

STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
OFFICE OF ADMINISTRATIVE HEARINGS

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

1748 Retail Shop Inc.

Respondent.

DECISION

Inspection No. 203202407160007

Respondent requested an emergency hearing on July 17, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on July 16, 2024.

An emergency hearing was originally scheduled for July 22, 2024 however based upon questions presented by the Respondent, a conference was held that day in lieu of a hearing so as to address those questions. During the hearing, it was decided that the parties would postpone a hearing so as to discuss settlement options. On July 29, 2024 Respondent indicated that a hearing was necessary. A hearing was held on August 6, 2024.

Patrick Tassy and Chevy Hall testified on behalf of the Respondent.

The Office of Cannabis Management (hereinafter “OCM”) was represented by Tara Miner, Esq.

Investigative Specialist James Schlipmann testified on behalf of OCM.

ISSUE

The allegations set forth in the Notice of Violation indicate that the Respondent was offering cannabis products, as defined by Cannabis Law Article 3, for sale without an appropriate registration, license, or permit. This allegation was based upon observations made during a regulatory inspection which was conducted at 1748 Flatbush Ave, Brooklyn, New York.

The scope of the emergency hearing was limited solely to the issue as to whether or not the padlocking provisions Cannabis Law Article 6 § 138-b of have been met by a preponderance of the evidence.

CONCLUSIONS OF LAW

Cannabis Law Article 6 §138(a) provides that “The board or the Office of Cannabis Management shall, in accordance with the authority otherwise conferred in this chapter, have the authority to: 1. order any person who is unlawfully cultivating, processing, distributing or selling cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such in this state without obtaining the appropriate registration, license, or permit therefor, or engaging in an indirect retail sale to cease such prohibited conduct. 2. seize any cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such, found in the possession of a person engaged in the conduct described in subdivision one of this section.”

Cannabis Law Article 6 § 138-b(1) provides that orders to seal: In addition to any other authority conferred in this chapter, pursuant to the provisions of this section, the board or the office shall have the authority to issue an order to seal 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 as described in subdivision eight of section ten of this chapter, in violation of subdivision one or one-a of section one hundred twenty-five or subdivision one or eight or section one hundred thirty-two of this article.

Cannabis Law Article 6 §138-b(6) provides that an order to seal may be issued by the office or the board pursuant to subdivision three of this section 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 zoned and lawfully occupied as a residence; and
- (b) the unlicensed activity as described in this section is more than a de minimis part of the business activity on the premises or in the building to be sealed pursuant to this subdivision, the office shall issue a notice of violation and order to cease the unlicensed conduct, which shall constitute notice that such activity must cease immediately. (See Regulations at 9 NYCRR 133.25(f)(2-3)).

Cannabis Law Article 6 §138-b(7) provides that in assessing whether unlicensed activity within a building is more than de minimis, the office or board, as relevant, 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. (See Regulations at 9 NYCRR 133.25 (f)(3)(i-iv)).

Cannabis Law Article 6 §138-b (3) provides that the office may issue an order to seal 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. (See Regulations at 9 NYCRR 133.25(f)(1)).

Cannabis Law Article 6 §138-b(4) sets forth the factors that determine an imminent threat to public health, safety, and welfare shall be limited to:

- (a) documented sales to minors;
- (b) unlicensed processing of cannabis products at the building or premises;
- (c) orders issued following an inspection wherein the person engaged in the unlicensed activity engaged in violent, tumultuous, or other behaviors indicating expressed intent to not comply with the office’s order to cease the unlicensed activity;
- (d) documented presence of unlawful firearms at the building or premises;
- (e) proximity of the building or premises to schools, houses of worship, or public youth facilities;
- (f) presence of products deemed unsafe based on reports of illness or hospitalization; or
- (g) sales of, or offers to sell, cannabis products not tested or labeled lawfully in accordance with this chapter. (See Regulations at 9 NYCRR 133.25(f)(1)(i-vii).

FINDINGS OF FACT

1. Respondent was offering cannabis products for sale without a license issued by OCM (Exh A). Investigator Schlipmann credibly testified and provided photographic evidence which established that at the time of the inspection, he observed cannabis flower, concentrate, and edibles (Exh B1 7-8, B2 4-5, C1 1-7, C2 1, 3-5, 9, C3 1-2, 8). The shop also had a point-of-sale system, cash register, and an ATM machine, all of which indicate that sales were occurring at the shop (Exh B1 3-4, 9, B2 2). A menu was located by the register, in public view, which Investigator Schlipmann testified were offers for sale of cannabis flower, as denoted by “ounce, half, and quarter,” as well as the designated prices, with each strain represented by one of six different color coded dots which corresponded to nearby jars containing cannabis flower, each labeled with the same colored dots located on the menu (Exh B1 6-8, B2 2, 7-8, C1 1). The back of the 20 jars of cannabis flower, located in public view, were also labeled with the strains, the majority of which also had a label on the back which indicated “CHT” which as was pointed out by Investigator Schlipmann, is “THC” spelled backwards (Exh C1 1). Investigator Schlipmann testified and provided photographic evidence which he identified as empty packages of cannabis flower, affixed to the window by the register, many of which depicted commonly known food items, and all of which, based upon their packaging, could appeal to persons under the age of 21

