

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 102202407230028

Elevated Convenience and Exotics Corp. Respondent.

Respondent requested an emergency hearing on July 30, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on July 23, 2024.

The emergency hearing was conducted on August 2, 2024 which is within three (3) business days of the Respondent's request.

The Respondent was represented by James Kirshner, Esq.

Ammar Alyafai testified 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.

Investigative Specialist Bladimir Nunez 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 2388 Grand Concourse, Bronx, 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.

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. The testimony and evidence establishes that Respondent was offering cannabis products for sale without a license issued by OCM (Pet Exh A). Investigator Nunez credibly testified and provided photographs which are conclusive that cannabis was being offered for sale. Such products include THC concentrate, THC edibles, THC flower, and THC pre-rolls (P Exh B 4-13, 15-17, P Exh C 1-4). In addition, there was a POS system at the site as well as processing equipment with loose cannabis located in the back of the store (P Exh B 3, 14-16).

2. Investigator Nunez 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 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. One such factor is the presence of

signs and symbols inside or outside the subject premises indicating that cannabis is being sold. Petitioner's Exh C 6 and 7 indicate two menus located in public view which list cannabis products for sale and corresponding prices. I note that Petitioner's Exh C 7 indicates the same products on the left and the right side of the menu with the distinction being that they are offered for sale in two different quantities. Variety and volume of cannabis products offered for sale are also factors to be considered when determining if unlicensed activity is more than de minimis. I note that despite the variety of products denoted on the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal, several of the same products were pictured in different exhibits (P Exh B 7, 9, P Exh C 4). While I find that there is a variety of products, a number of which were the same products in different flavors, I do not find that a significant volume of products existed on the premises. I find it significant that the photographs submitted by Petitioner taken from the entrance of the location clearly depicts coolers containing drinks along the right side of the store and shelves lining the left side of the location which contained paper towels, toilet paper, snacks, and candy (P Exh B 6). The area from which cannabis was being offered for sale was a small area at the opposite end of the store directly across from the door (P Exh B 2). Investigator Nunez credibly testified that there was cannabis product located behind the counter area however given the volume of non-cannabis products offered for sale at this location, I do not find 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..." pursuant to Cannabis Law Article 6 §138-b(6)(b). I further note that the Respondent presented a witness who identified himself as an employee of the store who credibly testified that pictures taken July 1, 2024 and entered into evidence, were consistent with the products contained in the store at the time of the July 23, 2024 inspection (R Exh A 1-15). The photographs were taken of the shelves themselves and depicted a substantial amount of various drinks, snacks, candy, cigars, lighters, smoking paraphernalia, medicine, toothpaste, batteries, mouthwash, microwavable food as well as other items (R Exh A 1-15).

Based upon the volume of illicit cannabis products depicted in the photographs in comparison with the volume of non-cannabis products, 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.

Respondent argues that service was not properly effectuated based upon the failure to mail a copy of the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal to the business owner and that a copy of the document was not properly posted. Investigator Nunez testified that the Respondent was personally handed a copy of the document to the only person working at the location at the time of the inspection and no evidence was presented to the contrary. He also testified that the employee refused to provide the address of the owner. I note that the withholding of such information impacts OCM's ability to serve the business owner by mail. Furthermore, a copy of the document was posted on the glass door (P Exh 1-2). Respondent's attorney contends that the rolldown door was solid and covered the posted document causing the posting to be insufficient however the document was posted on the glass door and personal service was achieved. I therefore find that service was not defective.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON JULY 23, 2024, IS HEREBY VACATED AND THE PADLOCK SHALL BE REMOVED IMMEDIATELY.

Dated: August 5, 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 5, 2024 to the following:

Nickolas Perry
Sheila Wagner
Zachary Hirschfeld
Ruben Espinosa, Esq.
James Kirshner, Esq.