

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No.: 118202406200023

ICONIC SMOKE AND EXOTIC CORP.

Respondent.

Respondent requested an emergency hearing on June 27, 2024, which was made within seven (7) calendar days of the date of the inspection which occurred on June 20, 2024.

The emergency hearing was conducted on August 27, 2024, after the original hearing date was adjourned at the agreement of both parties.

The Respondent was represented Matthew Swedick, Esq.

Mohamed Alghaithi testified on behalf of the Respondent.

The Office of Cannabis Management (hereinafter “OCM”) was represented by Raymond Caithathara under the supervision and observation of Simone Demelo, Esq.

Investigative Specialist Zachary Roubelakis 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 1321 Erie Blvd. Schenectady, New York 12305.

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.

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 Roubelakis testified that he has experience identifying cannabis as he received formal training in identifying cannabis products, both in house and in the field. He explained that he uses labels and packaging to identify cannabis products. He stated that during his inspection of Iconic Smoke and Exotic Corp. he observed cannabis products for sale behind the counter and in the back storeroom. Exhibit B and C feature those cannabis products, namely: gummies and other edibles, punch bars, THC vape pods and cartridges, pre-rolls, and cannabis flower. Additionally, Respondent's witness and the manager of the premises admitted that some cannabis products were being sold on the property. The Respondent did not dispute that cannabis products were in fact offered for sale on the premises.
2. Investigator Roubelakis 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 also stated that the employee in the store that day stated that no part of the premises was used as a residence.

3. The unlicensed activity which caused OCM to issue an order to seal at Iconic Smoke and Exotic Corp., did not constitute more than a “de minimis” part the business activity taking place on the premises. Cannabis Law Article 6 §138-b (7) and OCM Regulations part 133.25(f)(3) enumerate the factors to be considered when determining if unlicensed activity occurring within a business is more than de minimis. Of those factors, Petitioner argues that there were three de minimis factors present, a large volume of cannabis products, a large variety of cannabis products, and “the presence of signs or symbols, indoors or out, advertising the sale of cannabis or otherwise indicating that cannabis is sold on the premises.” Investigator Roubelakis testified that he observed what he considered to be a large variety and volume of cannabis product on the premises. He stated that cannabis products were found behind the counter in reach of the register with price tags. That product can be seen in Exhibit C-4 and C-5 contained in shallow drawers, which seemingly cannot hold much product. No cannabis products were visible to the public, except three empty jars, which may have contained cannabis flower at some point, but did not contain any flower at the time of the inspection. There are additional products observed in Exhibit B-13 in the form of cannabis flower packaged in individual bottles and held in a small Tupperware tub which also seem to be contained behind the counter, but there did not seem to be a large volume of cannabis within reach of the register.
4. Investigator Roubelakis added that cannabis products were also found in back storeroom. One of the examples of cannabis recovered from the storeroom was featured in Exhibit B14, which shows a large bag of cannabis flower on top of other products. When asked about the other products in the box, Investigator Roubelakis stated that they were nicotine vape products, and not illicit cannabis product. Though multiple packages of cannabis product can be seen in the background of the photos featured in Exhibit B, there are no pictures depicting the total or even approximate number of cannabis products discovered on the premises during the Inspection. Investigator Roubelakis also testified that he did not take a picture of all of the cannabis product recovered. He was unable to testify at any detail regarding the volume of cannabis recovered, aside from conclusory statements such as there being a high volume of cannabis. When asked in more detail about the amount of cannabis on premises he couldn’t give a conclusive answer. Investigator Rubelakis prefaced his estimation on the weight of cannabis product recovered with, “if I can remember.” He added that about 40lbs of product were recovered, but admitted that the estimate reflected packaging and cannabis in a variety of forms, some heavier than others. Investigator Roubelakis was unable to say how many products he recovered from the premises and agreed that there was a substantial number of legal products in the store that were offered for sale. Investigator Roubelakis also added that he believed the sale of cannabis was more than de minimis as there were posters related to cannabis in the store. However, the Respondent’s witness, Mr. Alghaithi stated that the posters were for sale. Mr. Alghaithi, most significantly testified that though the premises did engage in the sale of illicit cannabis, the cannabis portion of the business did not constitute more than 10% of the sales conducted at the store.

5. Petitioner has the burden of proof by a preponderance of the evidence. Is it possible that there was a large volume of cannabis on the premises during the inspection? Yes. However, due to Petitioner's sole witness being unable to describe with even rough precision or certainty, the volume of product recovered from the premises, and given petitioner's failure to enter into evidence documents or photographs showing the volume of cannabis product recovered from the premises, Petitioner has failed to meet its burden. This is particularly true in light of Respondent's witness being able to state with confidence the proportion of the business derived from the sale of illicit cannabis. The Exhibits show a store with shelves fully stocked with legal products, in addition to the testimony that legal products could also be found in the back room. Thus, Petitioner has failed to prove by a preponderance of the evidence that there was more than a de minimis amount of cannabis located at Iconic Smoke and Exotic Corp. on the date of the inspection.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON JUNE 20, 2024, IS VACATED AND THE PADLOCK SHALL BE REMOVED IMMEDIATELY.

Dated: September 3, 2024


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 3, 2024, to the following:

Nickolas Perry
Sheila Wagner
Raymond Caithathara
Simone Demelo, Esq.
Matthew Swedick, Esq.