STATE OF NEW YORK
CANNABIS CONTROL BOARD

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NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT,
APPELLANT-PETITIONER,

DECISION ON APPEAL

-against-

INSPECTION NO.:
204 2024 1001 0011

M & A 716 INC DBA OASIS SMOKE SHOP,
APPELLEE-RESPONDENT

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Appellant-Petitioner the New York State Office of Cannabis Management ("Appellant OCM") appeals from a decision and order of the Office of Administrative Hearings ("OAH") wherein the presiding Administrative Law Judge ("ALJ") vacated a sealing order issued against Appellee-Respondent M & A 716 Inc. ("Appellee") place of business. The Order to Seal ("OTS") was issued by Appellant 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.

Appellant OCM 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).*

Cannabis Law Section 125 states that "[n]o person[1] 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

[1] 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] 131[3][a]).

law. In response to a violation of the Cannabis Law, and related regulations, including any activity outside the scope of the license, registration, or permit, Appellant OCM is authorized to take various actions, including but not limited to, issuing a notice of violation ("NOV"), civil penalties, fees, suspension, cancellation, or revocation, seizure of product, and a stop order to cease unlicensed activity ("cease order"). *(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. *(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 OCM is further authorized to the authority to issue an OTS the building or premises of any business engaged in unlicensed activity, when such activity is conducted, maintained, or permitted in such building or premises, occupied as a place of business[2], in violation of Cannabis Law Sections 125(1) or 125(1a) or 132(1) or 132(8). *(Cannabis Law § 138-b[1]).* Appellant OCM may issue an OTS with an immediate effective date if such order is based upon a finding by the office of an imminent threat to the public health, safety, and welfare.[3] *(Cannabis Law § 138-b[3]; 9 NYCRR § 133.25[f]).* Section 138-b(4) provides factors the OCM shall consider in assessing whether there is an imminent threat to public health, safety, and welfare. Upon finding an imminent threat, the OCM may issue an OTS pursuant to Section 138-b(3) 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[4] part of the business activity on the premises or in the building to be sealed pursuant to the order. *(Cannabis Law § 138-b[6]).*

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[2] "[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]).

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

[4] 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."

Notwithstanding the factors listed in Section 138-b(4) or the restrictions in Section 138-b(6)(b), Appellant OCM may also issue an OTS with an immediate effective date upon a second or subsequent inspection in which unlicensed activity is confirmed to be continuing more than ten (10) calendar days after a NOV and cease order was previously issued by the OCM, provided that the OMC has also provided notice pursuant to Cannabis Law Section 138-a(13)(a)(ii). Pursuant to Section 138-a(13)OCM has authority:

> upon finding a violation of this section **by a holder of a license** issued by the state liquor authority, a registration issued by the commissioner of taxation and finance to sell cigarettes or tobacco products at retail, a registration issued by the commissioner of taxation and finance to sell vapor products at retail, or a lottery sales agent license issued by the division of lottery, (a) issue a notice of violation to the holder or an agent thereof that **clearly states** (i) that the holder's state licenses, permits, or registrations may be at risk of revocation or suspension **and** (ii) that the holder's business premises may be subject to an order to seal if upon a subsequent inspection the **office** finds that the violation has not been abated, **and** (b) notify the agency that issued the authorization that the holder is in violation of this section *(emphasis added).*

Pursuant to Section 138-b(2), an OTS issued by Appellant OCM, 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. 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 issued pursuant to Section 138-b must explicitly state the procedure to request a hearing on the sealing order within seven days. *(Cannabis Law § 138-b[2]; 9 NYCRR § 133.25[g][1]).* When a hearing is requested the presiding ALJ will render a hearing determination on the OTS within four business days of the hearing conclusion. *(9 NYCRR § 133.25[h][4]).* 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]).* Additionally, either party may request a hearing be scheduled on the underlying violations contained in the NOV and to enforce the Cease order pursuant to 9 NYCRR §§ 133.10(a) and 133.10(e). *(9 NYCRR §§ 133.25[h][4] and [i]).*

PROCEDURAL BACKGROUND

Regulatory Inspections

Appellee M & A 716 Inc. conducts business as OASIS Smoke Shop at 687 Dick Road, Cheektowaga, NY 14225.

