

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION
Inspection No. 102202407160024

INHALE SOCIAL CLUB

Respondent.

Respondent business owner, Frank Desideri, requested a hearing to contest the validity of an Order to Seal, which had been issued by enforcement agents of the Office of Cannabis Management, at his business located at 43 W. 33rd Street, New York, N.Y. on July 16, 2024.

The hearing request was granted, and a virtual hearing was conducted, via Webex on August 28, 2024. The scope of the hearing was limited solely to determine if the sealing provisions of Cannabis Law Article 6 § 138-b were proven by the Office of Cannabis Management 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 at a later date.

The Respondent, Frank Desideri, testified and appeared *pro se*.

The Office of Cannabis Management (hereinafter “OCM”) was represented by Raymond Caithathara.

Investigative Specialist Bladimir Nunez testified on behalf of OCM.

ISSUE

The allegations set forth in the Notice of Violation and Order to Seal indicated 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 conducted by agents of OCM on July 16, 2024, at the business known as Inhale Social Club, located at 43 W. 33rd Street, New York, NY. 10001.

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: 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, according to the credible testimony of Investigator Bladimir Nunez. He testified that he received training at OCM in identifying and categorizing cannabis products and that during the inspection of the location he observed what appeared to him to be packages of cannabis flower and pre-rolls, cannabis edibles, concentrates, a point-of-sale card reader, a spinning wheel with cannabis prizes listed, a grinder and label maker, as well as empty baggies, which he determined was consistent with the processing and sale of cannabis products on-site. He indicated that in the days prior to this inspection, agents had visited the location and asked if cannabis products could be purchased, and they were informed that they could be. At the time of this inspection, cannabis flower was located on the clear display case in the store and it was seized by agents from the NYS Department of Taxation and Finance. Investigator Nunez confirmed that the remaining cannabis packages on display at the time of the inspection were empty. He corroborated this testimony with numerous photographs that he took at the time of the inspection. (Exhibits B1-18, C1-6).

2. According to the credible testimony of the Investigator, no part of the premises sealed was being used as a residence. He saw no kitchen, shower, dresser, or any signs of personal use other than use as a commercial business. No evidence was offered to contradict these observations or to claim that any part of the premises sealed was zoned or lawfully occupied as a residence.

3. The unlicensed activity, which warranted an order to seal, also constituted more than a “de minimis” portion of the business activity at that location, according to the credible testimony of the Investigator. He testified that he found a large variety, and a high volume, of what appeared to be illicit cannabis products during the inspection at this location. Cannabis Law Article 6 §138-b (7) and OCM Regulations 133.25(f)(3) enumerate the factors to consider when determining if unlicensed activity occurring within a business is more than de minimis. From the photographs entered as evidence during the hearing, and the testimony of the Investigator listing the items displayed for sale, it was demonstrated by a preponderance of the evidence that this location had a large variety and a substantial volume of illicit cannabis being offered for sale.

4. This unlicensed activity did constitute an imminent threat to public health, safety, and welfare in that: there were offers to sell cannabis products that were not tested or labeled lawfully in accordance with Cannabis Law Article 6. The Investigator further noted that many of the cannabis products contained labels indicating they were cannabis products from California, and many were brightly colored or depicted characteristics with special appeal to children, all in violation of New York law. Moreover, he identified empty cannabis packages with loose flower located near a

grinder, which he testified strongly indicated that untested and unregulated cannabis processing was occurring at this location. (B16 & 17).

5. Respondent testified that the loose cannabis flower seized from the display counter was for his personal use and that he had the empty cannabis packages on display solely to sell memberships in his social club, which he swore would not be opened until he received a license for a cannabis lounge from OCM. He admitted that he had not applied for such a license and had no idea how long it would take him to get a license. He contends that because all of the purported cannabis products on display were empty packages, petitioner is unable to establish by a preponderance of the evidence that there was, in fact, cannabis products being offered for sale at the time of the inspection, as required by Cannabis Law Article 6 §138-b. I disagree. It is clear from the open display of such a large and varied amount of cannabis product, along with the presence of a spinning wheel for awarding cannabis prizes, as well as the confirmation obtained during a reconnaissance visit a few days prior, that this was an ongoing business operating solely for the purpose of selling cannabis products. Respondent's contention that he was simply operating a promotional cannabis "showroom" to lure potential members to his club once a license was obtained, is belied by his admission that he hadn't applied for such a license and that he had no idea how long it would take him to obtain such a license. I find his testimony to be not credible. Therefore, from the quality and totality of all of the evidence, when evaluated with reason and common sense, I find that it has been established by a preponderance of evidence, that at the time of this inspection, the respondent was engaged in the sale of cannabis products at this location, as required by Cannabis Law Article 6 §138-b.
6. Finally, the Notice of Violation and Order to Seal was properly served upon the respondent on July 16, 2024. The Investigator's credible and undisputed testimony established that the Notice of Violation and Order to Seal was personally served upon the store owner, Frank Desideri, who was present at the time of the inspection, and that it was also conspicuously posted on the front door of the premises, as required by Cannabis Law Article 6 §138(b)(2). (See Exhibits D 1-3). Because the business owner was directly and personally served, no further action was required to complete service.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON JULY 16, 2024, IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: September 4, 2024

Thomas Kidera
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 4, 2024, to the following:

Nickolas Perry
Sheila Wagner
Frank Desideri
Raymond Caithathara.