

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 104202408070048

HONEYCOMB HIDEOUT 2, INC.

Respondent

Respondent requested an emergency hearing on August 14, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on August 7, 2024.

The emergency hearing was conducted on August 19, 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 Student Intern Trent Biscone under the supervision of Michael Waller, Esq.

Investigative Specialist Sarah Tagliaferro 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 396 West Avenue, Lockport, 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 (Exh A 1). Investigator Tagliaferro credibly testified and provided photographic evidence that at the time of the inspection, she observed a wide variety of illicit cannabis products including cannabis flower cannabis concentrate, cannabis pre-rolls, and cannabis edibles (Exh B 1-2, 4-16, 18, Exh C 4-6, Exh D 1-4, 7, 9, 11-15, 19-21, 27, 29-30, 32-33, 35-36, Exh E 1-8, 13-16, 20, 25, 27-33, 35, 39). In addition, a cash register and an ATM machine were at the location, both of

which, given the products offered for sale, at the location, are indicative of sales of unlicensed cannabis (Exh B 19-20). Respondent's attorney contends that the OCM should be required to prove that products which Investigator Tagliaferro identified as cannabis products are in fact cannabis rather than something else. In refuting this contention, I note Cannabis Law Article 6 §138(a)(2) which authorizes OCM to "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." In this case, the products were marketed and labeled as cannabis products and therefore no testing is required as to the actual products contained therein.

2. Investigator Tagliaferro credibly 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." She testified that she did not see a bed, a shower, a kitchen, or a dresser with clothes which would indicate its use as a residence. She testified to going through the entire building prior to the premises being sealed including the back room and the basement. Investigator Tagliaferro testified that she was present when the front door was sealed and believes that the door to the basement may have also been sealed. Respondent's attorney contends that his client was unlawfully locked out of the basement which I find is not inappropriate when sealing a premises however there was testimony to indicate that Bilco doors leading to the basement of the location were not locked. When sealing a premises, all doors providing entrance or egress to the location are typically sealed. Respondent's attorney questioned Investigator Tagliaferro about a photograph which depicts the front of the location and above it shows what appears to be a wraparound type walkway or deck (Exh A 2). I note that when questioned, the Investigator testified that she was unable to access it. More significantly, she credibly testified that the employee at the shop advised them of all the entrances and exits at the location and that is what they relied on to seal the premises.

3. The unlicensed activity which warrants an order to seal constitutes more than a "de minimis" part the business activity. Cannabis Law Article 6 § 138-b (7) and OCM Regulations 9 NYCRR Part 133.25 (f)(3) enumerate the factors to consider when determining if unlicensed activity occurring within a business is more than de minimis. I note the presence of symbols of Respondent's logo, a bee which appears to be smoking a cannabis "joint" surrounded by cannabis leaves, located on flyers, several rugs in public view, and on a tablecloth as well as a lighted cannabis leaf and an inflatable pre-roll on display (Exh F 1-10). In addition, the flyers constituted marketing or advertising as they contained the Respondent's information, QR codes, and indicated that delivery was available and had language indicating "Download our App for Deals" (Exh F 10). Investigator Tagliaferro testified and provided photographic evidence of a large variety, as well as a substantial volume of illicit cannabis products, which were discovered during the inspection of this location. Furthermore, I find that the cannabis products constituted more than a de minimis part of the business activity based upon the credible testimony of Investigator Tagliaferro that although the shop did sell other items, there were very few in comparison to the amount of cannabis products observed.

4. The unlicensed activity constituted an imminent threat to public health, safety, and welfare based upon evidence presented which established there were sales or offers to sell cannabis products which were not tested or lawfully labeled in accordance with Cannabis Law

Article 6. Many of the products were labeled with the California logo which are prohibited for sale in New York State (Exh B 4, 6, Exh C 5, Exh E 1, 3, 5, 7, 13, 20, 28, 35). Furthermore, several of the cannabis products contained a spurious and misleading New York logo including the packages of cannabis products bearing the Honeycomb HideOut logo which was consistent with the flyers, rugs, and tablecloth containing the same depiction (Exh C 5, Exh D 4, 12, 14, 19, Exh E 27). Many of the cannabis products were labeled with signs or price tags denoting the price for the items which constitutes offer to sell (Exh B 1-6, 8-14, 16-18, Exh D 1, 3, 7, 23, Exh E 10, 21, 28, 30). It is also significant that many of the packages containing cannabis products were labeled with depictions which closely resembled certain commonly known food products or with bright colors and bubble lettering which could be appealing to people under 21 years of age and are also prohibited by New York laws and regulations (Exh B 1, 2, 4, 9-11, 13, Exh C 5, Exh D 1-5, 8, 10, 12, 14, 16, 21-22, 24, 27, 29, 31, 34, 39, Exh D 1, 3, 5, 7, 11, 13, 15-16, 18, 20-23, 27, 30, 35, 39). Furthermore, the testimony and evidence established that processing of unlicensed cannabis was occurring at the site. This included an empty coffee cup on a scale which what Investigator Tagliaferro testified was loose flower which was next to empty bags which the loose cannabis could be packaged in (Exh C 1-3).

5. The Notice of Violation and Order to Seal were properly served upon the Respondent on August 7, 2024. Investigator Tagliaferro's credible and undisputed testimony established that the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal were personally served upon the sole store employee present at the time of the inspection and were also conspicuously posted on the front door of the premises, as required by Cannabis Law Article 6 §138(b)(2). She testified that the employee refused to provide his name and sign the documents however took possession of them and indicated he would provide them to the owner. Furthermore, the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was conspicuously posted on the outside of the premises at the conclusion of the inspection (Exh A 2). The address of the business owner was not supplied to the Investigator by the store employee at the time of the inspection therefore no further steps were required by statute or regulations to complete service.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON AUGUST 7, 2024 IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: August 21, 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 21, 2024 to the following:

Nickolas Perry
Sheila Wagner
Trent Biscone
Michael Waller, Esq.
Phil Modrzynski, Esq.