

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION
Inspection No. 204202410010011

M & A 716 Inc.

Respondent.

Respondent requested an emergency hearing on October 1, 2024, which was made within seven (7) calendar days of the date of the inspection which occurred on October 1, 2024.

The emergency hearing was commenced on October 9, 2024 at the request of the Respondent and concluded October 11, 2024.

The Respondent was represented by Phil Modrzynski, Esq..

The Respondent, Musa Alharbi, testified on behalf of himself.

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

Investigative Specialist Daniel Gregory and Investigative Specialist Andrew Gerken 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 687 Dick Rd. Cheektowaga, New York 14225.

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.

During the course of this hearing the Petitioner called two witnesses regarding two separate regulatory inspections. The first was an inspection conducted by Investigator Daniel Gregory on August 22, 2024, in which a Notice of Violation and Order to Cease Unlicensed Activity was issued to the Respondent. On that form, the Respondent was alleged to have violated among other laws Cannabis Law Article 6 §§§ 125, 132, and 138-a. The premises was not ordered sealed on this NOV. The second inspection was conducted by Senior Investigator Andrew Gerken and the Respondent was issued an NOV and Order to Cease Unlicensed Activity based on Senior Investigator Gerken’s, “observation of cannabis flower, cannabis edible, concentrate (cannabis),” in addition to his observation of a “point of sale system.” The second NOV does not have a box checked next to Order to Seal, but per Senior Investigator Gerken’s testimony, the premises was in fact sealed. The basis of the sealing was marked as, “[t]his is a subsequent inspection in which unlicensed activity is confirmed to be continuing more than ten days after an NOV was previously issued. The prior Notice of Violation and Order to Cease Unlicensed Activity was previously issued on 8/22/24.”

The NOV issued after the second inspection states clearly at the top: “IF NO ORDER TO SEAL IS ISSUED AND UPON A SUBSEQUENT INSPECTION THE VIOLATION HAS NOT BEEN ABATED, THEN THE PREMISES MAY BE SUBJECT TO AN ORDER TO SEAL.”

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).

Cannabis Law Article 6 §138-b(5) sets forth an additional basis for issuing an order to seal: “Notwithstanding the factors listed in subdivision four of this section and the restriction set forth in paragraph (b) of subdivision six of this section, the office may issue an order to seal with an immediate effective date upon a second or subsequent inspection in which unlicensed activity is confirmed to be continuing more than ten calendar days after a notice of violation and order to cease unlicensed activity was previously issued by the office, provided that the office has also provided notice pursuant to subparagraph (ii) of paragraph (a) of subdivision thirteen of section one hundred thirty-eight-a of this article.”

Cannabis Law Article 6 §138(a)(13) (ii)(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: ... upon finding a violation of this section by a holder of a license issued by the state liquor authority, a registration issued by the commissioner of taxation and finance to sell cigarettes or tobacco products at retail, a registration issued by the commissioner of taxation and finance to sell vapor products at retail, or a lottery sales agent license issued by the division of lottery, issue a notice of violation to the holder or an agent thereof that clearly states that the holder’s business premises may be subject to an order to seal if upon a subsequent inspection the office finds that the violation has not been abated.”

FINDINGS OF FACT

Respondent was alleged to have been offering cannabis products for sale without a license issued by OCM on August 22, 2024. Respondent was issued an NOV to this effect. (Exhibit A). Respondent has an active Retail Dealer Certificate of Registration for Cigarettes and Tobacco Products as well as an active Retail Dealer Certificate of Registration for Vapor Products from the New York State Department of Taxation and Finance. (Exhibits B4 and B5). During the course of this hearing Investigator Gregory who issued the first NOV stated that alleged cannabis products were found in the outside rear of the premises. (See Exhibits B2, B11, B13). Senior Investigator Andrew Gerken testified regarding the second inspection done at M & A 716 Inc. doing business as Oasis Smoke Shop at 687 Dick Road. He explained that he had training and experience in identifying illicit products, conducting regulatory inspections. He testified that during the second inspection of the premises, he observed cannabis products on the premises in an adjoining location at 685 Dick Road. These observations are in evidence in Exhibit’s E6- E28 and F1- 16. Both the second NOV and the testimony of Senior Investigator Andrew Gerken clearly indicate that the Order to Seal was based upon a finding of a violation after a subsequent inspection. (Exhibit D).

This is problematic: there was never a finding or adjudication that cannabis was in fact being sold at 687 Dick Road. Though there was a warning located at the top of the first NOV regarding the failure to abate a violation possibly resulting in an order to seal, this language does not mirror the language contained in Cannabis Law Article 6 §138-b(5) which refers to Cannabis

Law Article 6 §138(a)(13) (ii)(a) . That law states that, “the board or the office of cannabis management shall, in accordance with the authority otherwise conferred in this chapter, have the authority to: ...upon finding a violation of this section by a holder of... a registration issued by the commissioner of taxation and finance to sell cigarettes or tobacco products at retail [or] a registration issued by the commissioner of taxation and finance to sell vapor products at retail...issue a notice of violation to the holder or an agent thereof that clearly states that the holder’s business premises may be subject to an order to seal if upon a subsequent inspection the office finds that the violation has not been abated.” The language in this passage does not state, as the first NOV implies that a simple issuance of an NOV and Order to Cease Unlicensed Activity is a sufficient basis for issuing an Order to Seal upon a subsequent observation of cannabis at a location. The Cannabis Law states that there must be a finding of a violation of the section. There was no evidence presented during this hearing that there has been a finding by the Office of Administrative Hearings for OCM or any other adjudicatory body, that Respondent was in violation of the Cannabis Law. As such, the Respondent did not have an opportunity to contest the observations and findings of OCM. To allow OCM to seal Respondent’s premises without such a finding would be both in contradiction of the Cannabis Law and in violation of basic principles of due process, as it would allow OCM the power to seal a premises based on previous allegation which has not been adjudicated, and that even if true, on its own did not give OCM the power to seal.

The OCM could have issued an NOV on October 1, 2024, which cited multiple theories of prosecution against Respondent, providing a separate basis for the issuance of the Order to Seal. They did not. When asked on cross examination whether the Order to Seal which was issued on October 1st only indicates that it was issued for a subsequent inspection, Senior Investigator Gerken stated, “correct.” He agreed that there was no indication of the Order to Seal being issued based on volume and variety, one of the factors to be considered if OCM were attempting to prove that there was more than a de minimis amount of unlicensed activity occurring at the location. Senior Investigator Gerken’s testimony was transparent; OCM was not proceeding on a theory of a violation of Cannabis Law Article 6 §138-b(6) and Cannabis Law Article 6 §138-b(3). Therefore the premises, must be unsealed.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON OCTOBER 1, 2024, IS HEREBY VACATED FROM THE DATE OF THIS DECISION.

Dated: October 18, 2024

Laurie Cartwright
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 October 18, 2024, to the following:

Nickolas Perry
Sheila Wagner
Celena Ditchev, Esq.
Luwick Francios, Esq.
Phil Modrzynski, Esq.