

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. 134202405230006**

**717 Convenience Corp. d/b/a Smoke City NYC**

Respondent.

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Respondent requested an emergency hearing on May 29, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on May 23, 2024.

The emergency hearing was conducted on June 12, 2024 pursuant to a mutual agreement between the parties.

The Respondent was represented by Marc Scolnick, Esq.

No witnesses testified on behalf of the Respondent.

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

Investigative Specialist Jillian Agnew 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 717 2<sup>nd</sup> Ave, New York, 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 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 (Exh A). Investigator Agnew testified that during the course of the investigation, she observed cannabis flower, cannabis edibles, and cannabis concentrate, all of which was labeled with the California symbol which she testified is not legally permissible to sell in New York State (Exh C, c-1, c-2, c-3, c-5, Exh D, d-1, d-2, d-3, d-4, d-5, Exh E, e-2, e-3, e-4, e-5). Investigator Agnew also testified and provided photographic evidence of jars of loose flower which she identified as cannabis which was also marked with a price tag indicating that it was offered for sale (Exh B, b-3, b-5, Exh D, d-1). It is notable that many of the products depicted in the pictures which were labeled as containing cannabis were marked with price tags which indicated that the items were being offered for sale (Exh B, b-3, b-5, Exh C, c1-c3, Exh D, d-1, d-2, d-5, Exh E, e1-e5).

2. According to Investigator Agnew, 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 Cannabis Law Article 6 § 138(b)(7) and regulations at 9 NYCRR §133.25(f)(3) enumerate the factors to consider when determining if unlicensed activity occurring within a business is more than de minimis. During the hearing, several exhibits were entered into evidence which depicted cannabis leaves on the interior of the store and indicated that cannabis was being sold at the shop (Exh B, b-3, b-5, Exh D, d-1, d-3). Investigator Agnew also testified and provided photographic evidence of both the volume and variety of illicit cannabis products on site. She further testified that while the shop sold products other than cannabis products, she estimated that approximately 50% of the products in the store consisted of cannabis products, which therefore exceeded the de minimis threshold.

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 in accordance with Cannabis Law Article 6. The products depicted were not labeled lawfully in accordance with Cannabis Law Article 6 or were labeled improperly with the California warning label (Exh C, c-1, c-2, c-3, c-5, Exh D, d-1, d-2, d-3, d-4, d-5, Exh E, e-2, e-3, e-4, e-5). Several packages were identified by Investigator Agnew as depicting cartoonish figures, using a particular font and brightly colored packaging, all of which she stated could be considered attractive to people under the age of 21 years of age (Exh C, c-1, c-2, c-4, c-5, Exh D, d-1, d-3, d-4, d-5, Exh E, e-2, e-4, e-5).

The Notice of Hearing/Order to Cease Unlicensed Activity/Order to Seal was served upon and signed by someone who identified himself as an employee of the store. Respondent’s attorney argues that service was not properly effectuated because that person was 19 years old and he contends was not of suitable age. Investigator Agnew credibly testified that this person was the only employee onsite during the duration of the inspection. I note that Regulations at 9 NYCRR §133.25 (g)(1) provide that “the office will deliver any order to seal 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 and will post the order to seal at the building or premises that have been sealed, secured and closed. The order will remain in effect pending a hearing and final determination of the board, or until such order is vacated by the office. An order to seal will explicitly state the procedures to request an emergency hearing on the order to seal within seven (7) calendar days and the right to have the emergency hearing on the order to seal held within three (3) business days of a request.” Therefore, I reject the Respondent’s attorney’s argument regarding improper service as while he arguably may not have been of suitable age to accept service or to be employed at a shop selling illicit cannabis, he was the only person in “apparent control of the premises at the time of the inspection” and thus was the only person that the investigator could reasonably serve.

Respondent’s attorney also contends that the person upon which the aforementioned documents were served was someone to whom English was not his first language and thus an interpreter should have been provided. Such argument is rejected based upon the credible testimony of Investigator Agnew who stated that she conversed with this person and it was her belief, based upon that conversation, that he understood the questions asked of him.

**WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON JUNE 14, 2024 IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.**

Dated: June 14, 2024

*Karen Lavery*  
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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 14, 2024, to the following:

Nickolas Perry  
Sheila Wagner  
Ruben Espinosa, Esq.  
Marc Scolnick, Esq.