

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 211202408200039

BREWSTER CONVENIENCE INC.

Respondent.

Respondent requested an emergency hearing on August 22, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on August 20, 2024.

The emergency hearing was conducted on August 27, 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 by Student Intern Zachary Hirschfeld under the supervision of Ruben Espinosa, Esq.

Senior Investigator 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 484 Delaware Avenue, Buffalo, 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.

Should either party file a request for an additional hearing to adjudicate the sufficiency of the Notice of Violation and the Order to Cease Unlicensed Activity, that hearing will be scheduled for a later date.

APPLICABLE 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)(2) requires any sealing order be served to the owner of the business or other person of suitable age or discretion in actual or apparent control of the premises at the time of the inspection. The sealing order must also be posted at the building or premises that was sealed, secured, or closed. Additionally, “a copy of the sealing order shall also be mailed to any address for the owner of the business *at any address provided by the person to whom such order was delivered...*” (emphasis added).

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. The testimony and evidence offered by Investigator Schlipmann established that Respondent was offering cannabis products for sale without a license issued by OCM (Exh A). Photographs were entered into evidence which depicted a large glass display cabinet, in full view of a patron of the shop, which contained a variety of cannabis products including cannabis edibles, cannabis flower, and cannabis concentrate, two of which contained price tags (Exh B 5-11). Those products were also inventoried on a series of six vouchers from the New York State

Department of Taxation and Finance (“DTF”) which were completed in the presence of Investigator Schlipmann at the time of the inspection (Exh C).

2. Investigator Schlipmann testified that 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.” No evidence was introduced by Respondent’s counsel to the contrary.

3. The unlicensed activity which warrants an order to seal does not constitute more than a “de minimis” part of the business activity. 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. While this location was identified by a sign on the outside of the building as a “Smoke Shop,” no evidence of signs and symbols advertising the sale of cannabis or otherwise indicating that cannabis was sold at the premises were shown at the hearing. I find that a variety of cannabis products were located at the shop. Specifically, different brands of cannabis flower, cannabis concentrate, and cannabis edibles were observed at the time of the inspection. As to the volume of cannabis products, I note that they were limited to one large or possibly two display cabinets. Investigator Schlipmann initially testified that no cannabis products were observed in any of the back room(s) however subsequently indicated that a box of cannabis flower may have been found but he could not recall with certainty (Exh B 11). In assessing whether a finding of more than de minimis so as to justify the Order to Seal, Cannabis Law Article 6 §138-b(6) requires that “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...” In the present case, the evidence does not support such a finding. I note that one side of the location consisted of cabinets which contained glassware used as smoking apparatus (Exh B 4). Furthermore, Investigator Schlipmann testified that of the approximately seven display cases on the right side of the shop, only one large or two cases consisted of cannabis products (Exh B 4). In addition, the shelves behind the display cases which lined the wall contained non-cannabis products. According to photographs produced by Respondent’s attorney and identified by Investigator Schlipmann, the shop also contained a humidor room which consisted of a series of shelves from the floor to approximately six feet in height on which cigars were displayed for sale (Exh B11 and B12). I find that the one large or two display cases were the only places where cannabis products were definitively located. The rest of the store consisted of glassware, nicotine vapes, ashtrays, grinders, lighters, rolling papers, and vape batteries. In addition, the humidor room contained shelves with boxes of cigars.

Therefore, based upon the volume of illicit cannabis products depicted in the photographs in comparison with the volume of non-cannabis products offered for sale, I find that selling cannabis was not the primary purpose of the store. I further find that OCM has not proven by a preponderance of the evidence that the products seized were more than de minimis.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON AUGUST 20, 2024, IS HEREBY VACATED AND THE PADLOCK SHALL BE REMOVED IMMEDIATELY.

Dated: August 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 August 28, 2024 to the following:

Nickolas Perry
Sheila Wagner
Zachary Hirschfeld
Ruben Esposito, Esq.
Phil Modrzynski, Esq.