STATE OF NEW YORK
CANNABIS CONTROL BOARD

----------X

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

DECISION ON APPEAL

-against-

INSPECTION NO.: 103202407180034

BRECKENRIDGE CAFÉ NYC LLC DBA BRECKENRIDGE CANNABIS CAFE,
APPELLEE-RESPONDENT

----------X

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") dismissed a notice of violation" (NOV") and order to cease unlicensed activity ("cease order") issued to Appellee-Respondent Breckenridge Café NYC LLC dba Breckenridge Cannabis Café ("Appellee"). The NOV and cease order were issued by Appellant OCM following a regulatory inspection of Appellee's place of business pursuant to New York State Cannabis Law ("Cannabis Law") Article 6 Section 138-a and Title 9 of the Codes, Rules, and Regulations of the State of New York ("NYCRR") Section 133.25.

Appellant OCM submits the instant appeal, and the exceptions noted therein, to the Cannabis Control Board ("CCB") for review pursuant to Cannabis Law Sections 10(18) and 17(8) and 9 NYCRR Section 133.25(k).

STATUTORY BACKGROUND

New York enacted the Marihuana Regulation and Taxation Act ("MRTA") in March 2021. The legislation created the New York State Cannabis Law. The Cannabis Law governs medical cannabis *(Cannabis Law Article 3)*, adult-use cannabis *(Cannabis Law Article 4),* and cannabinoid hemp and hemp extract *(Cannabis Law Article 5)*. The Cannabis Law also contains general provisions, including provisions related to enforcement and violations *(Cannabis Law Article 6)*. The CCB has authority to fix by rule and regulation the standards and requirements of cultivation, processing, packaging, marketing, and sale of medical cannabis, adult-use cannabis and cannabis product, and cannabinoid hemp and hemp extract *(Cannabis Law §§ 10 [4])*.

Under the Cannabis Law, 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 hundreds of chemical compounds, including cannabinoids.[1] The most common cannabinoids[2] in the cannabis plant are tetrahydrocannabinol[3] ("THC"), the principal psychoactive compound in cannabis, and cannabidiol ("CBD").[4] While hemp[5] is the same genus and species of the cannabis plant as adult-use or medical cannabis, it contains lower levels of Delta-9 THC.[6]

OCM regulates hemp that is used or marketed for its cannabinoid content, such as CBD, through its cannabinoid hemp program. Retailers selling cannabinoid hemp, in final form to consumers within the state, shall be required to obtain a cannabinoid hemp retailer license from the CCB. *(Cannabis Law § 93 [1])*. The CCB is also authorized to issue temporary permits for carrying on any activity related to cannabinoid hemp, hemp extract and cannabinoid hemp products that were licensed pursuant to the Cannabis Law. *(Cannabis Law § 110)*. Cannabinoid permits expressly authorize a permittee to conduct a few related specific activities including distribute cannabinoid hemp products manufactured out of state, to cannabinoid hemp retailers within New York State. *(see Cannabis Law § 91 [8]; 9 NYCRR § 114.18 [1])*.

Cannabis Law section 125 states that "[n]o person[7] 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." Appellant OCM is authorized to conduct, without notice, site visits and inspections, of any person, any premises, or place of business cultivating, processing, distributing, selling, or offering for sale cannabis, cannabis product, cannabinoid hemp or cannabinoid hemp extract product, or any

---

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

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

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

[5] 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]).

[6] OCM Cannabinoid Hemp Consumers: *What is Hemp?* https://cannabis.ny.gov/cannabinoid-hemp-consumers (last visited October 2025)

[7] 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]).

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]*). Appellant OCM 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]).*

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. *(9 NYCRR § 133.1[i]).* Additionally, any activity beyond the scope of any license, registration, or permit issued by the office or board may be considered unlicensed activity. *(Id.).* In response to a violation of the Cannabis Law, and related regulations, Appellant OCM is authorized to take various actions, including but not limited to, issuing a NOV, civil penalties, fees, suspension, cancellation, or revocation, seizure of product, and a stop order to cease unlicensed. (*Cannabis Law §§ 132; 138-a; 9 NYCRR § 133.25 [b]).* Cannabis Law section 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[.]"

