

STATE OF NEW YORK  
CANNABIS CONTROL BOARD

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5514 MYRTLE AVE CORP.,

APPELLANT-RESPONDENT,

-against-

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

INSPECTION NO.: 202 2024 1029 0045

Appellant-Respondent 5514 Myrtle Ave Corp. (“Appellant”) appeals from a decision and order of the Office of Administrative Hearings (“OAH”) wherein the presiding Administrative Law Judge (“ALJ”) extended a sealing order issued 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 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 OTS for one year.

Appellant timely 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 9 NYCRR § 133.25(k).

#### STATUTORY 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).

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 produces 100 different natural cannabinoids. The most common cannabinoids in the cannabis plant are tetrahydrocannabinol (“THC”), the principal psychoactive compound in cannabis, and cannabidiol (“CBD”). CBD is one of the naturally occurring phytocannabinoids

found in hemp and in all cannabis plant strains. 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. 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. (Cannabis Law § 3 [27]).

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, medical cannabis or cannabinoid hemp<sup>1</sup> 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 products, or adult-use cannabis products, means cannabis, concentrated cannabis, and cannabis-infused products for use by a cannabis consumer. (Cannabis Law § 3[9]). 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 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]). In response to a violation of the Cannabis Law, and related regulations, including any activity outside the scope of the license, registration, or permit, 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]). Appellant may also seize any cannabis, cannabis product, cannabinoid hemp, or cannabinoid hemp extract product, or any product marketed or labeled as such found in the possession of the person engaged in the unlicensed activity. 9 NYCRR § 133.25[d]). 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. (Cannabis Law § 131[3][a]; 9NYCRR § 133.1[i]). It also includes any activity beyond the scope of any license, registration, or permit issued by the office or board may be considered unlicensed activity. (Id.).

Appellant is further authorized to issue an immediate OTS the building or premises of any business engaged in unlicensed activity, when such activity is conducted, maintained, or permitted

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<sup>1</sup> 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]).

in such building or premises, occupied as a place of business<sup>2</sup> and upon a finding of an imminent threat to public health, safety, and welfare. (Cannabis Law § 138-b(1); 9 NYCRR § 133.25[f]). In assessing whether there is an imminent threat to public health, safety, and welfare, Cannabis Law § 138-b(4) provides factors the OCM shall consider. Upon finding such an imminent threat, an OTS 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 part of the business activity on the premises or in the building to be sealed pursuant to the order. In assessing whether unlicensed activity is more than a de minimis part of the business activity at the premises, Cannabis Law § 138-b(7) states: the OCM “shall consider factors such as any one or more of the following: (a) the presence of signs or symbols, indoors or out, advertising the sale of cannabis or otherwise indicating that cannabis is sold on the premises; (b) information shared in any advertisements or other marketing content in connection with the unlicensed business activity and any direct or indirect sales of cannabis or other conduct in violation of this chapter; (c) the volume of illicit cannabis products on site; and (d) the variety of illicit cannabis products on site.”

Following the issuance of an OTS, 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.”

An OTS must explicitly state the procedure to request an emergency hearing on the sealing order within seven (7) days. (Cannabis Law § 138-b[2]; 9 NYCRR § 133.25 [g][1]). If respondent fails to request such emergency hearing within seven (7) calendar days, then respondent waives the right to an emergency hearing pursuant to 9 NYCRR § 133.25 and will be entitled to a regular hearing pursuant to section 133.10. ((9 NYCRR § 133.25 [h][1]). 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 ALJs shall have the power and authority as defined by OCM regulations, State Administrative Procedure Act (“SAPA”), and other pertinent statutes. (9 NYCRR § 133.16). Additionally, the ALJ shall have the power to admit and

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<sup>2</sup> “[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]).

exclude evidence. (9 NYCRR § 133.17[7]). The rules of evidence need not be observed and evidence at a hearing may include, but is not limited to witness testimony, documents and objects. (9 NYCRR §§ 133.18[d][2] and [9]). The presiding ALJ must issue a written decision at the conclusion of the hearing. (9 NYCRR §§ 133.25[h][4] and [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 identifying the portion of the ALJ's decision and order to which the objection is made and specifically designate the portions of the record relied upon. (9 NYCRR § 133.25[k]).

