

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 11202408150029

GOLDEN FARMS EXPRESS CORPORATION

Respondent.

Respondent requested an emergency hearing on August 19, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on August 15, 2024.

The emergency hearing was conducted on August 22, 2024 which is within three (3) business days of the Respondent's request.

The Respondent was represented by Phil Modrzynski.

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

Investigative Specialist Scott Lustan 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 2280 Culver Rd, 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. The evidence and testimony establish that Respondent was offering cannabis products for sale without a license issued by OCM (Exh A). Investigator Luston provided photographic evidence of cannabis pre-rolls, cannabis concentrate, cannabis edibles, and Delta 9 products. He testified that prior to the inspection, he had conducted a search and determined that Golden Farms Express Corporation was not in possession of a license issued by OCM which permitted the sale of adult use cannabis products. During the hearing, Investigator Luston identified

cannabis pre-rolls, cannabis concentrate, cannabis pre-rolls, and Delta 9 products (Exh B 13, 17, 18-21, 35, Exh C 7, 10-11, 13, 19-21). Many of the products were affixed with price tags which is indicative that they were offered for sale (Exh B 17, 20, 23, 28, 33). Furthermore, many of the cannabis products contained the California label which Investigator Lustan testified is not legal to sell in New York (Exh B 13, 14, 17, Exh C 11, 13,16). Investigator Lustan testified that all the cannabis products were located in the back room with the exception of one package of pre-rolls located in a drawer behind the counter (Exh B 4) and that there were no products openly offered for sale or visible to the public in the main part of the store.

2. Investigator Lustan 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.” No evidence was offered by the Respondent’s attorney 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. 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. No signs and symbols were present inside or outside the store which would indicate that it was offering cannabis for sale. In fact, the signage on the outside of the store under the name “GOLDEN FARMS” had four smaller signs under it which stated “SMOKE SHOP” “GROCERIES” “LOTTO” “BEER.” To the left of the sign that said “SMOKE SHOP” appeared to be a regular pipe used for smoking tobacco and on the left glass window was a depiction of what Investigator Luston confirmed appeared to be a cigar. While a variety of products were depicted in the few photographs presented to the witness which he identified as cannabis pre-rolls, cannabis edibles, cannabis concentrate and Delta products, there was no evidence presented to show a significant product given the totality of non-cannabis products offered for sale in the store. Three bags of evidence were identified by Investigator Lustan as what he believed consisted of all the cannabis products removed from the location at the time of the inspection (Exh C 19-21). He also testified that the location was similar to a convenient store with three or four aisles inside it with products located on shelves on both side of each aisle. He identified the presence of more than one refrigerated cooler for drinks, as well as snacks, candy, groceries, beer, smoking paraphernalia as well as many other types of grocery products. Furthermore, he testified that none of the cannabis products or any offers to sell cannabis products were visible in the portion of the store where the public has access. Therefore, given the Investigator’s testimony as to the other products offered for sale in this location, I find that the unlicensed activity as depicted at the hearing does not consist of more than a de minimis part of the business activity on the premises or in the building to be sealed as is required by Cannabis Law Article 6 §138-b(6)(b).

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.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON AUGUST 15, 2024, IS HEREBY VACATED AND THE PADLOCK SHALL BE REMOVED IMMEDIATELY.

Dated: August 23, 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 23, 2024 to the following:

Nickolas Perry
Sheila Wagner
Michael McCarthy, Esq.
Phil Modrzynski, Esq.