

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION
Inspection No. 10720240870011

Fashion Gold Inc. D.B.A O's Smoke Shop

Respondent.

Respondent requested an emergency hearing on August 13, 2024, which was made within seven (7) calendar days of the date of the inspection which occurred on August 7, 2024.

The emergency hearing was conducted on August 13, 2024, which is within three (3) business days of the Respondent's request.

The Respondent was represented by Phil Modrzynski.

The Office of Cannabis Management (hereinafter "OCM") was represented Tracy Hennige, Esq.

Investigative Specialist Darrick Wakefield, 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 1623 Pine Avenue Niagara Falls, NY 14301.

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.

According to the testimony of Investigator Wakefield, the Notice of Violation (hereinafter “NOV”), Order to Seal, and Order to Cease unlicensed activity were posted on the building. (Exhibit A). Additionally, Investigator Wakefield explained that he provided a copy of the NOV, Order to Seal and Order to Cease unlicensed activity, to the personnel on site, but that they refused to acknowledge in writing that they were accepting service, and also refused to provide an address for the owner. As such, Investigator Wakefield’s service on Fashion Gold, fulfilled the service requirement outlined in the Cannabis Law.

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. Investigator Wakefield testified that he has training and experience in identifying cannabis and cannabis products. He explained that he identifies cannabis based on markings, packaging, appearance, and its distinctive odor. He explained that during his investigation he observed the following cannabis products offered for sale including, but not limited to: pre-rolls, drink enhancer, gummy edibles, cannabis flower, and chocolate chip cookie edibles,

2. No part of the premises to be sealed was used in part as a residence and pursuant to local law or ordinance no part was zoned and lawfully occupied as a “residence.” Exhibit B depicted the interior and exterior of the location. Both the exterior and interior of the location were visibly commercial in nature. There were shelves and cases filled with commercial items and no evidence of a bed, dresser, kitchen, shower or other trappings typically found on a residential premises. Exhibit B-1 also clearly shows that O’s Smoke Shop is located in proximity to other commercial properties.

3. The unlicensed activity which warranted an order to seal constituted 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 is more than de minimis. One of the relevant factors is whether a large volume and variety of illicit cannabis products was found on the premises. Indeed, Investigator Wakefield testified that he observed a wide variety and volume of products on the premises during his inspection. There were numerous brands on display, including: 3Chi, Strictly Delta, Waferz, Just Delta, Dankwoods, TKO, JUST HHC, JUST DELTA8, Synergy Cannabis, Lemon Made, Lost 8’s, PHD Hemp, Magic Mushrooms, BamBam, and D8. (See Exhibit C) An extensive variety of product types were also observed including: HHC Pre-Rolls, Tangerine Lime Delta 9 Drink Enhancer, Diamond Infused Banana Pudding and Strawberry Mimosa Pre-Rolls, Delta 9 Chocolate Chip Cookie, Delta 8 Peaches, Straw-Nana Vape Cartridge, Lemon OG Cartridge, THC Joint, Sour Diesel Hash, Hybrid and Sativa Flower, Pineapple Magic ,Mushrooms, Watermelon shaped edibles, and Berries and Cream Triple Infused Pre-Roll. (See Exhibit C)

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. Investigator Wakefield testified that the location was offering out of state products for sale, which in many cases had the California state cannabis logo. He explained that none of the items in the store had the New York State official cannabis logo, nor were they from a New York State Licensed Facility. Exhibit C-2, C-3, C-7, C-8, C11, and C-14, all contain products depicting the California state warning label or another miscellaneous warning label. In addition to the ample evidence showing that products on site were not tested or labeled lawfully in accordance with the Cannabis Law. There was also evidence of unlicensed processing on the premises in that there were extremely large numbers of empty cannabis flower packages on display. (See Exhibit C-8 and C11).

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON AUGUST 7, 2024, IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: August 19, 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 August 19, 2024, to the following:

Nickolas Perry
Sheila Wagner
Tracy Hennige, Esq.
Phil Modrzynski, Esq.