### PROCEDURAL BACKGROUND

#### Regulatory Inspection

Appellant conducts business as 5514 Myrtle Ave Corp. The address of Appellant's business is 55-14 Myrtle Avenue, Ridgewood, NY. On October 29, 2024, Appellee, along with members of the New York State Department of Taxation and Finance ("DTF"), conducted a regulatory inspection, No. 202 2024 1029 0045, of Appellant's business pursuant to Cannabis Law § 138-a and 9 NYCRR § 133.25(a). Based on observations made during the inspection, Appellee issued a NOV, a Cease Order and an immediate OTS. Appellee's OTS, NOV, and Cease Order are on a single page, 8 x14, document, that also contains a Certificate of Service. The first portion of the document is the NOV and Cease Order, the second the OTS, and the last section is the Certificate of Service.

The NOV issued to Appellant on October 29, 2024, included a statement of charges that the Appellee determined Appellant was engaging in unlicensed activity in violation of Cannabis Law §§ 125, 132 and 9 NYCRR § 120(i). The OTS also included a statement of charges that the unlicensed activity was an imminent threat to the public health, safety, and welfare, no part of the premises was used as a residence, and the unlicensed activity is more than de minimis part of the business activity. The investigator did not check the box indicating this was a subsequent inspection, but did include two dates, July 30, 2024, and September 10, 2024, in the space provided for noting a prior inspection(s) date.

Appellant requested a hearing on or about November 15, 2024.

#### Administrative Proceedings

On November 27, 2024, a virtual hearing was held before ALJ Lavery. Appellant and Appellee were represented by counsel. The scope of the hearing included whether the OTS was issued in compliance with Cannabis Law 138-b as well as whether the preponderance of the evidence established Appellant was in violation of the Cannabis Law and if so, what penalty should be imposed.

Senior Investigator Paredes testified on behalf of Appellee. He testified to being employed with the OCM Enforcement Division and to having conducted the inspection of Appellant's premises. In determining whether cannabis is being sold or marketed during a regulatory inspection, he testified he looks for any marketing or signage, a point-of-sale system, and whether there any products for which a license is required. During the inspection of Appellant's business, Investigator Paredes testified to observing signage that indicated Appellant was marketing and offering to sell cannabis. He identified a photograph, taken during the inspection, of the outside of the business premises. The business had a sign above the glass store front that read "Dispensary." Inside the store, the investigator testified to observing nine different signs depicting images of cannabis use, including someone smoking a joint and another sign with a slogan "Smoke Weed Everyday." Senior Investigator Paredes also testified to observing a safe that was under the counter where the cash register was located. Inside the open safe he observed a variety of THC flower, THC pre-rolls, THC concentrates and THC edibles. Investigator Paredes testified that cannabis products were only found inside the open safe and were not on display.<sup>3</sup> The investigator testified that the products were not labeled in accordance with the Cannabis Law, and many were labeled with warnings from California. According to property vouchers in evidence, approximately 44 units of 3.5-gram packages of cannabis flower were found, and approximately 100 pre-rolls. The investigator also testified to finding a scale with residue and a label maker, which he concluded was likely for unlicensed processing. Investigator Paredes could not recall if Appellant had a hemp license, but confirmed Appellant did not have an adult-use retail dispensary license to sell the cannabis products found.

Senior Investigator Paredes testified that during the inspection there was an individual observed near the counter and cash register. The individual identified themselves as an employee and provided their photo identification. Investigator Paredes testified he asked the employee what the owner's name was and all he was given was the name Jacob. He asked for a last name, a telephone number or an address but the employee stated he did not have any other information. Upon completing the inspection and preparing the NOV, Cease Order and OTS, a copy was provided to the employee who signed the certificate of service on the document. Senior Investigator Paredes testified the employee gathered some personal belongings that were near the counter, including a phone charger and a backpack, and left the premises before it was sealed. Senior Investigator Paredes further testified that although he included the dates in which the Appellant's business had previously been inspected, it was only for recording and notation on the

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<sup>3</sup> Appellant did not raise a challenge to the inspection of the safe at the hearing and has not raised any challenge to the inspection of the safe on appeal. On appeal, Appellant asserts the investigator's conclusion that cannabis found inside the safe was being offered for sale was mere speculation as no products were found on display.

report. He stated the OTS issued on October 29, 2024, was based solely on what was observed and seized during the inspection that day. After sealing the premises, a copy of the NOV, Cease Order, and OTS was posted on the front of the business premises.

