STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
CANNABIS CONTROL BOARD

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BRECKEN GOLD ATHLETICS NYC LLC d/b/a
BRECKENRIDGE HEMP COMPANY,

APPELLANT-RESPONDENT,

-against-

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

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DECISION ON APPEAL

INSPECTION NO.:
204 2024 0716 0023[1]

Appellant-Respondent Brecken Gold Athletics NYC LLC d/b/a Breckenridge Hemp Company ("Appellant") submitted the instant appeal, and the exceptions noted therein, to the Cannabis Control Board ("Board") for review pursuant to Title 9 of the New York Codes, Rules, and Regulations ("NYCRR") § 133.22.

Appellee-Petitioner New York State Office of Cannabis Management ("OCM") conducted a regulatory inspection of Appellant's place of business and determined Appellant was engaging in unlicensed activity in violation of the Cannabis Law and implementing regulations. Appellee-Petitioner OCM ("Appellee") issued a Notice of Violation ("NOV") and an Order to Cease Unlicensed Activity ("Cease Order"). Appellant requested a hearing with the Office of Administrative Hearings ("OAH") wherein the presiding Administrative Law Judge ("ALJ") issued a decision ordering Appellant to pay a civil penalty.

BACKGROUND

In March 2021, New York enacted the Marihuana Regulation and Taxation Act ("MRTA") legalizing adult-use cannabis and implementing a regulatory framework within the State of New York. The MRTA included enactment of Chapter 7-A of the New York State Consolidated Laws, known as the Cannabis Law. (Cannabis Law § 1). As part of the regulatory framework, the legislature found and declared that it is in the best interest of the state to regulate medical cannabis, adult-use cannabis, cannabinoid hemp and hemp extracts under independent entities, known as the Cannabis Control Board ("Board") and the Office of Cannabis Management, OCM. (Cannabis Law § 2).

Under the Cannabis Law, the term cannabis is used instead of marijuana. (Cannabis Law § 2). Cannabis is defined as all parts of the plant of the genus Cannabis, whether growing or not, including its seeds, resin, and any derivative, mixture, or extract. (Cannabis Law § 3[5]). The cannabis plant

[1] The Decision in this matter was updated on August 6, 2025, to correct a typographical error that was made with respect to the inspection number as listed in the caption on page 1. Only the Decision caption was revised to reflect the correct inspection number, 204 2024 0716 0023, which was listed in the factual findings of the Decision on page 5.

produces 100 different natural cannabinoids[2].[3] The most common cannabinoids in the cannabis plant are tetrahydrocannabinol[4] ("THC"), the principal psychoactive compound in cannabis, and cannabidiol ("CBD").[5] CBD is one of the naturally occurring phytocannabinoids found in hemp and in all cannabis plant strains.[6] While hemp is the same genus and species of the Cannabis plant as adult-use or medical cannabis, it contains lower levels of delta-9 THC, the psychoactive compound.[7]

The Cannabis Law defines hemp as the plant Cannabis sativa L. and any part of such plant, whether growing or not, with a delta-9 THC concentration of not more than three-tenths of a percent (0.3%) on a dry weight basis.[8] (Cannabis Law § 3 [27]). Cannabinoid hemp products include "any hemp, or any product processed or derived from hemp, that is used for human consumption provided that when such product is packaged or offered for retail sale to a consumer, it shall not have a concentration of more than three-tenths of a percent (0.3%) delta-9 THC." (Cannabis Law, §§ 3[3] and 90[2]). The licensing and production of the cannabinoid hemp program are coordinated between the New York State Department of Agriculture and Markets and the Appellee OCM.[9] The Department of Agriculture and Markets regulates hemp cultivation and hemp used exclusively for industrial or food purposes. OCM regulates hemp that is used or marketed for its cannabinoid content, such as CBD, through its Cannabinoid Hemp program.