After the issuance of a NOV and cease order, a party may request, or OCM, initiate an administrative proceeding to enforce an order to cease the unlicensed activity and to order a financial penalty. (*9 NYCRR §§ 133.25 [i]); 133.10 [a]).* Pursuant to Title 9 NYCRR section 133.16, the OAH, through the service of ALJs, shall conduct all adjudicatory proceedings which devolve upon the CCB by requirement of statute. An ALJ shall have all the power and authority of presiding officers or hearing officers as defined by the State Administrative Procedure Act ("S.A.P.A."), other pertinent statutes, and OCM's regulations. (*9 NYCRR § 133.16).* An ALJ shall conduct the hearing in a fair and impartial manner. *(9 NYCRR 133.17 [c]).* The ALJ shall have the power to, among other things rule upon all requests, including all requests for adjournments and to admit and exclude evidence. *(9 NYCRR § 133.17 [d][1]-[11]).* The rules of evidence need not be observed during a hearing. *(9 NYCRR § 133.18 [d][2]).* Evidence at a hearing may include, but is not limited to, witness testimony, documents, and objects. Documents may include, but are not limited to, affidavits or affirmations, business records or government records, photographs, and other documents. *(9 NYCRR § 133.18 [d][9]).* All evidence, including records, documents and

memoranda in the possession of the office of which it intends to introduce at the hearing, shall be offered and made a part of the record. *(NYCRR § 133.18 [d][5])*. Relevant and reliable evidence, including but not limited to records prepared by OCM or another governmental agency in the ordinary course of business, may be admitted without regard to technical or formal rules or laws of evidence applicable in the courts of the State of New York. *(NYCRR § 133.18 [d][10])*. "Records" means any information kept, held, filed, produced or reproduced, in any physical or digital form including, but not limited to, reports, statements, examinations, memoranda, opinions, affidavits, affirmations, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photographs, letters, policies, rules, regulations or codes. (emphasis added). *(Id.)*. Following the hearing, 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]; 133.25[i][2]])*.

Within thirty (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 § 133.25 [k])*. Upon the filing of an appeal, the CCB shall, based solely on the record on appeal, either confirm the decision in writing, make a written, superseding decision including a statement as to why they have not confirmed the ALJ's decision, or remand the matter for additional proceedings. *(Id.)*.

PROCEDURAL BACKGROUND

Regulatory Inspection

Appellee conducts business as Breckenridge Café NYC LLC dba Breckenridge Cannabis Café located at 319 Wythe Avenue, Brooklyn, NY 11249. On July 18, 2024, Appellee, along with members of the New York State Department of Taxation and Finance ("DTF"), conducted a regulatory inspection, No. 103202407180034, of Appellant's business pursuant to Cannabis Law section 138-a and 9 NYCRR section 133.25 (a). Based on observations made, Appellee issued a NOV alleging violations of the Cannabis Law Sections 125, 132, and 101 as well as Title 9 NYCRR Sections 120(i) and 114.14 (d)(1). Appellant OCM also issued a cease order pursuant to Cannabis Law Section 138-a (1) and Title 9 NYCRR Section 133.25.

Administrative Proceedings

A virtual hearing took place on November 18, 2024, before ALJ Lavery. Both Appellant and Appellee were represented by counsel.

Senior Investigator Joshua Coons ("Senior Investigator Coons") testified on behalf of

Appellant OCM. Senior Investigator Coons testified that he did not conduct the July 18, 2024, inspection of Appellee's business but was familiar with the inspection. He testified to supervising the investigator that had conducted the inspection of Appellee's business premises, Investigator Danielle Newell ("Investigator Newell"). As her supervisor, Senior Investigator Coons testified to having trained her on how to conduct regulatory inspections and how to document evidence during the inspection via photographs. He testified that he was Investigator Newell's investigator at the time of inspection. Senior Investigator Coons further testified that Investigator Newell uploaded the photographs and the NOV to a digital file on or about July 19, 2024. As her supervisor, that file was accessible to him for review and prior to the hearing he reviewed the file. Senior Investigator Coons identified the NOV and Appellant OCM requested to move the NOV into evidence. Counsel for Appellee objected asserting the witness had no personal knowledge and the document was hearsay. The ALJ overruled the objection allowing the document into evidence reasoning hearsay is admissible in an administrative proceeding.