August 22, 2024, Inspection

On August 22, 2024, Appellant OCM, along with members of the New York State Department of Taxation and Finance ("DTF"), conducted a regulatory inspection, No. 109 2024 0822 0005, of Appellee's business premises, 687 Dick Road, pursuant to Cannabis Law § 138-a and 9 NYCRR § 133.25(a). Based on observations made during the inspection, Appellant OCM determined Appellee was engaging in unlicensed activity in violation of the Cannabis Law and implementing regulations. Appellant OCM issued a NOV that alleged violations of Cannabis Law Sections 125 (general prohibitions), 132 (penalties), and 101 (cannabinoid hemp license) and the implementing regulations for adult-use cannabis, 9 NYCRR 120(i), and for cannabinoid hemp (9 NYCRR 114.14(d)(1). The NOV issued by Appellant OCM also included a cease order pursuant to Cannabis Law Section 138-a, unlawful business practices. Appellant OCM's NOV and cease order are on a single page, 8 x14, document, that also contains a section for the issuance of a sealing order and then there is a certificate of service. The first portion of the document is the NOV and cease order, the second section includes information for the issuance of a sealing order, and the last section is the certificate of service. The NOV and cease order from the August 22 identified the business owner as "Musa Alharbi." The business name and dba as "M&A 716 Inc./Oasis Smoke Shop." The NOV and cease order did not identify the business address inspected. The certificate of service was checked that delivery or signature was refused and a copy left in the vicinity of the person to be served.

October 1, 2024, Inspection

On October 1, 2024, Appellant OCM, along with members of DTF conducted another inspection, No. 204 2024 1001 0011, of Appellee's business premises, 687 Dick Road pursuant to Cannabis Law § 138-a and 9 NYCRR § 133.25(a). Appellant OCM determined based on observations made during the inspection that Appellee was engaging in unlicensed activity in violation of the Cannabis Law and implementing regulations. Appellant OCM issued a NOV, cease order, and an immediate OTS Appellee's business premises.

The NOV and cease order issued on October 1 identified the business owner as "Musa Deen Ahmed Alharbi." The business name and dba were listed as M&A 716 Inc/OASIS. The business address and address of the premises inspected was listed as 687 Dick Road. The October 1 NOV did not identify what section of the Cannabis Law was violated based on the investigator's observations. The section, contained in the statement of charges, was left blank and no box was checked identifying a specific statute. The section regarding the issuance of an immediate OTS was also left blank. The checkbox indicating an "ORDER TO SEAL – PREMISES HAVE BEEN CLOSED BY ORDER OF THE CANNABIS CONTROL BOARD" was not checked. While the box was not checked to indicate the issuance of an OTS, a box was checked underneath stating October 1 was a "subsequent inspection in which unlicensed activity is confirmed to be continuing more than ten days after a NOV was previously issued [and] [t]he prior NOV and cease order was previously issued on 08.22.24." On October 1, the inspection conducted expanded into a second separate premises, 685 Dick Road, that was not previously inspected on August 22.

Appellee requested a hearing with the OAH on October 1, 2024.

Administrative Proceedings

On October 9, 2024, a virtual hearing was commenced before ALJ Cartwright. The hearing concluded on October 11, 2024. Appellant and Appellee were represented by counsel. The scope of the hearing was to determine whether the OTS was issued in compliance with the provisions of Cannabis Law Section 138-b.

Appellant OCM called two witnesses, Investigator Daniel Gregory and Investigator Andrew Gerken. Investigator Gregory testified to conducting, along with members of DTF, the August 22, 2024, regulatory inspection. On that date, he testified that the back door of the premises was propped open during the inspection. Outside the premises, next to door he observed a box containing cannabis products. He also identified photographs of the box, and the cannabis products observed inside. Investigator Gregory testified Appellee did not have a license to sell cannabis products and had an expired cannabinoid hemp license. He testified that during the search he observed and photographed a certificate of authority for Appellee at 687 Dick Road. The investigator also testified to and identified registrations for cigarettes and tobacco products and vapor products issued to Appellee by the DTF. He investigator further testified that the inspection on August 22 was limited to 687 Dick Road. He testified here was no adjoining access between the two locations and that one would have to exit 687 Dick Road to enter 685 Dick Road. Although they requested access to 685 Dick Road, the individual

present during the inspection stated they did not have the key. The investigator could not recall the name of the individual present but stated they identified themselves as an employee. He testified to preparing the NOV and cease order issued on that date. When asked about service of the document, the investigator testified he believed the individual present did not sign the NOV and he thinks he just left a copy of it with them. Appellant OCM did not present any evidence of mailing a copy of the NOV and cease order to Appellee.