Pursuant to Cannabis Law § 93, retailers selling cannabinoid hemp, in final form to consumers within the state, shall be required to obtain a cannabinoid hemp retailer license from the Board. The Board also issues cannabinoid hemp processor licenses authorizing the processing cannabinoid hemp or hemp extract used for human consumption, whether in intermediate or final form. (Cannabis Law § 92). Pursuant to Cannabis Law § 110, the Board shall have the authority to issue temporary permits for carrying on activity related to cannabinoid hemp, hemp extract and products derived therefrom, licensed pursuant to the Cannabis Law. The Board also has authority to promulgate rules and regulations necessary to implement the licensing, processing, distribution, marketing, transportation, and sale of cannabinoid hemp and hemp extracts used for human consumption. (Cannabis Law § 10[4] and §§ 91 and 93[2]). In July 2023 the Board approved Title 9 NYCRR Part 114, Cannabinoid Hemp Emergency Regulations to be filed for public comment and issued a brief Emergency Justification to support the action. The proposed regulations, Title 9 NYCRR Part 114, set forth regulations governing the Cannabinoid Hemp program. The Board found emergency action were

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[2] "Cannabinoid" means 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 10[2] and 90[1]).

[3] OCM Adult Use Information: *What's Cannabis*, https://cannabis.ny.gov/adult-use-information (last visited July 2025).

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

[5] OCM Adult Use Information: *What Is THC?* https://cannabis.ny.gov/adult-use-information (last visited July 2025)

[6] OCM Hemp: Supporting Agricultural Innovation. *What is CBD*. https://cannabis.ny.gov/hemp (last visited July 2025)

[7] OCM Hemp: Supporting Agricultural Innovation. *What is Hemp*. https://cannabis.ny.gov/hemp (last visited July 2025)

[8] This definition is consistent with the definition of hemp under the Agriculture Improvement Act of 2018 ("Farm Bill"); United States Code Title 7 § 1639o(1).

[9] OCM Hemp: Supporting Agricultural Innovation. *Overview*, https://cannabis.ny.gov/hemp (last visited July 2025)

necessary for the protection of the public health, safety, and general welfare from the immediate threat posed by intoxicating cannabinoid hemp products. The Board further found the emergency regulations necessary to immediately allow the Appellee to address current challenges with the processing and retail sale of cannabinoid hemp products in New York State, including but not limited to, limiting the THC content of these products and ensuring consumers are not misled by product marketing and ambiguous labeling.[10] Part 114 was adopted and became effective December 13, 2023.

A Cannabinoid Hemp Retail licensee shall only sell cannabinoid hemp products that, inter alia, are manufactured, packaged, labeled and tested in accordance with Part 114. Retailers of cannabinoid hemp and extracts are authorized to sell cannabis products, but only those that contain a minimal amount, 0.3% or less delta-9 THC. (9 NYCRR §§ 114.14, 114.16; see Cannabis Law § 90[2]). Cannabinoid hemp products distributed or offered for retail sale in New York State shall not be in the form of an injectable, inhaler, product including cigarette, cigar, or pre-roll. (§ 114.8[a][6]). Pursuant to the packaging and labeling standards in section 114.9, cannabinoid hemp product packaging shall not display any content, or be labeled in any manner that causes a reasonable consumer to believe that a cannabinoid hemp product is cannabis, or medical cannabis, or that a licensee is authorized to sell or dispense cannabis, or medical cannabis, as those terms are defined in article 1 of the Cannabis Law (§ 114.9[h][8]); depict cannabis products or paraphernalia (§ 114.9[h][9]); or violate any other prohibitions as set out by the office. (9 NYCRR § 114.9[h][11]). Additionally, advertisements for cannabinoid hemp products or a cannabinoid hemp retailer shall not lead a reasonable consumer to believe that a cannabinoid hemp product is cannabis, or that a licensee is authorized to sell or dispense cannabis as defined in section 3 of the Cannabis Law. (§ 114.12[a][3]).