Subsequently Senior Investigator Coons was asked by Appellant OCM to identify several photographs taken by Investigator Newell during the inspection. The photographs were taken during the inspection and included photographs of the premises and the NOV. Counsel for Appellee objected to the admission of the photographs asserting the witness could not authenticate the photographs because he was not present at the time the photographs were taken. The ALJ sustained the objection reasoning there was a lack of foundation because Senior Investigator Coons was not present during the inspection and did not have "firsthand knowledge" of what the photographs displayed. Appellant OCM requested an adjournment after the ALJ's ruling to have Investigator Newell appear to testify. Appellant OCM did not have a specific time frame or date to provide and alternatively requested a few weeks. Appellee's counsel objected to the request for an adjournment claiming the proceeding was governed by Article 5 of the Cannabis Law because Appellee held a hemp retail license issued by OCM and thus the hearing must take place in thirty (30) days. The ALJ denied the adjournment stating it had already been quite some time between the inspection and the hearing.

Appellee presented testimony of one witness, Tyler Lehmann ("Mr. Lehmann"). Mr. Lehmann testified to being the owner of Breckenridge Café NYC LLC since 2022. He testified that he had a cannabinoid hemp retail license and a cannabinoid hemp distributor license both issued by OCM. The retail license was for the business premises inspected on July 18, 2024. He

also testified that he has a license in Colorado and multiple locations in New York. Mr. Lehman identified multiple certificates of analysis regarding products he stated were in his store at the time of the inspection. He was not present during the inspection but testified to watching the inspection via live video surveillance.[8] Mr. Lehman further testified that he watched the entirety of the inspection and observed the investigators taking photographs around the store as well as removing items from shelves. Mr. Lehman also testified that during the inspection there were products on-site, behind the sales counter, that were not available for sale with his cannabinoid hemp retail license but that they were only sold online. Mr. Lehman also identified Breckenridge Café brand logo on products displayed in photographs Appellee was permitted to enter into evidence. During cross-examination, Appellant OCM sought to have Mr. Lehman identify photographs of the business premises along with products observed and seized during the inspection. Counsel for Appellee objected claiming it was improper because Mr. Lehman did not take the photographs. The ALJ sustained the objection reasoning the photographs were previously excluded based upon a lack of foundation.

Hearing Decision

On November 18, 2024, the ALJ issued a decision dismissing the NOV and Cease Order upon a finding that Appellant OCM had failed to prove by a preponderance of the evidence that Appellee was engaged in unlicensed activity of cannabis and cannabis products without a valid license. The ALJ reasoned that Senior Investigator Coons could not lay a proper foundation for the photographs because he did not have "firsthand knowledge that they were a fair and accurate depiction of the contents of the photograph[s]." The ALJ then determined that in the "absence of the testimony of Investigator Newell or any evidence which she could have authenticated, OCM has failed to prove beyond a preponderance of the evidence" unlicensed activity.

Arguments on Appeal

Appellant OCM asserts that the ALJ's evidentiary rulings were erroneous and that OCM should have been permitted to present their case. Appellant OCM argues that the photographs should have been introduced as business records. Appellant OCM contends that photographs can be considered business records and the requirements for establishing them as business records

[8] The video surveillance was not offered or admitted into evidence and was not part of the record on appeal. Appellant OCM did not object to the testimony.

pursuant New York State Civil Practice Law and Rules ("C.P.L.R.") section 4518(a) were met. Appellant OCM further asserts that the record was sufficient, based on Appellee's witness testimony, to establish a preponderance of the evidence that Appellee violated was engaged in unlicensed activity at the time the inspection was conducted. Appellant OCM requests the ALJ's decision be vacated and the matter reinstated.