Appellant called two witnesses. The first witness, Manisha Baddam, testified to working for Appellant and to having been present at the store during other regulatory inspections. Ms. Baddam testified about the prior inspections, including inspections conducted by other agencies. Ms. Baddam testified to an inspection conducted by the NYC Consumer and Worker Protection office on September 12, 2024, in which she stated no evidence of cannabis activity was reported. Appellant offered the inspection report into evidence. The ALJ did not allow the document to be admitted into evidence, but did permit the witness to testify about the inspection and the content of the report. She testified that she was scheduled to work on October 29, 2024, but had an emergency vacation. She contacted the individual who was present at the time of the inspection and indicated she knows him as Rocky. She testified she tried to reach her manager but was unable to reach them and let them know her shift would be covered. Ms. Baddam testified that she was unaware how Rocky obtained the keys to open the business.

Appellant's second witness, Mr. Ali, identified himself as the sole owner of the business premises that was the subject of the proceeding. He testified to having applied for an adult-use cannabis retail license and that it was pending. He admitted to the business awning reading the shop was a dispensary and said it was done in preparation of obtaining a license. He testified that while he did not yet have an adult-use cannabis retail license, he did have a cannabinoid hemp retail license. He further testified he was unaware that Ms. Baddam had arranged for someone else to work for her and did not know the individual who identified themselves as an employee. Mr. Ali was also unaware how that individual obtained the keys. Mr. Ali further testified that he believed the cannabis products found during the inspection belonged to the individual present during the inspection. Mr. Ali also testified that he does leave all his safes open for access during regulatory inspections.

#### Hearing Decision

On December 9, 2024, the presiding ALJ issued a decision extending the OTS for one year and ordering Appellant to pay a \$6,000 civil penalty. The ALJ found that the credible testimony of the investigator established Appellant was offering for sale cannabis and cannabis products without the requisite license to do so, no part of the premises was occupied as a residence and the unlicensed activity was more than a de minimis part of Appellant's business activity. The ALJ determined that the unlicensed activity was an imminent threat to public health, safety, and welfare based upon the testimony of the investigator that the products found were not tested or labeled in accordance with the Cannabis Law. The ALJ further found that there was a variety

and volume of cannabis products found during the inspection. The ALJ reasoned that although the investigator did not indicate a volume of products as a basis for the OTS on the order, he credibly testified that it was not for personal use and there was a variety of each of the products that were found, which he did document on the order. Moreover, the ALJ noted that the pursuant to Cannabis Law 138-b(7), any one or more of the factors listed are sufficient for a finding that the unlicensed activity was more than a de minimis part of Appellant's business activity. The ALJ also relied on the evidence establishing the presence of a number of signs inside the store depicting cannabis, the sign outside the premises indicating it was a dispensary, and the evidence of processing occurring at the location.

The ALJ additionally found that proper service was made on Appellant through the personal service made on the individual present who identified themselves as an employee and was in actual control of the premises based on the investigator's credible testimony.

#### Argument on Appeal

Appellant argues that Appellee failed to properly serve the Appellant because personal service was not made on a person with actual or apparent authority. Appellant claims that the individual, who identified themselves as an employee, was not authorized because they were not an employee. Appellant further argues that Appellee failed to establish any service by mail and thus failed to establish proper service. Appellant further argues that the ALJ improperly precluded a Certificate of Inspection from the New York City Department of Consumer and Worker Protection. Finally, Appellant contends the investigator's conclusions were speculation and the ALJ's finding of sufficient volume and variety was arbitrary and capricious. Appellant requests that the OTS be vacated.<sup>4</sup>

#### QUESTIONS PRESENTED

Whether the ALJ improperly excluded Appellant's evidence, whether the ALJ improperly relied on evidence establishing a volume of illicit cannabis products in determining whether the unlicensed activity was a de minimis part of the business activity at the premises, and whether Appellee OCM established proper service under Cannabis Law 138-b(2).

#### OPINION AND REASONING

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

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<sup>4</sup> On appeal Appellant seeks only a vacatur of the OTS extended by the ALJ. Appellant has not requested any relief with respect to the ALJ's determination assessing a \$6,000 civil penalty.