Title 9 NYCRR Section 114.18 authorizes OCM to issue cannabinoid permits expressly authorizing a permittee to conduct one or more of the following activities: (1) distribute cannabinoid hemp products manufactured out of state, to cannabinoid hemp retailers within New York State; (2) deliver cannabinoid hemp products from a cannabinoid hemp retailer to consumers; (3) sell at retail cannabinoid hemp products for a limited duration; (4) continue operations for persons holding a valid CBD processor research partnership agreement with the New York State Department of Agriculture and Markets; (5) any other activity as determined by the Cannabis Control Board.

Cannabis Law § 125 states that "[n]o person shall cultivate, process, distribute for sale or sell at wholesale or retail or deliver to consumers any cannabis, cannabis product[11], 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

[10] Cannabis Control Board Meetings, Full Board Meeting on July 19, 2023, Part 114 Emergency Justification, https://cannabis.ny.gov/cannabis-control-board-meetings (last visited July 2025).

[11] Cannabis products, or adult-use cannabis products, 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]).

law. Under the Cannabis Law, "person" is broadly defined as "an individual, institution, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other entity." (Cannabis Law § 3[40-a]). Appellee is authorized to conduct, without notice, site visits and inspections, of any person, any premises, or place of business[12] 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 §§ 11[3]; 9 NYCRR §§ 133.25[a]). Appellee is also permitted to conduct a regulatory inspection of any place of business any registered, licensed or permitted place of business where adult-use cannabis, cannabinoid hemp, hemp extract products, or any products marketed or labeled as such, are cultivated, processed, stored, distributed or sold. (Cannabis Law § 11[5]; 9 NYCRR § 133.3.[a]). Title 9 NYCRR Part 114 also authorizes Appellee to inspect any retail location offering cannabinoid hemp products. (9 NYCRR § 114.11[f]).

In response to a violation of the Cannabis Law, and related regulations, including any activity outside the scope of the license, registration, or permit, Appellee is authorized to take various actions, including but not limited to, issuing a notice of violation, civil penalties, fees, suspension, cancellation, or revocation, seizure of product, and a stop order to cease unlicensed activity. (Cannabis Law §§ 132 and 138-a; 9 NYCRR §§ 133.4[c]; 133.25[b]). Unlicensed activity is defined as "any activity, within the authority of the office or the board to regulate, for which a person should have obtained a license, registration, or permit issued by the office or board, but failed to do the same. Additionally, any activity beyond the scope of any license, registration, or permit issued by the office or board may be considered unlicensed activity." (9NYCRR § 133.1[i]). Cannabis Law § 132(1)(a) prescribes penalties for "[a]ny person who cultivates for sale, offers to sell, or sells cannabis, cannabis products, medical cannabis, or any product marketed or labeled as such, without having an appropriate registration, license or permit therefor[.]" Furthermore, the penalties provided for in subdivision one of section 132 may be recovered by the attorney general on behalf of the board or office in an action or proceeding brought pursuant to section 138-a of the Cannabis Law. (Cannabis Law § 132[7]).

Appellee is expressly authorized to "seize any cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such found in the possession of a person engaged" in unlawful cultivation, processing, distributing or selling of cannabis, cannabis products, cannabinoid hemp, or hemp extract. (Cannabis Law § 138-a[2]). Appellee is also permitted to seize any items containing cannabis, cannabis samples, cannabis products, cannabinoid hemp, cannabinoid hemp samples, or cannabinoid hemp products, or any products marketed and labeled as such which are in violation of the Cannabis Law, or its applicable regulations, provided the licensee is notified, a signed receipt issued, including date and time of the inspection, the items seized, their

[12] "Place 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 for the activity described herein. (Cannabis Law §§ 11[3]).

approximate weight, quantity, and physical description, and documentation of the chain of custody of seized items is kept; and upon determination that the detention of the items seized are no longer necessary to ensure compliance with applicable regulations, the licensee shall be notified of that determination and the items may be returned. (9 NYCRR § 133.3[i]).

