

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. - 109202410160014

HOT SPOT SMOKE SHOP, INC.

Respondent.

Respondent requested an emergency hearing on October 17, 2024, which was made within seven (7) calendar days of the date of the inspection which occurred on October 16, 2024

The emergency hearing was conducted on October 24, 2024, pursuant to a mutual agreement between the parties.

The Respondent was represented by Phil Modrzynski, Esq.

The Office of Cannabis Management (hereinafter “OCM”) was represented Kevin Brown, Esq.

Investigator Daniel Gregory 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 5460 Transit Rd., Depew, NY 14043.

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.

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(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. On October 16, 2024, OCM Investigator Daniel Gregory conducted an inspection of Hot Spot Smoke Shop, Inc. located at 5460 Transit Rd., Depew (Ex. A). At that time, Investigator Gregory issued a Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal and the premises was sealed (Ex. A). On October 17, 2024, Respondent requested an Emergency Hearing with respect to the Order to Seal. A hearing was held on October 24, 2024, at which Investigator Gregory appeared as the sole witness. Investigator Gregory testified that a large number of signs and symbols were present at Hot Spot Smoke Shop, which he further testified that, according to his training and experience, indicated that cannabis sales may be occurring at the location. Among these signs and symbols were cartoons depicting the smoking of cannabis (Exs. B 2, 8, & 9), depictions of cannabis leaves (Exs. B 9, 10, 20, 22, & 24), and brand names that Investigator Gregory testified that he recognized as companies that produce cannabis products or cannabis related accoutrements (Exs. B 5, 6, 7, 8, 9). Further, Investigator Gregory testified that the products displayed at Hot Spot Smoke Shop are associated with cannabis and cannabis usage, including bong, ashtrays, hookahs, rolling papers, detoxifying agents, and trays (Exs. B 1, 2, 3, 4, 6, 8, 9, 10, & 22). None of the signs and symbols noted by Investigator Gregory were, according to his testimony, illegal and all are allowed to be sold under New York

law.¹ Investigator Gregory testified that he initially only found a single cannabis pre-roll on the premises of Hot Spot Smoke Shop. This amount, he admitted on cross-examination, would not have warranted an order to seal.

In addition to the signs and symbols, Investigator Gregory testified that he found scales with cannabis residue at Hot Spot Smoke Shop (Ex. B 21). He highlighted in his testimony the presence of an ATM (Ex. B 6) and a point-of-sale register (Ex. B 7), both of which served as indications that transactions were occurring. The ATM additionally suggests that cannabis may be sold on the premises as “people who purchase cannabis products prefer to use cash instead of a card,” as this makes the transaction untraceable. An electronic inventory system was also found on the premises (Ex. B 19) which listed prices for items that appeared to be cannabis products and matched some of the cannabis products later discovered. This, Inspector Gregory testified, led him to further believe that cannabis products were being sold on premises.

During the investigation, Investigator Gregory found the lease(s) for the building (Ex. B 21). The lease(s) indicated that Hot Spot Smoke Shop had access and rights to the location being inspected as well as the retail unit next door. The landlord for the building later sent these documents to Inspector Gregory (Ex. C). Investigator Gregory gained access to the second unit in which he found a large quantity of cannabis and items labeled as cannabis. This access was granted to the Investigator by the landlord of the building. No evidence was submitted that the owner of Hot Spot Smoke Shop possessed a key to the building next door; however, Investigator Gregory testified that the Respondent confirmed that the unit next door was being leased by him and that materials in the unit belonged to him (see also Ex. B 11). While Respondent’s counsel attempted to suggest that the leases were not in Respondent’s name due to variations between the name listed on the lease and Respondent’s name (compare Exs. C & F 1), I do not find this argument persuasive or particularly relevant. First, the name on the lease is substantially similar to that of the Respondent. Further, a check found in Hot Spot Smoke Shop and photographed by Investigator Gregory (Ex. B 24) listed Respondent as the sole proprietor of Hot Spot Smoke Shop, the business entity listed on the leases.

All the above factors, taken as a whole, indicate by a preponderance of the evidence that Respondent was offering cannabis products for sale without a license issued by OCM. It was uncontested that Respondent does not possess an Adult Use Cannabis license. Although the materials that were cannabis or labeled as being cannabis were not found within Hot Spot Smoke Shop, it is likely that they were readily available to Respondent for the purpose of sales. No alternative theory was put forth by Respondent as to the reason for why such a substantial quantity of cannabis was stored in the unit next to Hot Spot Smoke Shop. Respondent admitted that he stored items next door, which lends credibility to the theory that he had access to the location, despite not being the individual who granted access to investigators. The array of signs and symbols, along with the ATM, point of sale register, and inventory device make it more likely than not that cannabis was offered for sale at the location.

¹ The sole exceptions to the legality of products displayed at Hot Spot Smoke Shop were the “Magic Mushroom Microdose Chocolate Bars” and the hemp products that were on display and available for sale (B 25). While these products are not necessarily legal, Inspector Gregory testified these products did not factor into the decision to place an order to seal on Hot Spot Smoke Shop.

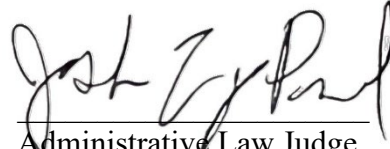
2. Investigator Gregory testified that no part of the premises to be sealed was used in part as a residence and pursuant to local law or ordinance, no part was zoned and lawfully occupied as a “residence.” He added that there was no kitchen, no shower and no dresser on the premises and that the property appeared commercial in nature. Respondent’s attorney conceded that no portion of the premises was used as a residence.

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. A large variety and volume of illicit products were discovered at Hot Spot Smoke Shop. A variety of brands were observed on premises, including: Medibles, Torch, Kawali, Bone Head, Naked Worm, Kushy Kreme, Treezy, Runtz, Ganja, and Jeeter Juice. (Exs. D & E). A variety of product types were also observed including: pre-rolls, live resin, a THC beverage, gummy edibles, sours gummy edibles, concentrate, cannabis flower- both individually bagged and multiple bulk bags. Investigator Gregory placed the estimate of the amount of cannabis flower discovered on site to be in the range of multiple pounds (Exs. D 17, 20 & E 1, 2) and further estimated that “hundreds” of products labeled as cannabis products were discovered on premises. These estimates were reasonable and supported by the photographic evidence. (Exs. D & E). The total amount of product, coupled with the variety of said product, supports a finding that the unlicensed activity being conducted at Hot Spot Smoke Shop constitutes more than a “de minimis” part of the business activity.

4. The unlicensed activity being conducted at Hot Spot Smoke Shop 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. Many of the items found during the inspection were labeled as cannabis products and either contained an inspection stamp of production outside New York State or no inspection stamp at all (Exs. D & E). It is likely that none of the products were tested in New York as the products shown in the photographs submitted into evidence lacked the inspection stamp of New York State (Exs. D & E). Inspector Gregory testified that the packaging of many of the products were designed with bright colors and cartoon characters or to mimic a popular brand of snack so as to appeal to minors (see Exs. D 3-8). While this is likely true, it did not factor into my decision concerning the threat to public health, safety, and welfare. Due to the large amount of product not tested in New York discovered during the inspection as demonstrated by the absence of labels or labels not in accordance with New York state law, the activity occurring at Hot Spot Smoke Shop constituted an imminent threat to public health, safety and welfare.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON OCTOBER 16, 2024, IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: October 30, 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 October 30, 2024, to the following:

Phil Modrzynski, Esq.

Kevin Brown, Esq.

Celena Ditchev, Esq.

Nickolas Perry

Sheila Wagner