

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

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**OFFICE OF CANNABIS MANAGEMENT,**

Petitioner,

-against-

**DECISION**

**Inspection No. 211202405290001**

**Buffalo Smokes**

Respondent.

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Respondent requested an emergency hearing on May 30, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on May 29, 2024. A Notice of Violation and Order to Seal were issued at the time of inspection.

The emergency hearing was conducted on June 4, 2024 which is within three (3) business days of the Respondent's request.

The Respondent was represented by Charles Gaughan, Esq.

No witnesses appeared on behalf of the Respondent.

The Office of Cannabis Management (hereinafter "OCM") was represented by Student Intern Zachary Hirschfeld under the supervision of Ruben Espinosa, Esq.

Senior Investigator William McKay 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 Buffalo Smokes located at 394 Evans Street, Buffalo, New York, 14221.

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. Investigator McKay credibly testified and provided photographic evidence that at the time of the inspection, he observed a wide variety of illicit cannabis products including cannabis gummies, vapes, and pre-rolls (Exh B, Exh D-5, Exh D-5). While Respondent's attorney argued that the products were hemp for which his client had a hemp license, Investigator McKay testified that the products in question contained other derivatives in addition to the hemp which rendered them cannabis products. Investigator McKay testified that Respondent's OCM issued hemp license expired October of 2023 however indicated that even if Respondent's hemp license was current, the products offered for sale would still not have been in compliance with NYS law and regulations.

2. According to the credible testimony of Investigator McKay, 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.”

3. The unlicensed activity which warrants an order to seal constitutes more than a “de minimis” part the business activity. This was established by both credible testimony of Investigator McKay as well as his consistent documentation reflected by the Notice of Violation, which indicated that the volume and variety of illicit cannabis products observed at the site exceeded a “de minimis” part of the business activity. Respondent’s attorney credibly testified that there were many other products which did not contain cannabis and were offered for sale at shop. While this testimony is accepted as true, Investigator McKay’s testimony that cannabis products offered for sale were more than “de minimis” is controlling and thus meets the threshold issue.

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 not tested or labeled lawfully in accordance with Cannabis Law Article 6. The products were not labeled with the NYS OCM adult use label. Exhibit D-6 depicted various products offered for sale contained in packages which depicted cartoonish figures and font, both of which could be considered attractive to people under the age of 21 years of age.

**WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON MAY 29, 2024 IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.**

Dated: June 7, 2024

  
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 7, 2024, to the following:

Nickolas Perry

Sheila Wagner

Zachary Hirschfeld

Ruben Espinosa, Esq.

Charles Gaughan, Esq.