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.: 207 2024 0821 0042

IGNITE'S OUTLETS, INC.,
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") issued a decision extending the sealing order and ordering a six thousand dollars ($6,000) civil penalty on the violation issued to Appellee-Respondent Ignite's Outlets, Inc. ("Appellee"). Appellant OCM submits the instant appeal, and the exceptions noted therein, to the Cannabis Control Board ("CCB") for review pursuant to New York State Cannabis Law ("Cannabis Law") Sections 10(18) and 17(8) and Title 9 of the Codes, Rules, and Regulations of the State of New York ("NYCRR") Section 133.25(k).

STATUTORY BACKGROUND

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[2], 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." 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]).*

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

[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]).

[2] 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]).

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]*). In response to a violation of the Cannabis Law and related regulations, Appellant OCM is authorized to take enforcement action and impose sanctions, including but not limited to, issuing a notice of violation ("NOV"), seeking civil penalties, seizure of product, and a stop order to cease unlicensed activity ("cease order"). (*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[.]" The penalties provided for may be recovered by the attorney general or OCM in an action or proceeding brough pursuant to section 138-a. *(Cannabis Law § 138-a [7]).*

Appellant is further authorized to issue an immediate sealing order ("OTS") for 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 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, the Cannabis Law and regulations provide factors the OCM shall consider. *(Cannabis Law § 138-b(4); 9 NYCRR § 133.25 [f][1]).* Upon finding such an imminent threat, Cannabis Law Section 138-b (3) authorizes the issuance of an immediate OTS 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[3] part of the business activity on the premises or in the building to be sealed pursuant to the order. (*Cannabis Law § 138-b [6]; 9 NYCRR § 133.25 [f]).* 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 a hearing within seven (7) calendar days, then respondent waives the right to an emergency hearing and will be entitled

[3] In assessing whether unlicensed activity is more than a de minimis part of the business activity at the premises, Cannabis Law Section 138-b(7) states: 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."

to a regular hearing pursuant to section 133.10. *(9 NYCRR § 133.25 [h][1]).*

A party may also request, or OCM initiate, an administrative proceeding to enforce a cease order and to order a financial penalty be assessed for the violation. (*9 NYCRR §§ 133.25 [i]; 133.10 [a]).* 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 regulations. (*9 NYCRR § 133.16).* It is the responsibility of the ALJ, among other things, to review the statement of charges and issue a decision after a hearing that shall include the ALJ's findings of facts, legal conclusions and a penalty, if any, that should be assessed for the violation. *(9 NYCRR §§ 133.17 [a]; 133.21 [a]; 133.25 [i]).* 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

On August 21, 2024, Appellant OCM conducted a regulatory inspection of Appellee's place of business, located at 1525 Route 9, in Halfmoon, New York, 12065, pursuant to Cannabis Law Sections 138-a; 138-b and Title NYCRR Section 133.25 (a). Based on observations made during the inspection, Appellant OCM determined that Appellee was engaging in unlicensed activity in violation of Cannabis Law Sections 125 and 132 and Title 9 NYCRR Section 120 (i). Appellant OCM also issued a cease order pursuant to Cannabis Law Section 138-a (1) and an immediate OTS pursuant to Section 138-b (3).

Appellee requested a hearing with the OAH. A virtual hearing was conducted on November 8, 2024. Appellant OCM and Appellee were represented by counsel. Appellant OCM presented evidence, including testimony and photographs in support of its argument that Appellee was engaged in unlicensed activity and that the OTS was properly issued.[4]

[4] Appellant OCM does not raise any challenge to ALJ's factual findings or the decision to extend the OTS. Appellant solely raises a challenge to the amount of the penalty assessed by the ALJ.

On November 22, 2024, the ALJ issued a decision and order extending the OTS for one year from the decision date and ordering Appellee to pay a six thousand dollars ($6,000) civil penalty. Appellant OCM timely submitted the instant appeal and the exceptions therein on December 19, 2024. Appellant OCM asserts the ALJ erred by failing to assess the maximum civil penalty of ten thousand dollars ($10,000). Appellee did not submit an opposition.

ANALYSIS AND REASONING

Following a review of the record on appeal, the ALJ's decision is confirmed and the appeal dismissed.