An action is arbitrary if it “is without sound basis in reason and is generally taken without regard to the facts.” (Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cnty, 34 N.Y.2d 222, 231 [1974]). Where a rational basis exists for an agency's action, a court may not substitute its judgment for that of the agency, and the agency's determination, acting pursuant to legal authority and within its area of expertise, is entitled to deference (96 AD3d 669, 671 [1<sup>st</sup> Dept. 2012]). In this matter, the ALJ's decision was made with reason, was supported by the evidence presented at the hearing, was within the authority of the ALJ and was in accordance with the law. (Cannabis Law § 132[a]; 9 NYCRR § 133.21[a]; see also, 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).

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 and afford an opportunity to be heard. (Matter of Infante v Donohue, 42 Misc 2d 727 [Sup Ct, Albany County 1964; Ruffin v. Lion Corp., 15 N.Y.3d 582–83 [2010]; Raschel v. Rish, 69 N.Y.2d 694, 696 [1986]; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, [1950]). In this matter, there was substantial evidence at the hearing to support a finding that service was effectuated on Appellant that was reasonably calculated to provide notice. The ALJ relied upon the testimony of the investigator and found the personal service effectuated was made on an individual that was in actual control of the premises. The individual identified themselves as an employee, they had personal belongings near the cash register area, and they accepted service signing the certificate of service. The ALJ also relied upon the evidence establishing a copy of the OTS was posted at the premises. While there was no evidence of mailing to the Appellant, the ALJ found no such mailing was required because there was no address for the business owner provided by the employee at the time of personal service. The ALJ's determination is consistent with the plain language of the statute. Cannabis Law § 138-b(2), by its plain language, provides that a copy of the order shall also be mailed “to any address for the owner of the business at any *provided* by the person to whom such order was delivered.” (emphasis added). The record establishes that no address was provided by the individual present at the time of the inspection and to whom personal service was made. 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]). Thus, the Board rejects Appellant's argument that Appellee failed to establish proper service was effectuated pursuant to Cannabis Law § 138-b(2).

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. The ALJ's determination relied on all the evidence

presented including the testimony of both Appellee and Appellant's witnesses. The ALJ found the testimony of Investigator Paredes to be credible. Whereas the ALJ found Appellant's testimony lacked credibility. Specifically, the ALJ rejected Appellant's testimony that the cannabis products found belonged to the individual present during the inspection. The ALJ's determination also set forth the evidence in which it relied most upon. While the products were not found on display, the ALJ determined that the location was organized like a dispensary, there was a volume and variety of the products found, and there was signage depicting cannabis indicating there was offers to sell cannabis without the requisite license to do so. Additionally, the ALJ relied upon the investigator's testimony that the products observed for sale were not labeled or packaged in accordance with the Cannabis Law. 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]). Here, there is nothing in the record to support disturbing the ALJ's findings as to witness credibility.

Similarly, the Board rejects Appellant's argument that it was an error of law for the ALJ not to admit the NYC Consumer and Worker Protection inspection report from September 12, 2024. The ALJ's decision not to admit the evidence was within their authority. (see, 9 NYCRR § 133.17[7]). In excluding the evidence, the ALJ reasoned that the inspection report was not relevant to the inspection conducted by Appellee on October 29, 2024. Additionally, while the ALJ did not permit the document to be entered into evidence, the witness was permitted to testify to the inspection and the results of the inspection. Moreover, Appellant fails to point to any support for the assertion that the ALJ's evidentiary ruling was an error of law.

The Board is also not persuaded by Appellant's argument that the ALJ improperly relied upon the volume of the products observed and seized. Appellant's argument lacks merit and ignores the plain language of Cannabis Law § 138-b(7), which permits the consideration of any one or more of the four factors listed, when determining whether unlicensed activity is more than a de minimis part of the business activity on the premises. The factors listed include the presence of signs or symbols indicating cannabis is sold, advertisements or marketing, variety of illicit cannabis products on site, and the volume of illicit products on site. Here, there was substantial evidence in the record that there was a variety and volume of products observed and seized. The ALJ specifically relied upon the investigator's testimony and vouchers submitted by Appellant

establishing a volume of cannabis products were seized during the inspection. The plain language of the statute is not ambiguous and thus should not be overlooked.

#### 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 133.25(k).

DATED: September 9, 2025