

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 204202410040012

GENEVA CONVENIENCE AND SMOKE SHOP, INC.

Respondent.

Respondent requested an emergency hearing on October 9, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on October 4, 2024.

The emergency hearing was conducted on October 15, 2024 which is within three (3) business days of the Respondent's request.

The Respondent was represented by Phil Modrzynski, Esq.

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

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 481 Hamilton Street, Geneva, 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. According to the credible testimony of Investigator Gerken, the Respondent was offering cannabis products for sale without a license issued by OCM (Exh A). The Investigator testified that he and other members of the OCM Enforcement Team participated in a regulatory inspection of Geneva Convenience and Smoke Shop, Inc. at the same time that the NY State Police were conducting a search of that location, pursuant to a search warrant which was issued by Ontario County Sitting Judge Honorable Frederick Reed on October 3, 2024 (Exh F 1-2). Investigator Gerken testified that he had been advised by a member of the NY State Police that they had conducted undercover purchases of illicit cannabis at Respondent's shop which was the

catalyst for the search warrant (Exh F 1-2). The Investigator provided testimony and photographs of a back room as well as a separate storage room which contained various types of cannabis products including cannabis concentrate, cannabis flower, and cannabis edibles (Exh C 1-18, Exh D 1-19, Exh E 1-9, 11-25, 32-35). Upon entering the shop Investigator Gerken testified and provided photographic evidence of both an ATM and a point-of-sale system, both of which are indicative of unlicensed cannabis sales (Exh B 2, 6). Many of the cannabis products were labeled with the California logo which Investigator Gerken testified were not legally permissible to sell in New York (Exh C 1-4, 7- 9, 11, 17-18, Exh D 1-3, 6-7, 14-17, Exh E 2-9, 11-19, 22, 24, 33-34). Many of the products were affixed with price tags which indicates that they were offered for sale (Exh C 1-6, 9, 11, 13-18, Exh D 1-12, 18, Exh E 2-5, 7-8, 13-15, 18-19, Exh G 1-2). Respondent's counsel contends that many of the products do not identify the concentration of cannabis contained in the product however the majority of the products indicate that they do in fact contain cannabis and as the Respondent had neither an Adult Use Retail License issued by OCM or a Cannabinoid Hemp Retail License, it is unlawful for Respondent to offer for sale products containing any amount of cannabis irrespective of the concentration. Furthermore, Respondent's counsel contends that it was improper for OCM to conduct a regulatory inspection concurrent with the NY State Police search of the location. I note that the explicit language of the search warrant grants the authority of the search of the subject premises, "TO ANY POLICE OFFICER IN THE STATE OF NEW YORK OR ANY AGENT OF THE NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT" (Exh F 1-2). Furthermore, Investigator Gerken testified that the Enforcement Unit of OCM has the authority to conduct regulatory inspections at their discretion absent any warrant. As such I find that the timing of OCM's regulatory inspection was completely appropriate, especially as OCM was specifically named as an authorized party on the search warrant.

2. According to the credible testimony of Investigator Gerkin, 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." The testimony and photographs presented at the hearing depict an area at the location which contains several rooms including one with couches, one with a bed, as well as a shower stall (Exh G 4-5, 7-8). I note that this area does not have a bathroom with a toilet as that is located and accessed in the shop (Exh G 6). Investigator Gerken credibly testified that at the time of the investigation, he asked the Respondent if anyone lived at the premises and the Respondent stated that no one lived there however crashed there occasionally. Therefore, I find that by Respondent's own admission, the location was not used as a residence.

3. The unlicensed activity which warrants an order to seal constitutes 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 or symbols, inside or outside the location, advertising the sale of cannabis or otherwise indicating that cannabis is sold on the premises. I note the presence of a sign depicting a cannabis leaf located inside the shop however visible from outside the location (Exh B 3). The price tags affixed to many of the cannabis products indicate that they were offered for sale (Exh C 1-6, 9, 11, 13-18, Exh D 1-12, 18, Exh E 2-5, 7-8, 13-15, 18-19, Exh G 1-2). Further indicators are volume and variety of cannabis products offered for sale. The testimony and

photographs entered into evidence depict a large volume and significant variety of cannabis products for sale (Exh C 1-18, Exh D 1-19, Exh E 1-9, 11-25, 32-35). As such, I find that the unlicensed activity as described in this section is more than a de minimis part of the business activity on the premises.

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. Investigator Gerken testified that many of the cannabis products contained the California label which he testified were not legally permissible to sell in New York State (Exh C 1-4, 9, 11, 17-18, Exh D 1-3, 6-7, 14-17, Exh E 2-9, 11-19, 22, 24, 33-34). Furthermore, a substantial number of the cannabis products offered for sale were packaged with labels which contained bright colors, bubble font and depicted images very similar to food and candy products commonly known and which could be appealing to children, all of which are also in violation of New York law (Exh C 1-18, Exh D 1-19, Exh E 1-9, 11-25, 27-29, 32-35).

5. Respondent's attorney argued that absent testing, there is no way to know whether the products identified by Investigator Gerken 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 products identified as cannabis by Investigator Gerken were in packages labeled as containing cannabis or labeled as THC. As such, the Cannabis Law provides for products labeled as containing cannabis or THC 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 4, 2024 IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

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

Nickolas Perry
Sheila Wagner
Celena Ditchev, Esq.
Abir Ahmed, Esq.
Phil Modrzynski, Esq.