ISSUE ON APPEAL

Whether the ALJ erroneously excluded evidence, improperly denied an adjournment and erroneously dismissed the NOV and Cease Order?

ANALYSIS AND REASONING

Following a review of the record in this matter, the ALJ's decision cannot be confirmed, and the appeal must be granted. We agree with Appellant OCM that the ALJ erred in dismissing the NOV and Cease Order. The ALJ erroneously denied admission of Appellant OCM's evidence, improperly denied a subsequent adjournment request, and erroneously denied Appellant OCM's attempt to authenticate photograph evidence through Appellee's witness, the business owner.

Under the rules of evidence, the proper foundation for photographs is through the testimony of a competent witness that the photograph accurately represents the subject matter depicted. *(People v. Price, 29 N.Y.3d 472, 477 [2017]; People v. Byrnes, 33 N.Y.2d 343, 347 [1974]; Powell v. Burg, 239 A.D.3d 679, 680 [2nd Dept. 2025]; Davidow v. CSC Holdings, Inc., 156 A.D.3d 682 [2nd Dept. 2017*]). However, the formal rules of evidence do not apply in administrative hearings held pursuant to the Cannabis Law and implementing regulations. *(Cannabis Law § 17 [2]; 9 NYCRR § 133.18 [d][2]; S.A.P.A § 306 [1]).* Where a statute is unambiguous, the courts must give effect to its plain meaning. *(Yatauro v. Mangano, 17 N.Y.3d 420 [2011]; Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d 270, 286 [2009]).* Here, the plain language of the Cannabis Law is that the CCB "shall not be bound by the laws of evidence in the conduct of hearing proceedings, but the determination shall be founded upon preponderance of evidence to sustain it." *(Cannabis Law § 17 [2]).* The ALJ in this matter improperly excluded Appellant OCM's evidence from admission into the record based upon the formal rules of evidence.

Moreover, all evidence, including records, documents, business records, photographs, and memoranda in the possession of OCM, which it intends to introduce at the hearing, shall be offered and made a part of the record. *(emphasis added). (9 NYCRR § 133.18 [d][5]; [d][9]; S.A.P.A. § 306 [2]*). Based on the plain language of the Cannabis Law and the implementing regulations,

the ALJ should have admitted Appellant OCM's photograph evidence and made it part of the record. *(Id.)*. Furthermore, the evidence in this instance, photographs of the premises inspected, were also substantial or relevant evidence in that they had the tendency to support a conclusion or ultimate fact. *(Matter of Call–A–Head Portable Toilets, Inc. v. New York State Dept. of Envtl. Conservation, 213 A.D.3d 842, 844 [2023] quoting 300 Gramatan Ave. Assoc. v. State Div. of Human Rights, 45 N.Y.2d 176, 180 [1978])*. Relevant and reliable evidence, including but not limited to records and photographs, prepared by OCM or another governmental agency in the ordinary course of business, may be admitted without regard to technical or formal rules or laws of evidence applicable in the courts of the State of New York. *(9 NYCRR § 133.18 [10])*. As such, the ALJ erred in denying the admission of Appellant OCM's photograph exhibits because the witness did not have "firsthand knowledge." The admission of the evidence would not have removed the requirement of the Cannabis Law that the determination be founded upon a preponderance of the evidence. *(Cannabis Law § 17 [2])*. The ALJ still retained the authority and discretion to determine the weight to be accorded, if any, to the evidence and whether there was a preponderance of the evidence that Appellee was engaged in unlicensed activity. *(9 NYCRR §§ 133.25 [i][2]; 133.21 [a])*.