Review of an administrative penalty is limited to whether the measure or mode of penalty or discipline constitutes an abuse of discretion as a matter of law. *(Kelly v. Safir, 96 N.Y.2d 32, 38 [2001]; Featherstone v. Franco, 95 N.Y.2d 550, 554 [2000])*. A penalty must be upheld unless it is "so disproportionate to the offense as to be shocking to one's sense of fairness," thus constituting an abuse of discretion as a matter of law. *(Pell v. Board of Ed. of Union Free School Dist., 34 N.Y.2d 222, 237[1974]; see also, Kelly v. Safir, 96 N.Y.2d at 38; Featherstone v. Franco, 95 N.Y.2d at 554–555)*. This determination involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or to the harm to the agency or the public in general. *(Kelly v. Safir, 96 N.Y.2d at 38 [citing Pell v. Board of Ed of Union Free School Dist., 96 N.Y.2d at 234])*. Contrary to Appellant OCM's contention, the ALJ did not err in failing to impose the maximum penalty and the penalty imposed does not shock one's sense of fairness.

Appellant OCM asserts that an immediate OTS is a "drastic remedy" and as such when an OTS is upheld following a hearing it "should naturally come" with the maximum penalty for the underlying violation. Appellant OCM does not point to any statute or regulation that would support the proposition that the maximum penalty must be imposed whenever an OTS is upheld. Instead, Appellant OCM argues that the maximum penalty is a "sort of 'per se' fine amount" and that any penalty issued at a lower amount shocks the sense of fairness as it is disproportionate to the harm that warranted the OTS. This argument, however, ignores the plain language of the Cannabis Law that a civil penalty of not more than ten thousand dollars shall be imposed. *(Cannabis Law § 132 [1][a])*. 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])*. In assessing civil penalties, the nature of such violation shall be considered and the penalty assessed shall be proportionate to the violation. *(Cannabis Law § 132 [1][c])*. Here, the plain language of the statute is not ambiguous and thus should not be overlooked. The statute is clear that upon establishing a

violation, a civil penalty of no more than ten thousand dollars may be assessed. The statute does not mandate a civil penalty of ten thousand dollars be assessed when an OTS is upheld.

An ALJ is in charge of rendering a decision after a hearing, including the findings of facts, legal conclusions, and a penalty, if any. *(9 NYCRR 133.21 [a])*. Thus, it is within the discretion of the ALJ to determine a penalty that is proportionate to the violation. "That reasonable minds might disagree over what the proper penalty should have been does not provide a basis for vacating a penalty." *(Edwards v. City of Middletown, 191 A.D.3d 668 [2nd Dept. 2021])*. Appellant OCM argues that the need for deterrence warrants "punitive damages" or an "additur" given Appellee's acts were willful and reckless. The six-thousand-dollar penalty assessed by the ALJ in this matter was made with reason and was proportionate to the evidence presented at the hearing. In determining the penalty amount, the ALJ reasoned that Appellant OCM's witness, a senior investigator with OCM, who had taken part in over one hundred inspections, testified that the volume of cannabis products that was found during the inspection of Appellee's business was in the "middle range" of the inspections he had conducted. The ALJ further reasoned that evidence established that the cannabis products observed during the inspection were in a back room and not on the sales floor. The ALJ concluded that after balancing these various factors, he determined an "intermediate range" civil penalty would be proportionate to the violation.

Appellant OCM has not demonstrated that the ALJ erred in failing to assess the maximum penalty. Determining the civil penalty to be assessed was within the authority and discretion of the ALJ. *(9 NYCRR §§ 133.21 [a]; 133.25 [i][2])*. A review of the record in this matter does not support that the ALJ abused their discretion in determining the amount of the civil penalty to be assessed. The ALJ balanced the evidence in reaching a civil penalty that was proportionate the violation. The civil penalty assessed in this matter was in accordance with the law and is not shocking to one's sense of fairness. *(Cannabis Law § 132 [1][a])*. Having failed to establish there was an error of law, there is no lawful basis to disturb the civil penalty assessed and the appeal must be dismissed.

CONCLUSION

Based on the foregoing, the ALJ's decision and order in this matter is confirmed. Wherefore, the appeal is dismissed. 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