After the issuance of a NOV and Cease Order by Appellee, any party may request a hearing, or administrative proceeding, to enforce a Cease Order and order a financial penalty. (9 NYCRR §§ 133.10[a]; 133.25[i]). Pursuant to Title 9 NYCRR § 133.16, the OAH, through the service of ALJs, shall conduct all adjudicatory proceedings which devolve upon the Board by requirement of statute. The ALJ's responsibilities include, but are not limited to, reviewing the statement of charges and issuing decisions after hearings and on motions. (9 NYCRR § 133.17[a]). The ALJ shall prepare the decision which shall include the findings of facts, legal conclusions, and a penalty, if any. (9 NYCRR § 133.21[a]). Within 30 calendar days of the date a copy of the decision of the ALJ is sent to all parties, any party may submit exceptions to the decision for review by the Board. (9 NYCRR § 133.22[a]).

QUESTIONS PRESENTED ON APPEAL

Whether a licensed cannabinoid hemp retailer is subject to Article 6 of the Cannabis Law and subject to seizure by OCM during a regulatory inspection? Whether it was an error of law to impose a civil penalty for unlicensed activity pursuant to Cannabis Law 132(1)(a) on a cannabinoid hemp retailer? Whether there was sufficient evidence establishing unlicensed activity as defined in the Cannabis Law? Whether the ALJ retroactively applied regulatory standards from guidance issued after the inspection? Whether the ALJ shifted the burden of proof to Appellant in violation of due process?

FINDINGS OF FACT

Regulatory Inspection

Appellant conducts business as Brecken Gold Athletics NYC LLC d/b/a Breckenridge Hemp Company. The address of Appellant's business is 59 W 31st Street, New York, NY. On July 16, 2024, Appellee, along with members of the New York State Department of Taxation and Finance ("DTF"), conducted a regulatory inspection, No. 204202407160023, of Appellant's business pursuant to Cannabis Law § 138-a and 9 NYCRR § 133.25(a)[13]. Based on observations made during the inspection, Appellee issued a NOV alleging violations of the Cannabis Law, including sections 125 and 132, and a Cease Order pursuant to Cannabis Law § 138-a(1) and 9 NYCRR § 133.25(c).

Appellant requested a hearing to contest the NOV on or about July 17, 2024.

Administrative Proceedings

A virtual hearing took place on October 7, 2024, before Administrative Law Judge (ALJ)

[13] The inspection was assisted by members of the New York State Police and by the Department of Corrections and Community Supervision by securing the location premises. They did not participate in conducting the inspection and remained outside during the inspection.

Lavery. Both Appellant and Appellee were represented by counsel.

Appellee presented testimony and photograph exhibits in support of its argument that Appellant was engaged in unlicensed activity in violation of the Cannabis Law. Appellee's witness, OCM Investigator Jessica Jenkins, testified to being present and taking part in the inspection of Appellant's business. Investigator Jenkins testified that the regulatory inspection was scheduled after Appellee received information that Appellant was selling cannabis from the business premises. She identified the NOV and Cease Order, issued to Appellant following the inspection, and testified to having prepared the document. Investigator Jenkins testified that that Appellant held a cannabinoid hemp license issued by Appellee but did not have an adult-use retail license for the sale of cannabis, cannabis products, products marketed or labeled as such, or any products in the form of pre-rolls, cigarettes or cigars.