This error was compounded when the ALJ denied Appellant OCM's request for an adjournment for Investigator Newell's testimony and therein the ability to authenticate the photographs. While an ALJ has the power to rule upon requests, including all requests for adjournments, the reasoning for the denial here appears to have been impacted by an error of law. The only reasoning the ALJ provided for denying Appellant OCM's request for an adjournment was that "quite some time had passed." There was no order to seal issued as part of the inspection on Appellee's business and thus no emergency hearing was required. (*see Cannabis Law §§ 138-a [3]; 138-b [2]-[3]; 9 NYCRR § 133.25 [i])*. Additionally, while Appellee held a cannabinoid hemp license issued and a distributor permit pursuant to Article 5 of the Cannabis Law, neither insulates him from being subject to a violation of Article 6 of the Cannabis Law for unlicensed activity.

In addition to improperly denying the admission of the photograph evidence and subsequent adjournment request, the ALJ erred in denying Appellant OCM an opportunity to enter the evidence through Appellee's witness, Mr. Lehman. Mr. Lehman testified to being the business owner of the premises, and to watching the "entirety" of the inspection via live video surveillance. He further testified to having observed the investigators taking photographs and

removing items from shelves during the inspection. Mr. Lehman also identified his business brand logo on products depicted in photographs entered by Appellee. Based on that testimony, Appellant OCM should have been permitted the opportunity to ask Mr. Lehman if he was able to identify photographs of his business premises and products that displayed the Breckenridge Café logo. Rarely is it required that the identity and accuracy of a photograph be proved by the photographer. Rather, since the ultimate object of the authentication requirement is to ensure the accuracy of the photograph sought to be admitted into evidence, "any person having the requisite knowledge of the facts may verify," or an expert may testify that the photograph has not been altered. *(People v. Byrnes, 33 N.Y.2d at 347; see People v. Patterson, 93 N.Y.2d 80, 84 [1999]*). Therefore, even had the hearings been subject to the formal rules of evidence, it was error of law for the ALJ to prevent Appellant OCM from attempting to have Appellee's witness identify the photographs and enter them into evidence.

An administrative determination may be annulled where the prejudice so permeates the underlying hearing as to render it unfair. *(Ackerman v. New York State Dept. of Health, 155 A.D.3d 1138, 1141 [3rd Dept. 2017]; Matter of Block v. Ambach, 142 A.D.2d 842, 845 [3rd Dept. 1988], affd. 73 N.Y.2d 323 [1989])*. The erroneous exclusion of evidence warrants a reversal or vacating of the decision only if it can be said that such evidence, had it been admitted, probably would have had a substantial influence upon the result of the proceeding. *(see, CPLR § 2002; Geary v. Chruch of St. Thomas Aquinas, 98 A.D.3d 646 [2nd Dept. 2012]; Milone v. Milone, 266 A.D.2d 363 [2nd Dept. 1999])*. In this matter, the evidence was improperly excluded. The excluded evidence likely would have had a substantial influence upon the proceeding and the ultimate determination considering the ALJ's decision in this matter hinged on the "absence of Investigator Newell's testimony or any evidence which she could have authenticated." However, it was the ALJ's erroneous rulings that resulted in the absence of evidence, including Investigator Newell's testimony. Consequently, it is reasonable to conclude that had the evidence not been excluded it would have had a substantial influence on the rest of the proceeding. The errors permeated the entire hearing and resulted in Appellant OCM being denied a fair and impartial hearing. *(see 9 NYCRR § 133.17 [c])*. Thus, the ALJ's decision cannot be confirmed, and a new hearing is warranted. *(c.f., Greary v. Church of St. Thomas Aquinas, 98 A.D.3d at 647; lv. denied 20 N.Y.3d 860* [no new trial required when the court improperly precluded evidence since "there is no indication that the evidence would have had a substantial influence on the result of the trial"]).

CONCLUSION

Based on the foregoing, the ALJ's decision and order in this matter cannot be confirmed. Wherefore, Appellant OCM's appeal is granted, the NOV reinstated, and the matter is remanded to the OAH for additional, de novo, proceedings consistent with the Cannabis Law, related regulations, and this decision. The foregoing constitutes the final decision of the Board in accordance with Cannabis Law Sections 10 (18) and 17 (8) and Title 9 NYCRR Section 133.25.

DATED: November 13, 2025