

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 106202406050004

High Life Organic Convenience Corp.

Respondent.

Respondent requested an emergency hearing on June 11, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on June 5, 2024.

The emergency hearing was conducted on June 14, 2024 which is within three (3) business days of the Respondent's request.

The Respondent was represented by Nancy Tang, Esq.

No witnesses testified on behalf of the Respondent.

The Office of Cannabis Management (hereinafter "OCM") was represented by Student Intern Zachary Hirschfeld under the supervision of Ruben Espinosa, Esq.

Investigative Specialist Alfonso Rodriguez 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 2139 Nostrand Ave., Brooklyn, New York, NY.

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 off the evidence.

CONCLUSIONS OF 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 (Exh A). Investigator Rodriguez testified that while conducting the inspection at High Life Organic Convenience Corp, he observed cannabis flower, both loose and packaged, cannabis edibles, and cannabis concentrate, many of which were affixed with a price tag (Exh B, b-1, b-1a, b-2, b-3, b-4, b-5, b-6, Exh C, c-3, c-4). Investigator Rodriguez testified and provided photographic evidence which establishes that the majority of the packaged cannabis products found were branded with the California warning label which he testified are not legally authorized to be sold in New York State (Exh B, b-1a, b-2, b-3, b-4, b-5). The packages which were not labeled with the California brand were identified as cannabis products and Investigator Rodriguez confirmed that Respondent was not in possession of a license to sell any adult use cannabis products. Investigator Rodriguez also provided testimony and photographic evidence of a grinder, two scales and a cash register which he indicated is further evidence of cannabis being sold at the premises (Exh A, a-6, Exh B, b-2, Exh C, c-5). He also provided photographic evidence of a document entitled "MENU" which he testified was taped in a location on the inside of the shop, in such position that it could be viewed by people in the shop, and represented prices

for quantities and kinds of cannabis flower which he further testified corresponded with some of the products observed at the site (Exh C, c-1). Respondent's attorney provided two documents issued to the Respondent by the NYS Department of Taxation and Finance, one of which was a "Retail Dealer Certificate of Registration for Vapor Products" and the other a "Retail Dealer Certificate of Registration for Cigarettes and Tobacco Products" (Exh 1 and Exh 2). Respondent's attorney also provided a copy of an email entitled "Cannabinoid Hemp Program Office of Cannabis Management" which had an application number, the name of Respondent's business and indicated "Application Type: RENEWAL" (Exh 3). According to Respondent's attorney, while this document is entitled "RENEWAL," the document indicated that the Respondent's NYS Cannabinoid Hemp Retailer License application "had been temporarily approved." Respondent's attorney argued that the aforementioned documents, particularly the Hemp Application License approval permitted the Respondent to sell or offer for sale products which contained some cannabis. Such argument is rejected given the credible testimony of Investigator Rodriguez who testified that none of the products which he observed during the course of the inspection were legally authorized for sale by any of the documents offered by the Respondent's attorney.

2. According to the testimony of Investigator Rodriguez, 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." He testified that he observed a bathroom with a sink and a functioning toilet as well as a room with a mattress on the floor. He stated that there was no kitchen or shower and testified that he believed the location to be commercial in nature. Respondent's attorney disagreed and stated that the presence of the mattress as well as the toilet, sink and the restaurants and delis in close proximity to the shop are compelling evidence that the premises was used as a residence. Such contention is rejected as without merit as the mattress, sink, toilet and nearby restaurants do not reasonably support the conclusion that the location was serving as a residence. In addition, no witness was presented to testify that the location was utilized as a residence.

3. The unlicensed activity which warrants an order to seal constitutes more than a "de minimis" part the business activity. The 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. During the hearing, testimony and photographic evidence was introduced into evidence, of both the outside and inside of the location, which indicated that cannabis was being sold at the premises. The sign on the outside which indicated the name "High Life" had a depiction of a puff of smoke after the word "High" (Exh A, a-3). Furthermore, in the interior of the shop there was a large what decoration displayed on the wall of a burning cannabis pre-roll (Exh A, a-4). Investigator Rodriguez indicated that there was a large variety and volume of cannabis products including cannabis flower, cannabis concentrate, and cannabis edibles. He also indicated that based upon the total products for sale at the shop, the majority of the sales conducted was the sale of cannabis.

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 which were not tested or lawfully labeled in accordance with Cannabis Law Article 6. Photographic evidence taken at the time of the inspection depicted various products which were not labeled lawfully in accordance

with Cannabis Law Article 6 or which were labeled improperly with the California warning label (Exh B, b-1, b-1a, b-2, b-3, b-4, b-5, b-6, Exh C, c-3, c-4).

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON JUNE 5, 2024 IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: June 14, 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 June 14, 2024, to the following:

Nickolas Perry
Sheila Wagner
Zachary Hirschfeld
Ruben Esposito, Esq.
Nancy Tang, Esq.