(Exh B1 5, C1 6). He testified that based upon his experience and belief, these packages were advertising for products available for purchase indicating that there would be no other reason for them to be posted by the service window. Many of these packages contained the California logo which Investigator Schlipmann testified was prohibited in New York (Exh B1 5). It is also noteworthy that one of the products offered for sale was branded with a counterfeit NYS logo (C1 7). Investigator Schlipmann also testified and provided photographic evidence which establishes that processing of cannabis was occurring at the location. Such evidence included many empty packages, pre-roll tubes, trays with loose flower, containers, stickers, scales, and large bags of loose cannabis flower in various states of processing from large buds to a fine consistency for processing pre-rolls (Exh B1 7, B2 2-5, 7, C1 1, 8-9, C2 1-9, C3 1-8).

2. According to Investigator Schlipmann, no part of the premises to be sealed was used in part as a residence and pursuant to local law or ordinance, is zoned and lawfully occupied as a “residence.” Investigator Schlipmann credibly testified that at the conclusion of the inspection, he conversed with a male and female employee standing together at the location and asked the male if he lived there. According to the Investigator, the male responded that he did not live there but sometimes stayed there. Investigator Schlipmann subsequently asked the male employee if anyone lived there to which he responded no. Respondent provided a picture of a bed located in a room at the shop which was surrounded by some piles of clothing (Exh 1 9A/9B 1-2). Respondent’s witness, Chevy Hall, the female who was with the male when Investigator Schlipmann inquired as to whether anyone lived at the site, testified that she had worked at the shop since September of 2023 and moved into the room at the shop with her boyfriend, approximately three or four months later. Ms. Hall testified that there was no shower at the site, and no oven or stove. I find her testimony that this was her residence as incredible and in furtherance of that position, note that at the time that her boyfriend was asked if anyone lived at the shop, she remained silent. It is also significant that Ms. Hall’s New York State Identification, issued May 28, 2024, indicated an address different than the address of the subject location (Exh D 1). As such, I find that no part of the premises was used in part as a residence.

3. The unlicensed activity which warrants an order to seal constitutes more than a “de minimis” part the business activity. Cannabis Law Article 6 § 138-b (7) and OCM Regulations 9 NYCRR Part 133.25 (f)(3) enumerate the factors to consider when determining if unlicensed activity occurring within a business is more than de minimis. I note the presence of symbols of cannabis leaves (Exh B1 5,8, Exh B2 2, 6) inside the shop as well as a large mural inside the shop depicting colorful pictures and contained the phrase “Flower to the People” (Exh B1 3). In addition, a menu was on display in public view at the location as well as empty bags posted by the service window for the purpose of advertising (Exh B1 5-6). Both a large variety, as well as a substantial volume of illicit cannabis products, were discovered during the inspection of this location. Many of the products were labeled with the California cannabis label which Investigator Schlipmann testified is not legal in New York State and none of the products contained the appropriate New York logo. I find that the volume of cannabis products in the store constitutes more than a de minimis part of the business activity.

4. The unlicensed activity constituted an imminent threat to public health, safety, and welfare based upon evidence presented which established there were sales or offers to sell

cannabis products which were not tested or lawfully labeled in accordance with Cannabis Law Article 6. Many of the products were labeled with the California brand which are prohibited for sale in New York State and not labeled with the New York State brand. It is also significant that some of the cannabis packages advertising the cannabis flower offered for sale were bags labeled with depictions which closely resembled certain commonly known food products and could be appealing to people under 21 years of age and are also prohibited by New York laws and regulations (Exh B1 4-5, 7-8, B2 3-4, C1 1-5, 7-8, C2 5-6). Furthermore, the testimony and evidence established that processing of unlicensed cannabis was occurring at the site. This included bags and a bowl containing loose cannabis flower, two scales, empty pre-roll tubes, empty bags, and stickers, found at the location (Exh B2 2-5, 7, Exh C11,8,9, Exh C2 1-9, Exh C3 1-8)

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON JULY 16, 2024 IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: August 7, 2024

Karen Lavery
Administrative Law Judge

PLEASE BE ADVISED: Either party may appeal this decision within 30 calendar days of receipt, according to the specific manner described in Regulations at 9 NYCRR 133.25(k).

This decision was sent via email on August 7, 2024 to the following:

Nickolas Perry
Sheila Wagner
Tara Miner, Esq.
Patrick Tassy