During the inspection, Investigator Jenkins observed various products for sale that did not conform to the requirements for cannabinoid hemp and thus were beyond the scope of products that could be sold with a cannabinoid hemp retailer license. She described the products and identified numerous photographs depicting the products observed during the inspection. One brand of product observed, and photographed, was an edible product that was marketed and labeled as "Muffins New York Cannabis." There were several types of the brand in different brightly colored packages. There were also a volume of each type of the product on display on the retail floor and additional packages in the basement of the location.[14] The evidence further included testimony and photographs of cannabinoid hemp products that were designed to facilitate smoking in violation of cannabinoid hemp requirements, evidence of hemp products that were not labeled in accordance with packaging requirements, including bright colors that could be attractive to individuals under 21 years of age, and evidence of a variety of hemp products that exceeded permissible amounts of THC, and evidence of products that had stickers placed over, thereby covering, warning labels and dosage information. These products were observed in various places, including locations on display, or visible to the public, on the sales floor. Investigator Jenkins testified that Appellant was not licensed to offer the products. She testified that based on her training and experience, she believed the products observed were being offered for sale. Based on the observations during the inspection, a NOV and Cease Order was issued to Appellant because their cannabinoid hemp retail license did not authorize the sale of products marketed or labeled as cannabis nor the sale of products exceeding maximum THC amounts permitted in cannabinoid hemp products. Investigator Jenkins identified the NOV and Cease Order and testified to having prepared the documents. She further admitted that when preparing the document, she did not include the Muffins New York Cannabis edibles as one of the

[14] During the hearing Appellant referred to the inspection as a "raid," but did not raise a constitutional objection, or any objection, at the hearing or on appeal, to the authority of Appellee to conduct a regulatory inspection of Appellant's business premises or the scope of such inspection. Appellant raised objections to Appellee acting pursuant to Cannabis Law 138-a, namely seizing products and seeking a civil penalty, against a cannabinoid hemp retail licensee, which Appellant has raised as an exception to the ALJ's decision in the instant appeal.

products observed during the inspection and that such omission was simply an oversight.

Mr. Tyler Lehmann testified on behalf of Appellant. Mr. Lehman testified he was the owner of the business and was in possession of a cannabinoid hemp retail license and a cannabinoid hemp distributor permit, both issued by Appellee. Mr. Lehman testified that he sells the non-compliant products observed with his distributor permit online to customers outside New York State. They receive approximately 10 -20 orders a day that are packaged at the premises inspected and left at the door where the United States Postal Service picks them up for delivery. He further testified that the pre-rolls observed and photographed are processed and packaged onsite at the business premises inspected, but the hemp is not grown in New York. Mr. Lehman also testified that the Muffins New York Cannabis edible products observed during the inspection were manufactured in the State of Colorado. Mr. Lehman testified that he has retail licenses and a manufacturer license in Colorado. A copy of a Farm Products Dealer License and a License to Operate a Hemp Establishment issued to Brecken Gold Hemp d/b/a Breckenridge Hemp Co. were identified by Mr. Lehman and entered into evidence. Mr. Lehman admitted the items observed and photographed during the inspection were located at the premises, however, he claimed the items were only being stored for the online out of state orders and were not being offered for sale to customers in New York. While the products were kept in display cases, or clear translucent cabinets on the sales floor, Mr. Lehman identified a sign that he put above the products. The sign read: "ATTENTION!! For consumers and vendors outside of New York State, You can buy all our products surpassing NYS THC regulations on www.thebreckenridgehemp.com." Mr. Lehman admitted to covering product warning labels and information regarding THC quantities stating it was done before the law changed.

During the hearing Appellant's counsel made a motion to dismiss the NOV and Cease Order in light of the Investigator's omitting the description of the cannabis products observed. The ALJ dismissed the motion to dismiss.[15]

Hearing Decision

The ALJ's decision, issued on October 21, 2024, found that Appellant was selling illicit cannabis[16] and cannabis products without the requisite license on July 16, 2024, and ordered Appellant to pay a $7,500.00 civil penalty.

OPINION AND REASONING

Following a review of the record on appeal, the Board finds the ALJ's decision supported by a preponderance of the evidence and in accordance with the law. Based on the following reasons, the Board confirms the ALJs decision and denies Appellant's appeal.

Appellant's argument that the OCM's regulatory authority pursuant to Cannabis Law § 138-a only applies to unlicensed operators and does not apply to a cannabinoid hemp retailer, such as

[15] Appellant has not raised an exception to the ALJ's ruling on the motion to dismiss in the instant appeal.