Investigator Andrew Gerken testified to conducting, along with members of DTF, the regulatory inspection on October 1, 2024. He testified he was not part of the inspection of August 22 but was aware of it. He testified that the individual present was identified as the manager and business owner and provided his identification, which was photographed. The identification provided included an address for the business owner different than that of the business premises. During the August 22 inspection, Investigator Gerken testified that the inspection expanded into 685 Dick Road. He testified access was provided by the individual present. Inside 685 Dick Road, Investigator Gerken testified to finding cannabis products in boxes that were stored in the attic of the premises. Investigator Gerken described 685 Dick Road as not being open to the public. The investigator also testified to finding a few products Appellee was not licensed to sell, cannabis, cannabis products, and cannabinoid hemp products during the inspection of 687 Dick Road. Investigator Gerken identified numerous photographs identifying a variety of products including cannabis flower, cannabis edibles, cannabis concentrates, vape cartridges, cannabis pre-rolls and cannabinoid hemp products that were observed and seized from both the premises inspected. Finally, the investigator testified that he prepared the NOV, cease order, and the OTS issued on October 1. When he attempted service on the individual present, the business owner, Mr. Alharbi, service was refused. The investigator testified to placing a copy on the counter in front of the Mr. Alharbi and taking a photograph. Appellant OCM did not present any evidence regarding the mailing of the NOV, cease order, and the OTS to the Appellee.

Appellee called one witness, Mr. Alharbi. He testified to being the business owner of 687 Dick Road. He testified he was not the owner nor leasing 685 Dick Road, but that his uncle was. He stated he did not have a key for 685 Dick Road and in fact had to call his uncle the day of the October 1 search to provide access to the investigators during the inspection.

During summation, Appellee argued that the NOV issued seemed inappropriate and Appellant OCM had not in fact established a violation had taken place at 687 Dick Road. Appellant OCM argued

that 685 Dick Road was essentially an extension of 687 Dick Road because the business owner was the same and Mr. Alharbi's testimony was not credible. Additionally, Appellant OCM argued there was a voluminous amount of products found in 685 Dick Road and as an extension of 687 Dick Road the OTS was properly issued.

Hearing Decision

On October 19, 2024, the presiding ALJ issued a decision vacating the OTS. The ALJ reasoned that the language contained in the NOV served during the first inspection on August 22, 2024, did not meet the requirements under the Cannabis Law. The ALJ also reasoned that Appellant OCM relied on the October 1 inspection as being a subsequent inspection for the basis of the OTS and did not rely on other factors such as the volume or variety of products as would be required pursuant to Cannabis Law Section 138-b subdivisions (3) and (6).

Arguments on Appeal

On appeal Appellant OCM asserts that they established by a preponderance of the evidence that the OTS issued on October 1, 2024, was warranted based on Cannabis Law Section 138-b(5) and thus the OTS was properly issued. Appellant OCM argues the ALJ improperly held that the OCM failed to satisfy the elements required to issue an OTS during a subsequent inspection pursuant to Section 138-b(5). Appellant OCM further argues that there was a preponderance of the evidence that Appellee was engaged in continued unlicensed activity from August 22, 2024, to October 1, 2024.

Additionally, Appellant OCM asserts that the ALJ improperly held Section 138-a(13)requires an adjudication by OAH on the NOV before an OTS can be issued during a subsequent inspection. Appellant OCM states Section 138-a(13) does not require an ALJ to adjudicate an NOV from the first inspection for an OTS to be issued during a second inspection in reliance on Section 138-b(5). Appellant OCM argues they complied with what is required under Section 138-a(13) because each NOV has language providing notice to its respondents. Further, Appellant OCM argues the NOV from the first inspection demonstrates Appellee was on notice as required pursuant to Section 138-a(13).

