

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 2032024071700011

Cloud 9 NYC

Respondent.

Respondent requested an emergency hearing on July 22, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on July 17, 2024.

The emergency hearing was conducted on July 25, 2024 which is within three (3) business days of the Respondent's request.

Anthony Brito and Johnysha Santana testified on behalf of the Respondent.

The Office of Cannabis Management (hereinafter "OCM") was represented by Shaquan Hunt, 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 2163 2nd Avenue, New York, NY.

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.

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 Schlipmann credibly testified and provided photographic evidence that at the time of the inspection, he observed a wide variety of illicit cannabis products including cannabis flower cannabis concentrate, and cannabis edibles (Exh B 4, Exh C 1-6, 12-14). In addition, photograph evidence was admitted into evidence which showed an ATM and a point of sale system, both of which are indicative of sales of unlicensed cannabis at the site (Exhs B 5-6). A spiral notebook was located on the counter which Investigator Schlipmann described as a menu as it listed numerous cannabis products and their corresponding prices as well as indicating that cash was the only accepted form of payment and referred to the location of the ATM in the shop (Exh C 15). Investigator Schlipmann testified that the prices on the menu were consistent with the illicit cannabis products which he found at that location. Furthermore, Investigator Schlipmann testified that in the back of the shop he found a grinder, a tray with loose cannabis, pre-roll tubes, empty packaging, labels, and two boxes containing bags of cannabis flower, all of which indicate that processing of illicit cannabis was occurring at the location (Exh C 7-14).

2. Inspector Schlipmann credibly 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.”

3. The unlicensed activity which warrants an order to seal constitutes more than a “de minimis” part the business activity. The Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal (Exh A) in conjunction with the testimony of Investigator Schlipmann as well as the photographic evidence established that the volume and variety of illicit cannabis products observed at the site exceeded a “de minimis” part of the business activity (Exh B 4, Exh C 1-6, 12-14).

4. The unlicensed activity constituted an imminent threat to public health, safety, and welfare because there were sales or offers to sell cannabis products which were not tested or lawfully labeled in accordance with Cannabis Law Article 6. Many of the products were labeled with the California brand which are prohibited for sale in New York State and not labeled with the New York State brand (Exh C 2, 12, 14). It is also significant that some of the cannabis products were packaged with labeling very closely resembling certain cereals, and other food items which are commonly known and could be appealing to people under 21 years of age and are also prohibited by New York laws and regulations (Exh C 5-7). Furthermore, the testimony and evidence established that processing of unlicensed cannabis was occurring at the site. This included the tray with loose cannabis flower, the grinder, empty pre-roll tubes, empty bags, labels, and two different boxes of bags of cannabis flower bearing the labels found at the location (Exh C 7-14).

5. Respondents contend that the person in charge of the shop at the time of the inspection, Eugene Sanchez, demanded a warrant however the investigators ignored the request and proceeded to conduct the investigation. I reject this contention given the credible testimony of Investigator Schlipmann who indicated that he walked into the business during the hours it was open to the public and conducted the inspection. I further note that the two witnesses who testified were not present at the time of the inspection and the person who was present during the inspection was not called as a witness at the hearing. While they contend that they should have been present at the time of the investigation, there is no requirement that an investigation cannot be conducted without the owner present. Investigator Schlipmann testified that Mr. Sanchez, who identified himself as the manager of the shop, was very combative and in an “elevated state” and refused to sign the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal when presented with it. Investigator Schlipmann testified that he handed it to either Mr. Sanchez or a female who was present at some time during the inspection. In addition, the document was posted on the outside of the location as well as a copy of which was mailed to the location (Exh D 2-3, Exh E).

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON JULY 17, 2024 IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: July 29, 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 July 29, 2024 to the following:

Nickolas Perry
Sheila Wagner
Shaquan Hunt, Esq.
Anthony Brito