

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 118202406050011

LATHAM KING TOBACCO INC. 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 August 30, 2024 pursuant to a mutual agreement between the parties.

The Respondent was represented by Matthew Swedick, Esq.

The Office of Cannabis Management (hereinafter “OCM”) was represented by Michael Waller, Esq.

Investigative Specialist Zak 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 724 New Loudon Road, Latham, 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.

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. According to the credible testimony of Investigator Roubelakis, Respondent was offering cannabis products for sale without a license issued by OCM (Exh A 1). Such products included cannabis concentrate, cannabis edibles, cannabis pre-rolls and cannabis flower (Exh B 7, 9, 11, 15-16, 18, 20, 22, 24-32). The cannabis products were contained in two boxes approximately 1.5ft x 1 ft and 2ft x 2ft, both approximately one foot high as well as a grocery type plastic bag (Exh B 26-27, 32). The products were located behind the counter (Exh B 26-27, 32). A “menu” containing what Investigator Roubelakis identified as six different cannabis strains and their corresponding prices was located next to the register (Exh B 5).

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, is zoned and lawfully occupied as a “residence.” No testimony was offered to the contrary.

3. The unlicensed activity which warranted the Order to Seal constituted more than a de minimis portion of the business activity at this location based upon the credible testimony of

Investigator Roubelakis. He found a large variety and a substantial volume of illicit products during his inspection of this location. 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. One such factor is the presence of signs or symbols advertising the sale of cannabis or otherwise indicating that cannabis is being sold on the premises. I note the presence of the picture on the wall inside the premises which depicts a caricature of a cannabis bud with the number “420” on its shoes, a number which is often used in conjunction with smoking cannabis (Exh B 3). Based upon the photographs entered as evidence during the hearing and the testimony of the Investigator as to the products seized, it was clearly demonstrated by a preponderance of the evidence that this location had a large variety and substantial volume of illicit cannabis products being offered for sale (Exh B 7, 9, 11, 15-16, 18, 20, 22, 24-32).

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 that were not tested or labeled lawfully in accordance with Cannabis Law Article 6. A large number of the cannabis products at the location were labeled with the California logo which Investigator Roubelakis testified were not legal to sell in New York State (Exh B 7, 9, 11, 14, 18, 22, 30). Furthermore, the cannabis products were affixed with price tags which is indicative that they were offered for sale. In addition, the “menu” next to the cash register contained the name of six cannabis strains and their corresponding prices which is further evidence of cannabis products being offered for sale (Exh B 5). It is also significant that many of the cannabis products offered for sale were in brightly colored packages with lettering and depictions which could be appealing to people under 21 years of age which is also prohibited by New York laws and regulations (Exh B 7, 11, 13, 15-16, 18, 20, 22, 24-25, 28, 31).

5. The Notice of Violation and Order to Seal were properly served upon the Respondent on June 5, 2024. Investigator Roubelakis’ credible and undisputed testimony established that the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was personally served upon the sole store employee present at the time of the inspection and was also conspicuously posted on the front door of the premises, as required by Cannabis Law Article 6 §138(b)(2). He testified that the employee refused to sign the documents however took possession of them (Exh A 1). Furthermore, the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was posted on the outside of the premises at the conclusion of the inspection (Exh A 3-4). 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 so as to complete service.

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: September 4, 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 September 4, 2024 to the following:

Nickolas Perry
Sheila Wagner
Michael Waller, Esq.
Matthew Swedick, Esq.