

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

7th AVE ORGANIC CORP.

Respondent.

DECISION

Inspection No. 102202406180011

Respondent requested an emergency hearing on June 24, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on June 18, 2024.

The emergency hearing was conducted on June 27, 2024 which is within three (3) business days after a sworn affidavit was received from counsel for respondent requesting an emergency hearing for the case with inspection number 102202406180011.

The Respondent was represented by James Kirschner, Esq.

Daniel Hulkower testified on behalf of the Respondent.

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

Investigative Specialist Bladimir Nunez 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 319 7th 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 off 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 Nunez testified that as an OCM investigator, he has training and experience in identifying cannabis, cannabis products, and the distinction between cannabis and hemp. He testified that while conducting the inspection at 7th Ave Organic Corp, he observed cannabis flower, cannabis pre-rolls, cannabis concentrate, and cannabis edibles at the location, many of which were labeled with the California logo which he testified was not legal to sell in New York State (Exh B 1, 5-12, Exh C 5-6, Exh D 5, 7-10, Exh E 1). He testified that none of the cannabis products which he observed at the location were branded with the New York logo. Further evidence was shown of a point of sale system, a ledger depicting cash sales, and a receipt which did not identify the product sold however significantly, did not reflect any tax charged, all of which are indicative of cannabis products offered for sale (Exh E 1-2, 4) Respondent's witness who identified himself as the manager of the shop, testified that Respondent was selling cannabis products and was not in possession of a license authorizing them to do so.

2. According to the testimony of Investigator Nunez, 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.”

3. The unlicensed activity which warrants an order to seal constitutes more than a “de minimis” part the business activity. The Cannabis Law Article 6 §138-b (7) and OCM Regulations part 133.25(f)(3) enumerate the factors to consider when determining if unlicensed activity occurring within a business if more than de minimis. One such factor is the presence of signs or symbols advertising the sale of or otherwise indicating that cannabis is sold on the premises. Investigator Nunez provided testimony and photographic evidence of the sign on the outside of the store depicting the name as “Canna World Organic Product” as well as a sign on the counter entitled “Cannabis World,” both of which indicate that cannabis is offered for sale at the location (Exh B 2-3). Investigator Nunez also provided photographic evidence as to what he testified to as both a volume and variety of cannabis products which included cannabis flower, cannabis pre-rolls, cannabis concentrate, and cannabis edibles (Exh B 1, 5-12, Exh C 5-6, Exh D 5, 7-10, Exh E 1). He also testified that the percentage of cannabis products offered for sale in comparison to non-cannabis products, was approximately fifty percent.

Respondent’s witness testified that Respondent was in possession of a Cannabinoid Hemp Retail License which authorized the sale of hemp and CBD products. While Respondent’s attorney contends that the cannabis products offered for sale at the location were not more than a de minimis part of the business activity, I note that the Respondent’s own witness testified that the cannabis products offered for sale consisted of approximately fifty percent of the products offered for sale in the store. As such, I find that the cannabis products offered for sale at the location, exceeded the de minimis threshold.

4. The 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. The products depicted in Exhibits B, C, D, and E, as testified to by Investigator Nunez, depicted products which were labeled with the California label and none were branded with the New York label.

Respondent’s attorney argues that the service of the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was improper, citing that it was not served pursuant to Cannabis Law Article 6 138-b (10) which requires that the document be mailed via certified mail and within five days following the issuance of the order. The testimony of both Investigator Nunez and Respondent’s witness established that the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was personally served upon the sole store employee present at the time of the inspection and the document was also posted on the storefront of the location (Exh F 1-2). An Affirmation of Mailing was sent to the address of the business which Investigator Nunez testified was the process which OCM followed (Exh H). As evidenced by Respondent’s attorney’s appearance at the hearing in a representative capacity of the named business, I reject his argument of improper service. Respondent’s attorney’s timely request for, and the granting of an emergency hearing, establishes that the Respondent was not in any way prejudiced by any service issue.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON JUNE 18, 2024, IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: June 28, 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 June 28, 2024 to the following:

Nickolas Perry
Sheila Wagner
Paul Tsui, Esq.
James Kirschner, Esq.