

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 134202406130013

NICE MOOD SMOKE SHOP LLC

Respondent.

Respondent requested an emergency hearing on June 14, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on June 13, 2024.

The emergency hearing was conducted on June 24, 2024 due to a request by the Respondent's attorney and consent by the OCM attorney.

The Respondent was represented by Anthony Galli, Esq.

Mahkoud Awwad testified on behalf of the Respondent.

The Office of Cannabis Management (hereinafter "OCM") was by Ruben Espinosa, Esq.

Investigative Jillian Agnew 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 4605 West Genesee Street, Syracuse, 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 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 Agnew testified that while conducting the inspection at Nice Mood Smoke Shop LLC, she observed cannabis flower, cannabis edibles, and cannabis concentrate, many of which were affixed with a price tag (Exh B, b-1, b-2, b-3, Exh C, c-1, c-2, c-3, c-4, c-5). Investigator Agnew testified and provided photographic evidence which established that the packaged cannabis products found were branded with the California warning label which is not legally authorized to be sold in New York State and was not labeled with the New York State brand (Exh B, b-1, b-2, b-3, Exh C, c-1, c-2, c-3, c-4, c-5). Investigator Agnew also provided testimony and photographic evidence of a cash register and point of sale system which she indicated is further evidence of cannabis being sold at the premises (Exh B, b-5). She also provided photographic evidence of a notebook opened to a page entitled “nicemood Notes” which she testified was located on the counter next to the cash register (Exh B, b-4). On the left side of the page contained the word “strain” which Investigator Agnew testified is common nomenclature referring to cannabis. On the right side of the page was a list which Investigator Agnew identified as cannabis products and corresponding prices, some of which were consistent

with ones located at the site. It should be noted that Respondent had a cannabinoid hemp retail license issued by OCM and according to the testimony of Investigator Agnew, the hemp products were located in a cabinet on the left side of the store in public view of any persons entering the shop. The products identified as cannabis were in a backroom outside of public view and some products were also located in a safe.

2. According to the testimony of Investigator Agnew, 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.” In the absence of any evidence to the contrary, the Investigator’s testimony is accepted as credible.

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 were introduced depicting what Investigator Agnew identified as cannabis products, some of which were affixed with price tags, which is indicative that they were offered for sale. It is significant that the products affixed with price tags were located both in the backroom and in the safe. Investigator Agnew also testified as to observing a cash register and point of sale system as well as a notebook open to a page which identified what she described as cannabis products with prices listed next to each item (Exh B, b-1. B-5). She also indicated that based upon the total products for sale at the shop, approximately 40-50 % of the products were cannabis products. Furthermore, the variety of products both observed and listed on the notebook page were in excess of de minimis.

Respondent’s witness who identified himself as the owner of the shop testified that he sold tobacco, cigars, hookahs, jewel vapes, and CBD, gummies and creams pursuant to his Hemp License. He admitted that he did have some cannabis products in his safe which he testified were for his own personal consumption only. He testified that these products were not for sale to the public. Investigator Agnew credibly testified that cannabis products were located not only in the safe but in a backroom behind the register. She further testified that price tags were affixed to some of the products located in both places. Therefore, based upon the products affixed with price tags observed in both areas as well as the notebook page indicating a variety and quantity of cannabis products with corresponding prices located was on the counter by the cash register, the Respondent’s testimony is rejected as lacking credibility.

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-2, b-3, Exh C, c-1, c-2, c-3, c-4, c-5).

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON JUNE 13, 2024 IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: June 26, 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 26, 2024 to the following:

Nickolas Perry
Sheila Wagner
Ruben Esposito, Esq.
Anthony Galli, Esq.