[16] "Illicit cannabis" means and includes any cannabis flower, concentrated cannabis and cannabis product on which any tax required to have been paid under any applicable state law, has not been paid. Illicit cannabis shall not include any cannabis lawfully possessed in accordance with the Cannabis Law or the Penal Law. (Cannabis Law § 136[1]).

Appellant, is contrary to the plain language of the statute and as such lacks merit. Section 138-a, by its plain language, applies broadly to "any person" engaged in unlicensed activity. (Cannabis Law § 138-a[1]). The statute is unambiguous. Where a statute is unambiguous, the courts must give effect to its plain meaning. (Yatauro v. Mangano, 17 N.Y.3d 420 [2011]). Here, the plain language of the statute is "any person," which means any person. (Cannabis Law § 138-a[1]). Furthermore, unlicensed activity includes licensees, registrants, or permittees engaged in activity beyond the scope of their license. (9 NYCRR § 133.1[i]). Thus, the Board rejects the statutory interpretation, advanced by Appellant, that a cannabinoid hemp retail licensee cannot be the subject of regulatory action by Appellee pursuant to Cannabis Law § 138-a.

Similarly, the Board rejects Appellant's assertion that Appellee is not empowered under the Cannabis Law and implementing regulations to seize unlawful products from a cannabinoid hemp retail licensee. Appellee is expressly authorized to seize any items containing cannabis, cannabis samples, cannabis products, cannabinoid hemp, cannabinoid hemp samples, or cannabinoid hemp products, or any products marketed and labeled as such which are in violation of the Cannabis Law, or its applicable regulations. (Cannabis Law 138-a[2]; 9 NYCRR 133.3[i]). Here, the evidence supports the ALJ's findings that Appellee complied with the applicable law and regulations, when products were seized pursuant to the inspection conducted of Appellant's business premises. Specifically, notice of the seizure was provided to Appellee in writing by way of a property voucher documenting the items seized.[17]

The civil penalty imposed in this matter was supported by a preponderance of the evidence and in accordance with the law. A review of the record demonstrates that the decision and order in this matter was supported by the evidence presented at the hearing, was within the authority of the ALJ and was thus in accordance with the law. (Cannabis Law § 132[a]; 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 [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]). Contrary to Appellant's claim, the decision in this matter adequately set forth both the evidence and the law relied upon in determining whether Appellant was in violation of the law and an appropriate sanction under the law. There was substantial evidence in the record to establish Appellant was engaging in unlicensed activity. 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). Here, the ALJ's determination relied on the testimony of both Appellee and Appellant's witness. Appellant testified

[17] Appellant submitted the instant appeal with eight exhibits. Exhibit 4 included a copy of the NOV and Cease Order issued in this matter, along with property vouchers from both OCM and DTF documenting the seizure of cannabis products, hemp cannabinoid products, and those marketed and labeled as such.

that he did not have an adult-use cannabis retail license, an adult-use processor license, or a cannabinoid hemp processor license from the Appellee. Appellant also testified to having similar licenses in Colorado and applying for the same in New York, however, at the time of the inspection he did not posses a processor license or an adult-use cannabis retail license. The ALJ further relied upon the investigator's testimony and the photographs taken during the inspection in determining that Appellant was offering cannabis products and other unlawful cannabinoid hemp products for sale and was engaged in unlicensed processing. 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]; 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]). There is no basis in the record that supports disturbing the ALJ's findings as to witness credibility.

