

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 104202408070050

EMPIRE SMOKE SHOP 3, INC.

Respondent.

Respondent requested an emergency hearing on August 9, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on August 7, 2024.

The emergency hearing was originally scheduled for August 13, 2024 and at Petitioner's request, the hearing was rescheduled for and held on August 16, 2024.

The Respondent was represented by Phil Modrzynski, Esq.

The Office of Cannabis Management (hereinafter "OCM") was represented by Mark Lahey, Esq.

Investigative Specialist Sarah Tagliaferro 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 2916 Williams Street, Cheektowaga, 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.

Should either party file a request for an additional hearing to adjudicate the sufficiency of the Notice of Violation and the Order to Cease Unlicensed Activity, that hearing will be scheduled for a later date.

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)(2) requires any sealing order be served 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. The sealing order must also be posted at the building or premises that was sealed, secured, or closed. Additionally, “a copy of the sealing order shall also be mailed to any address for the owner of the business *at any address provided by the person to whom such order was delivered...*” (emphasis added).

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 (Exh A). Investigator Tagliaferro credibly testified and provided photographs which are conclusive that cannabis was being offered for sale at the location. Such products included THC concentrates, THC edibles, THC flower, and THC pre-rolls (Exh B 8-13, Exh C 4-20). The majority of the products were located in baskets or a box located in a back room not in public view of customers, however some products were on display in the public area (Exh C 18). Some of the products were affixed with a price tag or otherwise marked in such a manner to indicate that they were offered for sale (Exh C 7-8, 14, 17-18). In addition, there was a Point-of-Sale system as well as an ATM machine at the location (B 4-7).

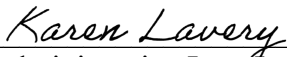
2. Investigator Tagliaferro testified that no part of the premises to be sealed was used in part as a residence and pursuant to local law or ordinance, is zoned and lawfully occupied as a “residence” and that she believed this location to be a commercial property. No evidence was offered to refute this testimony.

3. The unlicensed activity which warrants an order to seal does not constitute more than a “de minimis” part of the business activity. In so finding, I note that the majority of the cannabis products found were located in baskets or a box in a back room which was not accessible to the public, with only one photograph offered into evidence which depicted a small amount of cannabis pre-rolls which were on display to a person entering the shop (Exh C 18). While Investigator Tagliaferro opined that the baskets in the back were likely moved from the front area to the back room after the Respondent learned that enforcement units were in the area, I reject that as mere speculation. Furthermore, some of the items which Investigator Tagliaferro testified were offered for sale in public view, are supported by one photograph (Exh C 17) but not another which was also taken at the time of the inspection and depicted the top of the same display case absent such product (Exh C 1). She testified that she could not recall the order in which the photographs were taken, therefore her testimony that the product was on display is rejected given her testimony that some of the products were photographed after being moved from the back room onto the display counter in the front of the shop, prior to seizing them. The photographs of the inside of the location depicted numerous non-cannabis items offered for sale which was confirmed by Investigator Tagliaferro’s testimony that the shop also sold nicotine vapes, smoking paraphernalia, chips, beverages, and candy (Exh C 1-3). While I find Investigator’s Tagliaferro’s testimony credible that cannabis products were offered for sale, 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 although Investigator Tagliaferro testified that the Department of Taxation and Finance Enforcement team seized five pounds of cannabis flower and fourteen pounds of cannabis concentrate, no photographs or vouchers to support this testimony were presented at the hearing.

Therefore, based upon the volume of illicit cannabis products depicted in the photographs in comparison to the volume of non-cannabis products, I find that selling cannabis was not the primary purpose of the shop. I further find that OCM has not proven by a preponderance of the evidence that the products seized were more than de minimis.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON AUGUST 7, 2024, IS HEREBY VACATED AND THE PADLOCK SHALL BE REMOVED IMMEDIATELY.

Dated: August 16, 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 August 16, 2024, to the following:

Nickolas Perry
Sheila Wagner
Mark Lahey, Esq.
Phil Modrzynski, Esq.