

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 109202410020011

EXTREME GIFTS INC.

Respondent.

Respondent requested an emergency hearing on October 3, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on October 2, 2024.

The emergency hearing was conducted on October 8, 2024 which is within three (3) business days of the Respondent's request.

Robert Zicari and Kathrine Howard testified on behalf of the Respondent.

The Office of Cannabis Management was represented by Kevin Brown, Esq.

Investigative Specialist 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 1694 Penfield Road, Rochester, 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. Respondent was offering cannabis products for sale without a license issued by OCM. Investigator Gregory credibly testified and provided photographic evidence that at the time of the inspection, he observed cannabis concentrate, cannabis flower, cannabis pre-rolls, and cannabis edibles at the location (Exh B 7-10, 12, 15, 17-21, 23-27, Exh C 1-3, 5 -7, 9-12, 14, 16-17). According to Investigator Gregory, prior to the investigation, the Enforcement team had sent someone into Extreme Exotics Inc. for the purpose of attempting to purchase cannabis and products were shown to the potential buyer which constitutes an offer to sell. Cannabis products were located in three drawers under the cash register, most of which were affixed with price tags (Exh B 6-9). In the back rooms, Investigator Gregory observed more cannabis products as well as molds for cannabis edible products, a large amount of empty packaging, a tray with loose

cannabis on it, pre-roll tubes, a scale, a price gun, and labels for cannabis products identified as “Gorilla Glue” (Exh B 10-28, Exh C 1-4, 8-13, 15-16). A notebook was also found in the back on which was written “WEED” and several pages which were entered into evidence contained what Investigator Gregory described as quantities as well as various strains and flavors of cannabis products with which he was familiar based upon his training and experience (Exh C 19-23). Prices and what appeared to be total amounts were also reflected on the pages of the notebook (Exh C 20-23). A packing slip was also entered into evidence which was observed at the location and contained a description of six cannabis products, ordered in quantities of two, which were shipped from a party in California to the Respondent on September 17, 2024 (Exh C 25). The Investigator testified that on the day of the inspection, he was initially going to issue the Respondent a Notice of Violation however based upon the discovery of further products in the back rooms as well as evidence of processing cannabis on site, he determined that an Order to Seal was warranted.

2. According to the credible testimony of Investigator Gregory, no part of the premises to be sealed was used in part as a residence and pursuant to local law or ordinance, was zoned and lawfully occupied as a “residence.” He testified that he saw no kitchen, shower, or dresser containing clothes. No evidence was offered by the Respondent to refute those observations or to claim that any part of the premises sealed was zoned or lawfully occupied as a residence.

3. 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 or symbols, indoors or out, advertising the sale of cannabis or otherwise indicating that cannabis is sold on the premises. Respondent’s exhibit 2 is a photograph of products in the front window visible from the outside, which included a hat depicting “420” which is a common reference to cannabis. There were similar hats inside the location in addition to other ones which were branded with depictions of cannabis leaves and some of which containing the phrase “High Life,” all of which are references to cannabis and are indicators that cannabis is sold on the premises (R Exh 3-4). The price tags on the cannabis products observed at the site as well as the notebook containing quantities, strains, flavors, and prices are indicators that cannabis is offered for sale at this location (Exh B 6-9, Exh C 19-23). In addition, the offer to sell cannabis products to the person sent by the Enforcement team, prior to the inspection, is further evidence that illicit cannabis was offered for sale. Based upon the photographs entered into evidence at the hearing and the testimony of investigator Gregory, it was demonstrated by a preponderance of the evidence that this location had a large variety and a substantial volume of illicit cannabis being offered for sale. Respondent contends that there was a significant amount of other merchandise offered for sale at the location. The presence of many other products offered for sale at the location is undisputed however the volume and variety of cannabis products offered for sale including the ongoing ability to produce it given Respondent’s processing operation, as well as the prices and monetary totals contained in the notebook located in the back (Exh C 19), exceeds the threshold of de minimis. He also contends that this location served as the location for several other businesses, most of which were online and were not the same entity as Extreme Gifts Inc. While that may be true, the entity known as Extreme Gifts Inc. located at 1694 Penfield Road, Rochester, New York is the one which from which illicit cannabis was being offered for sale. Any other business entities which may be using that address are not subject to the Order to Seal

and therefore are not relevant to this determination. As such, I find that the unlicensed activity at Extreme Gifts Inc. constituted more than a “de minimis” part of the business activity.

4. The unlicensed activity did constitute 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. Investigator Gregory testified that many of the cannabis products contained the California label or some other state label which he testified were not legally permissible to sell in New York State (Exh B 8-9, 23-26, Exh C 5). Two of the products also contained a spurious New York State label (Exh B 17, 26). A substantial number of the cannabis products offered for sale contained labels with bright colors and depicted images which could be appealing to children, which is also in violation of New York law (Exh B 7-9, 17, 22-26, Exh C 3-5, 7, 10-12, 14, 16). In addition, Investigator Gregory identified large amounts of empty cannabis packages, a tray containing loose cannabis, a scale, a price gun, labels with cannabis strain, THC content and weight, and molds for cannabis edibles, all of which he testified strongly indicated that untested and unregulated cannabis processing was occurring at this location (Exh B 10-28, Exh C 1-4, 8-13, 15-16).

5. The Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was properly served upon the Respondent on October 2, 2024 (Exh A). Investigator Gregory’s credible and undisputed testimony established that the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was personally served upon the Respondent who initially identified himself as the manager of Extreme Gifts Inc. Investigator Gregory testified that Respondent refused to sign the document and it was left on the counter (Exh A). According to the Investigator, it was not until after the document was completed and left for the Respondent that the Respondent identified himself as the owner of the shop. Furthermore, the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was also conspicuously posted on the front door of the premises, as required by Cannabis Law Article 6 §138(b)(2) (Exh D 2-3). Therefore, I find that service was properly effectuated in accordance with Cannabis Law Article 6 §138(b)(2).

6. Respondent argued that absent testing, there is no way to know whether the products identified by Investigator Gregory to be cannabis products were in fact cannabis. I note that Cannabis Law Article 6 §138(b)(1) specifically refers back to Cannabis Law Article 6 §125(1) which provides that no unlicensed person shall process or sell at retail, any cannabis products marketed or labeled as such. It also refers to Cannabis Law Article 6 §132 which prescribes penalties for unlicensed persons offering to sell cannabis and cannabis products or products marketed and labeled as such. The majority of the products identified as cannabis by Investigator Gregory were in packages labeled as cannabis often with the strain, THC concentration, and a warning on it. As such, the Cannabis Law provides for products labeled as cannabis to be construed as such based upon the packaging and therefore no testing is required under the law.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON OCTOBER 2, 2024 IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: October 9, 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 October 9, 2024, to the following:

Nickolas Perry
Sheila Wagner
Celena Ditchev, Esq.
Kevin Brown, Esq.
Robert Zicari