The Board is not persuaded by Appellant's argument that the ALJ improperly shifted the burden to Appellant to demonstrate that the products observed were not available for sale within the state. The ALJ expressly disagreed with Appellant's position that the sign advertising online sales for out of state customers and vendors was evidence that the products on display were not for sale at the location. The ALJ reasoned that the sign did not explicitly state the items were not for sale and did not offer clarity on the Appellant's ability to sell the products within the state. The decision specifically sets forth the evidence in which the ALJ relied upon in determining Appellant was engaged in unlicensed activity. Specifically, the ALJ relied on the totality of the evidence including but not limited to the labeling of products as "cannabis," the lack of clear signage regarding the ability to purchase products with greater than 0.3% THC online, the visibility of these items on the sales floor, and the volume of packages on display in determining the items were being offered for sale. The ALJ further found the use of "cannabis" in the labeling of products would lead a reasonable consumer to believe that they are purchasing cannabis, a product with 0.3% or more THC, rather than a cannabinoid hemp product. These factual and legal conclusions are within the discretion of the ALJ and are in accordance with the law. Neither the Cannabis Law nor the applicable regulations require Appellee to individually test products that are "marketed or labeled" in a way that is inconsistent with the retailer's license before seizing the products or issuing a NOV and Cease Order. (Cannabis Law §§ 138-a[1], [2]; 9 NYCRR § 133.25[c]; see also Cannabis Law §105 ["This section shall not obligate the board, in any way, to perform any testing on hemp, cannabinoid hemp, hemp extract or any product derived therefrom."]).

Moreover, the plain language of the statute is not ambiguous and thus should not be overlooked. Cannabis Law § 125(1) expressly prohibits the cultivating, processing, distributing for sale, offers for sale or the delivery to consumers any cannabis, cannabis product, cannabinoid hemp, hemp extract product, or any *product marketed or labeled as such*, within the state without obtaining the appropriate registration, license, or permit from Appellee. (emphasis added). When presented with a

question of statutory interpretation, the primary consideration "is to ascertain and give effect to the intention of the Legislature." (Yatauro v. Mangano, supra; Matter of DaimlerChrysler Corp. v Spitzer, 7 N.Y.3d 653, 660 [2006], quoting Riley v County of Broome, 95 N.Y.2d 455, 463 [2000]). The starting point for discerning legislative intent is the language of the statute itself (see Roberts v Tishman Speyer Props., L.P., 13 N.Y.3d 270, 286 [2009]). The language of the Cannabis Law makes clear that the Legislature granted Appellee the enforcement power to regulate unlicensed activity and seize, upon a violation, any product that is marketed or labeled as cannabis or cannabinoid hemp. (see Cannabis Law §§ 125[1]; 132[1][a]; 138-a; 138-b). The Legislature has deemed any activity conducted in violation of Cannabis Law § 125(1) as presenting a danger to public health, safety, and welfare. (Cannabis Law § 125[1-b]). While Appellant is correct that there is no provision prohibiting the use of the word "cannabis" in the Cannabis Law or the cannabinoid hemp regulations, a cannabinoid hemp product must comply with packaging and labeling requirements which include not displaying any content, or be labeled in any manner that causes a reasonable consumer to believe that a cannabinoid hemp product is cannabis or that a licensee is authorized to sell or dispense cannabis. (9 NYCRR § 114.9[8]). In this matter, the ALJ found that the difference between the two products is exactly why OCM requires different licenses and packaging requirements including labeling that is not misleading.

Finally, Appellant's argument asserting a due process violation based on retroactive application of guidance from October 2024 is without merit. The October 2024 Guidance did not introduce new rules or regulations. It merely provided information and guidance on existing requirements that became effective on December 13, 2023. While the ALJ's decision relied upon the location in which the products marketed and labeled as cannabis were observed, the ALJ found the location, on the salesfloor and accessible to customers, indicated the items were being offered for sale at the location inspected. The ALJ did not determine the violation was failure to properly label or store the products pursuant to Title 9 Part 114, but rather a violation of Cannabis Law 125 because Appellant's cannabinoid hemp retail license would not authorize the sale of such products. The ALJ further found that a Cannabinoid Hemp Distributor Permit would also not permit the sale of products labeled as cannabis to customers in New York State.

CONCLUSION

Based on the foregoing, Appellant's appeal and the relief therein is denied. The decision and order of the ALJ is affirmed. The foregoing constitutes the final decision of the Board in accordance with Cannabis Law 10(18) and Title 9 NYCRR 133.23(f)(4).

DATED: July 25, 2025