

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION
Inspection No. 20420240821004

Fly Smoke Shop

Respondent.

Respondent requested an emergency hearing on August 23, 2024, which was made within seven (7) calendar days of the date of the inspection which occurred on August 21, 2024

The emergency hearing was originally scheduled for August 29, 2024, which is within three (3) business days of the Respondent's request. The hearing was adjourned on August 27, 2024 for settlement discussions and a hearing was conducted on September 11, 2024.

The Respondent was represented by Charles Gaughan, Esq..

Matthew Bennet testified on behalf of the Respondent.

The Office of Cannabis Management (hereinafter "OCM") was represented by Abir Ahmed.

Investigative Specialist Andrew Gerken 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 576 Dick Road, Depew, New York 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.

There were no allegations of improper service raised during this hearing by Respondent's attorney.

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. Respondent was offering cannabis products for sale without a license issued by OCM. During the course of the hearing, Investigator Andrew Gerken testified that he has training and experience in conducting regulatory inspections, including in his role as an investigator for OCM. He explained that he has conducted regulatory inspections in both his current and prior employment. He stated that he received training at OCM, both in the office and in the field, in identifying cannabis and delta hemp products. He explained that during a regulatory inspection, he looks for illicit packaging such as bright, bubble letters that are attractive to children. He also looks at the QR codes sometimes featured on the packaging. In determining if a business is selling illicit cannabis, he does advanced reconnaissance, and speaks to people coming in and out

of the store. In addition he also looks at the signage and whether products are being offered for sale online. In this instance, Investigator Gerken explained that he observed a cannabis leaf in a sign in the storefront window, which he interpreted as some evidence of cannabis sales at the unlicensed premises. During the course of the hearing multiple exhibits were entered into evidence, which showed that the Respondent was selling cannabis products. Exhibits C, D, and E showed alleged cannabis edibles on display to the public, such as “Dope Dough,” Cosmic Conez Half Bak’d, and Delta Munchies Delta-9 gummies. Investigator Gerken also testified regarding cannabis products that were found in a back room of the location on the floor and in a black metal cabinet. These items included: naked worm pre-rolls, Torch Live Resin vapes, Naked Worm gummies, Get Spaced concentrate, Space Club Live Resin and Liquid Diamonds vape, and Grape Soda/Gas I cannabis flower, High-C Rainbow Sherbert, and Deadicated Edibles. (Exhibits E-J). There was testimony by a witness for the Respondent, Mr. Bennett, that almost all the product in the back of the store, excluding the black bag on the second shelf featured in Exhibit J1, was his. Mr. Bennett explained that he consumed large amounts of cannabis daily. He also explained that the bag on the second shelf contained product belonging to another employee. He denied owning the Torch vapes featured in Exhibit J4. The majority of Mr. Bennett’s testimony centered around the process by which he cultivates and cures his own cannabis. I found that testimony credible, particularly given the specific “Terp Lock” bags holding cannabis flower featured in Exhibit I4. However, what I do not find credible is that the majority of the product recovered from the black cabinet and back of the store, was for Mr. Bennet’s personal consumption. It is very difficult to believe that one would bring in that much cannabis and store it at one’s place of work, particularly if that business does not sell cannabis. Furthermore, when asked about his specific cannabis consumption habits, Mr. Bennett gave vague answers, demurring that he ate edibles throughout the day and took breaks to smoke multiple times a day. Mr. Bennett’s mere conclusory statements about how much cannabis he consumed, did not explain the large volume and variety of products observed in the black cabinet and in bags at the location.

2. Investigator Gerken 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 stated that there was no shower, bed, or chest of drawers on the property, and that the property was commercial in nature.

3. The unlicensed activity which warrants an order to seal constitutes more than a “de minimis” part the business activity. Fly Smoke met two of the four criteria or factors listed in the Cannabis Law, used to determine if the unlicensed activity at a business is de minimis. Specifically, the premises had both a volume and variety of cannabis product, including products which Investigator Gerken deemed problematic, as they were attractive to children because of their bubble font or cartoon like nature, namely: Exhibit H5 and H6, as well as the Dope Dough - Exotic Edibles seen in Exhibit C4. Investigator Gerken recovered at least nine brands of illicit cannabis product, specifically: Naked Worm edibles and pre-rolls, three flavors of Delta Munchies, four flavors of Dope Dough - Exotic Edibles, three flavors of Cosmic Conez by Half Bak’d, at least four varieties of Torch vapes, two varieties of GetSpaced product- a vape by Space Club, Cannabis flower labeled Grape Soda, a Cannabis drink by High-C, and multiple types of cannabis infused baked goods by Deadicated Edibles. (Exhibit C through J). The volume

of the product collected can be seen most easily in the following: the first large bag filled with product in the foreground Exhibit J and the large bag of torch vapes featured in J4.

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 lawfully in accordance with Cannabis Law Article 6. The illicit cannabis products observed in the course of this proceeding were primarily unlabeled or contained out of state or fictitious Cannabis warning labels. The Dope Dough – Exotic Edibles contained a fictitious cannabis warning label. The Half Bak’d, Naked Worm, and Deadiated Edibles, products did not contain a cannabis warning label. The Torch vapes, Grape Soda- Gas I, High-C, and empty Mandarin Mac packaging were labeled with a California warning label. Additionally, there was no evidence presented to indicate that the products recovered from the location were tested in accordance with New York Law.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON AUGUST 21, 2024, IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: September 17, 2024

Laurie Cartwright
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 September 17, 2024, to the following:

Nickolas Perry

Sheila Wagner

Abir Ahmed, Esq.

Charles Gaughan, Esq.