QUESTION PRESENTED

Whether the sealing order was improperly vacated as a result of an error with the factual and legal findings of the ALJ?

ANALYSIS AND REASONING

The record on appeal supports the ALJ's determination that Appellant OCM failed to satisfy the elements required to issue an OTS as part of a subsequent inspection. As reasoned by the ALJ, the language contained in the NOV served during the first inspection on August 22, 2024, did not meet the requirements under the Cannabis Law. Specifically, the language did not meet the notice requirements of Sections 138-b and 138-a(13). There is no question that Appellant OCM has the authority to issue an OTS for the premises of any unlicensed business in which any person is engaged in violation of Cannabis Law Sections 138-a, 125, or 132. *(Cannabis Law §§ 138-a[11] and 138-b[1]).* Such issuance must be in accordance with the procedures outlined in Section 138-b. *(Cannabis Law §§ 138-a[11]).* The issuance of the OTS in this matter was not in accordance with Cannabis Law 138-b.

Title 9 NYCRR § 133.17(d)(11) mandates an ALJ to conduct a hearing in "accordance with the requirements of due process." A fundamental principle of due process is notice of the charges. *(Matter of Murray v Murphy, 24 NY2d 150,157 [1969]).* In an administrative forum an agency must give notice of the charges that is reasonable under the circumstances, so that respondent can prepare an adequate defense. *(Matter of Block v. Ambach, 73 NY2d 323, 332 [1989]; Matter of Fitzgerald v. Libous, 44 NY2d 660, 661 [1978]).* In this matter, there is substantial evidence to support vacating the OTS based on the failure of Appellant OCM to establish the requisite notice. "Substantial evidence" means "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." *(300 Gramatan Ave. Assocs. v. State Div. of Human Rights, 45 N.Y.2d 176, 180 [1978]).* The standard is a deferential one that "demands only that a given inference is reasonable and plausible, not necessarily the most probable." *(Matter of Café, La China Corp. v. N.Y.S. Liquor Auth., 43 A.D.3d 280, 281 [1st Dept. 2007]).* When deciding if a defect in service is merely technical, the guiding principle must be one of notice "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 NY3d 578, 582 [2010]; Raschel v. Rish, 69 N.Y.2d 694, 696 [1986]; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, [1950]).* The actual receipt alone is not dispositive of the efficacy of service. *(Ruffin v. Lion Corp., 15 N.Y.3d at 583).* Under the totality of the circumstances, the defects with service in this matter were not merely technical.

Service was not effectuated as required pursuant to Cannabis Law Sections 138-b(2) and 138-b(5). The omissions contained in the documents issued to Appellee along with the lack of sufficient evidence establishing service resulted in a lack of notice to the Appellee. The service attempts here do

not establish service reasonably calculated to apprise Appellee of the charges against them. While the record contains evidence that the August 22 NOV was posted at the premises, there was insufficient evidence to establish personal service. The investigator could not say for certain how service was executed stating he thinks he just left a copy with the employee present during the inspection. Appellant OCM presented no evidence regarding service by mail to the business owner. Also, while a slight variation, the NOV and Cease order from August 22 identified a different name for the business owner and a different dba for the business than what was issued as a result of the inspection on October 1, 2024. Similarly, the certificate of service on the October 1 NOV indicates personal service was refused and a copy was left in the vicinity of the person to be served. The person to be served was identified as the business owner. His identification, depicting an address different than that of the premises inspected, was photographed. Appellant OCM presented no evidence that a copy of the OTS was mailed to the business owner, at any address, the business premises or that provided at the time of the inspection on his identification.

