine for the sale of illicit cannabis and cannabis products without a license on June 21, 2023, pursuant to Cannabis Law Article 6 § 132(1)(a).

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The ALJ rejected Respondent's claim that he was denied due process based upon the second regulatory inspection having occurred prior to the hearing regarding the regulatory inspection which occurred on June 21, 2023. The ALJ reasoned that the Appellant had testified that he was aware of the language of the NOV, Cease Order, and the warning sticker which directed him to cease the unlicensed cannabis sale. The ALJ also rejected Appellant's argument that Cannabis Law § 16-a was applicable to the regulatory inspections that occurred. The ALJ noted that Cannabis Law § 16-a sets forth the process by which an action to enjoin the unlicensed sale of cannabis can be brought in the New York Supreme Court rather than an administrative hearing alleging a violation and seeking penalties, such as the instant proceeding. The ALJ further rejected Appellant's argument that the regulatory inspections are violative of the constitution as being beyond the jurisdiction of an ALJ to determine the constitutionality of statutes in an administrative proceeding and cited relevant caselaw.

The ALJ found the testimony of Appellee's witness credible and that the error with respect to the address noted on the NOV was a scrivener's error. Additionally, the ALJ found Appellant's testimony confirmed the regulatory inspection occurred at his business. The ALJ further found Appellant did not possess license issued by Appellee to offer cannabis products for sale. The testimony and evidence clearly established that cannabis products were displayed and that there were several price lists and inventory logs documenting the sale of cannabis products and not stickers, patches, or clothing items. Moreover, the ALJ relied on the testimony of Appellant that he continued to operate business as normal gifting cannabis.

Appellant was ordered to pay a \$540,000.00 fine in accordance with Cannabis Law § 132(1)(a), for the continued sale of illicit cannabis and cannabis products without a license for the 27 days beginning June 22, 2023, through July 2023.

### Arguments on Appeal

In their appeal, Appellant requests that the ALJ's decision not be confirmed and that the penalties imposed be 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 was untimely and inconsistent with other administrative law procedures. Appellant points to the New York State Administrative Procedure Act ("SAPA") and other state agencies for their timelines. Appellant further asserts that OCM's enforcement is arbitrary and capricious. Appellant also argues that the penalty imposed by the ALJ is arbitrary and capricious because other similarly situated businesses had their violations withdrawn. Further, Appellant argues, that the penalty imposed is an excessive fine and violative of the Eighth Amendment of the United States Constitution.

Appellee did not file an opposition to the appeal. The failure of a party to respond to an appeal cannot be deemed a waiver or admission. 9 NYCRR § 133.25(k).

### OPINION AND REASONING

The Cannabis Law and the regulations are silent on the length of time that an ALJ must issue a decision. Title 9 NYCRR § 133.17 provides the procedure for an ALJ to enter a decision but does not offer guidance on timing. Appellant acknowledges the Cannabis Law and regulations are silent on the issue of timing and instead looks to the timing set forth in the SAPA and those in place with other state administrative agencies. SAPA does not establish a time limit in which an agency must render a decision. (see SAPA Law § 307). While Appellant looks to other agencies and 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. Accordingly, the Board finds that the argument is without merit and that the ALJ's decision was not untimely.

Appellant further argues that Appellee's enforcement practices are arbitrary and capricious because other unlicensed cannabis shops had their violations withdrawn unlike Appellant. Additionally, Appellant argues the assessment of both the \$10,000 penalty and the \$540,000 penalty by the ALJ was arbitrary and capricious. The Board disagrees with this argument and finds that the penalties assessed for the two inspections and resulting violations were 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]). In this matter, the ALJ relied on the investigator’s testimony and photograph exhibits documenting various cannabis and cannabis products were on display and evidence that Appellant was advertising pricing. Moreover, in addition to Appellee’s evidence, the ALJ relied on Appellant’s witnesses’ testimony admitting to offering cannabis and cannabis products. Thus, the Board finds that 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, Appellant misplaces reliance on Lynch v. N.Y.C. Civilian Complaint Review Bd, 206 A.D.3d558 (1<sup>st</sup> Dept. 2022) to support its argument that Appellee’s enforcement and the ALJ’s decision to assess a penalty were arbitrary and capricious. Lynch was not a challenge to an ALJ determination, but instead an Article 78 proceeding challenging a municipal rule in New York City. 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 does not deny the violations, but instead raises policy and constitutional arguments regarding the implementation and enforcement practices of Appellee. To the extent Appellant asserts other policy arguments, these arguments are also not based in the facts or evidence before the ALJ and thus beyond the scope of the administrative proceeding.

A review of the record demonstrates that the ALJ’s determination and the penalties imposed were the result of the evidence presented at the hearing, was within their authority and was not excessive or shocking to one’s sense of fairness. (Cannabis Law § 132 and 9 NYCRR § 133.21[a]). 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 [3<sup>rd</sup> 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, there was substantial evidence in the record to establish Appellant was offering a variety of cannabis products and products marketed as cannabis including cannabis flower, cannabis pre-rolls, cannabis edibles, and cannabis concentrates at the time in which both regulatory inspections were conducted. As noted by the ALJ, Appellant was aware of the first inspection and the resulting issuance of the NOV and Cease Order along with the warning sticker placed upon his business exterior. Moreover, the penalties assessed is in accordance with the provisions of the

Cannabis Law as set forth by the legislature. Cannabis Law § 132(a)(1) provides that when a person was is ordered to cease the sale or offers to sell cannabis and continues such violation after receiving the cease order, such as Appellant, such person may be assessed a civil penalty of no more than twenty thousand dollars per day for each day during which such violation continues. The ALJ in this matter considered the weighed the evidence, including Appellant’s own testimony admitting the continued unlicensed activity between the date of the first inspection and the date of the second inspection, a total of twenty-seven (27) days. Accordingly, the ALJ found that Appellant continued the unlicensed sale of cannabis and cannabis products for twenty-seven days and imposed a penalty of twenty thousand dollars per day pursuant to Cannabis Law § 132(1)(a). In addition, the ALJ properly assessed a ten-thousand-dollar fine penalty for the first inspection and resulting violation. As such, the Board finds that the ALJ considered the nature of the violations and assessed penalties that were proportionate to the violations in accordance with the law. The penalties imposed were not so disproportionate to the offense under the circumstances as to be shocking to one's sense of fairness.

#### CONCLUSION

Based on the foregoing, the Board denies Appellant’s appeal and affirms the decision of the ALJ, and the penalties assessed to the Appellant.

The foregoing constitutes the final decision of the Board.

DATED:        March 20, 2025