

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

325 Smoke Shop Inc.

Respondent.

DECISION

Inspection No. 104202407160034

Respondent requested an emergency hearing on July 24, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on July 16, 2024.

The emergency hearing commenced on July 29, 2024 which is within three (3) business days of the Respondent's request and concluded on August 2, 2024.

The Respondent was represented by Jacqueline S. Kafedjian, Esq.

Mortaltha Alsaidi testified on behalf of the Respondent.

The Office of Cannabis Management (hereinafter "OCM") was represented by Ruben Espinosa, Esq.

Investigative Specialist Sarah Tagliaferro 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 325 Broadway Suite A, New York, NY.

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 Tagliaferro testified that she observed cannabis flower, cannabis concentrate, and cannabis edibles (Exh A). Photographs were entered into evidence depicting cannabis flower labeled “Premium Cannabis Flower” with packaging bearing the California logo which according to the Investigator, is not legal as it was not manufactured in New York, nor did it contain the NY label (Exh B 4-6, Exh H 1-6). Evidence was provided depicting various kinds of cannabis concentrate, some of which were also labeled with the California symbol (Exh B 7, D 3, E 1-4). Exh B 8 consisted of a paper entitled “4/20 Specials” and Investigator Tagliaferro credibly testified that “4/20” was an unofficial cannabis holiday. The document listed 7 “specials” indicating that if a person bought certain cannabis items, they would get a discount on another cannabis item or one for free (Exh B 8). For example, the first line stated “Buy \$100 of 8th, get 1 half off” which the Investigator explained that an 8th is nomenclature for a quantity of cannabis which is commonly sold (Exh B 8). A cash register and a point-of-sale system were also present at the location which the Investigator testified was indicative of sales occurring at the site (Exh B 9). Investigator Tagliaferro testified that she also observed a variety of different brands of cannabis pre-rolls located at the site (Exh C 1-8). Investigator Tagliaferro identified

Delta 8 THC edibles as well as THC edibles (Exh D 1-9). She testified that a package of edibles cannot contain more than 10 mg of THC per package. Investigator Tagliaferro testified that Delta 8 products are not legal to sell in New York State. Although Respondent was in possession of a valid Cannabinoid Hemp Retail License issued by OCM (Exh 1), the products depicted in the photographs presented at the hearing contained more than the legal limit of THC permissible under his Hemp License. Furthermore, Respondent had numerous products in various forms containing Delta 8 which were offered for sale (Exh D 1-7, E 1-2, 4). I further note that the numerous pre-rolls depicted in the photographs are not legal for Respondent to sell irrespective of his Hemp License even if they did not contain cannabis. According to OCM's Cannabinoid Hemp Regulations Guidance for Licensees Revised January 2024 which was cited from during the hearing by Respondent's attorney, "A cannabinoid hemp retail license does not permit the sale of cannabinoid hemp products intended for smoking to consumers. A retail license is required through the New York State Adult-Use Cannabis Program to sell cannabinoid hemp products in the form of a pre-roll, cigarette, cigar, or hemp products packaged or combined with other items designed to facilitate smoking such as rolling papers or pipes." Therefore, merely the sale of cannabinoid hemp pre-rolls, irrespective of the inclusion of THC, requires an Adult Use Retail License issued by OCM which Respondent does not possess.

2. Investigator Tagliaferro testified 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" and no evidence was offered to the contrary.

3. 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. 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 logo which Investigator Tagliaferro testified is not legal in New York State and none of the products contained the New York Label (Exh B 4-7, C 1-8, D 1-9, E 1-4, F 1, H 1-6). Another factor to be considered in determining if the activity occurring within a business is more than de minimis, is the presence of advertising the sale of cannabis or otherwise indicating that cannabis is sold on the premises. I find that the cannabis leaf stickers, the pre-roll sticker, as well as the inflatable joints affixed to the ceiling would indicate that cannabis is being sold at the premises (Exh B 2-3). In addition, Investigator Tagliaferro credibly testified that the "4/20 Specials" referred to cannabis products and their corresponding prices which is further indicative of cannabis being sold at the location (Exh B 8). As such, I find that that the unlicensed activity occurring within the business was more than de minimis.

4. This unlicensed activity constituted an imminent threat to public health, safety, and welfare in that there were sales of, or offers to sell, cannabis products that were not tested or labeled lawfully in accordance with Cannabis Law Article 6. As testified to by Investigator Tagliaferro, many of the illicit cannabis products were labeled with the California logo and none were labeled with the New York State logo, both of which are in violation of New York State law.

While Respondent's attorney argues that Respondent did not intentionally sell cannabis products at this location, the Respondent testified that he had not made an effort to stay informed of any changes in the laws with respect to the products authorized under his Hemp License. In fact, Respondent testified that he believed that Delta 8 was a CBD product. While his actions may not have been willful, it is his responsibility to actively remain educated as to any changes in this market and not shift the blame to NYS to keep him updated.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON JULY 17, 2024 IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: August 6, 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 6, 2024 to the following:

Nickolas Perry

Sheila Wagner

Ruben Espinosa, Esq.

Jacqueline S. Kafedjian, Esq.