In addition to the lack of evidence establishing service was effectuated in accordance with Cannabis Law Sections 138-b(2) and 138-b(5), Appellee was not provided with basic notice of the charges in either of the NOV documents issued. The NOV from August 22 did not include any address. By failing to identify an address, or business premises, there was no notice as to what premises, if any, would be subject to a future sealing on a subsequent inspection. Furthermore, the inspection on October 1 included an expanded inspection into a premises that was not part of the first inspection. The NOV issued to Appellee from October 1 did not include or identify a second premises was inspected. The 685 Dick Road address was not included on the NOV issued to Appellee from October 1. Although not identified in the NOV as the premises inspected on October 1, during the hearing, Appellant OCM presented and relied on evidence regarding the inspection conducted on October 1 of 685 Dick Road. While Appellant OCM asserted the premises was adjoining or basically an extension to 687 Dick Road, the evidence established the two premises did not in fact connect from within either premises. The NOV issued to Appellee also did not provide notice of which section of the Cannabis Law was believed to be violated on October 1 when the OTS was issued. The section was left blank, and no box was checked. Similarly, the box identifying the issuance of an OTS by the Cannabis Control Board was not checked on the October 1 NOV issued to Appellee.

Appellant OCM did not move to amend either NOV and did not move to conform the charges to the testimony before summing up and submitting the matter to the ALJ for decision. (*Cf. Mandelstam*

v. McDonald, 229 A.D.3d 912 [3rd Dept. 2024](requirements of due process [in administrative cases] are not as exacting ... as in criminal cases and the governing rule allows an amendment "at any time prior to the submission of the hearing officer's report," provided there is "no substantial prejudice" to the accused)*; Matter of Roberts v. New York State Bd. for Professional Med. Conduct, 215 A.D.3d 1093, 1097 [3d Dept. 2023]; Matter of Kosich v. New York State Dept. of Health, 49 A.D.3d 980, 982 [3d Dept. 2008], appeal dismissed 10 N.Y.3d 950, [2008])*. The evidence before the board does not support a finding that service attempts in this matter were reasonably calculated to apprise Appellee of the charges against them. The first NOV did not identify a location and thus failed to apprise Appellee what premises was in violation and could be subject to a future immediate sealing order. No evidence of mailing for either NOV was presented. The omissions contained in the documents issued to Appellee along with the lack of sufficient evidence establishing service resulted in a lack of basic notice of the charges.

In addition to the lack of evidence establishing service and notice of the charges pursuant to the Cannabis Law, Appellant OCM did not meet the burden of establishing by a preponderance of the evidence that the October 1 violation was in fact a continued violation from the August 22 inspection. When issuing an OTS during a subsequent inspection, Appellant OCM must also demonstrate that the unlicensed activity was confirmed to be continuing more than ten (10) calendar days after an NOV and Cease order were previously issued and notice provided pursuant to Cannabis Law Section 138-a(13). *(Cannabis Law 138-b[5])*. Here, there was insufficient evidence establishing the business premises inspected were the same between the first and second inspection. The NOV and Cease order from August 22 did not include any address. The testimony from the investigator regarding the August 22 inspection was that the inspection was contained to 687 Dick Road and did not expand into 685 Dick Road. Whereas, during the October 1 inspection, the evidence relied upon included inspection of an entirely different premises than what was inspected during the August 22 inspection. Appellant OCM also failed to demonstrate the violation observed on October 1 was a confirmed continuation of what was observed and Appellee violated for on August 22 by failing to identify what section(s) of the Cannabis Law was violated during the second inspection.

Due process requires adequate notice and ALJ's are mandated to conduct a hearing in accordance with the requirements of due process. *(NYCRR § 133.17[d][11])*. As the finder of fact, an ALJ must weigh the evidence and decide whether relevant and probative proof has been adduced to a level which, at minimum, is slightly "less than a preponderance of the evidence" (*300 Gramatan Ave.*

Assocs., 45 N.Y.2d at 180). Under the totality of the circumstances, the Board agrees with the determination of the ALJ vacating the OTS.[5]

CONCLUSION

Based on the foregoing, the Board finds that the Order to Seal was not improperly vacated. Accordingly, the decision of the Administrative Law Judge is affirmed and Appellant OCM's appeal, along with the relief requested, is denied.

The foregoing constitutes the final decision of the Board.

DATE: October 6, 2025

[5] The decision in this matter is based on Appellant OCM not establishing the requisite service and notice for a subsequent inspection pursuant to Cannabis Law Section 138-b(5) and because there was insufficient evidence establishing that the violation from the first inspection was not abated or had in fact continued as required by Sections 138-b(5) and 138-a(13). Given that determination, the Board did not reach a determination on the merits of Appellant OCM's second exception. *(9 NYCRR § 133.23[e]).*