

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION
Inspection No. 104202406050007

SMOKE DEPOT GREECE, INC.
630 W. Ridge Rd
Rochester, NY 14615

Respondent.

Respondent 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 630 W. Ridge Road in Rochester, N.Y. on June 5th, 2024.

The hearing request was granted, and a virtual hearing was held on September 20, 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 was represented by Phil Modrynski, Esq.

The Office of Cannabis Management (hereinafter “OCM”) was represented by Trent Biscone, under the supervision of Abir Ahmed Esq.

Investigative Specialist Sarah Tagliaferro 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 June 5th, 2024, at the business known as Smoke Depot Greece, Inc., located at 630 West Ridge Road, Rochester, NY. 14615.

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 Sarah Tagliaferro. She testified that she received training at OCM in identifying and categorizing cannabis products and that during the inspection of the location she observed what appeared to be cannabis flower and pre-rolls, cannabis edibles, concentrates, a scale and point-of-sale register, sales ledgers, lists of cannabis products with prices, a “bump box” and numerous empty cannabis packages, which she concluded was consistent with the processing and sale of cannabis products on-site. She corroborated this testimony with numerous photographs that she took at the time of the inspection. (Exhibits B1-24, and C 1-42).
2. According to the credible testimony of the Investigator, no part of the premises sealed was being used as a residence. She saw no 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. She testified that she found a large variety, and a high volume, of illicit 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 found at this location, 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 sales of, or 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. (Exhibit C14). Moreover, she identified empty cannabis packages, a small scale with what appeared to be cannabis residue, and a “bump box” which she testified strongly indicated that untested and unregulated cannabis processing was occurring at this location. (Exhibits B14&15).
5. Respondent counsel argues that absent proof of testing conducted on any of the purported cannabis products, petitioner is unable to establish by a preponderance of

the evidence that there was, in fact, cannabis products being offered for sale at this premises at the time of the inspection, as required by Cannabis Law Article 6 §138-b. While I agree with counsel's contention that it is not enough to prove that the products seized were merely marketed as cannabis, in order to meet the requirements of Cannabis Law Article 6 §138-b, I disagree with counsel's contention that absent a test confirming that the products were cannabis, petitioner is unable to meet their burden. The preponderance of evidence standard of proof, can be met without the necessity of a test, if the quality and totality of circumstantial evidence establishes that cannabis products were being offered for sale. In the case at hand, the existence of a "brick and mortar" location containing such a large variety and volume of products, all labeled and priced as cannabis for sale, belies any contention that these products are not what they purported to be. Moreover, the continual day to day existence of this business goes a long way toward proving that customers were, in fact, receiving what they understood they were paying for. Finally, the Investigator testified that she was trained in recognizing the peculiar odor of cannabis and she credibly testified to smelling that same odor, when various cannisters of pre-rolls that were located at this premises were opened. Therefore, the quality and totality of circumstantial evidence, when evaluated with a modicum of common sense, does establish by a preponderance of evidence, that what looked like cannabis products, felt like cannabis products, smelled like cannabis products, and were packaged for sale under well-known cannabis labels and logos, was indeed cannabis, 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 June 5th, 2024. The Investigator's credible and undisputed testimony established that the Notice of Violation and Order to Seal was personally served upon the sole store employee 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 A1-5). The full name and address of the business owner was not supplied to the Investigator by the store employee at the time of the inspection, so 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 JUNE 5, 2024, IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: September 25, 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 25, 2024, to the following:

Celena Ditchev, Esq.
Nickolas Perry
Sheila Wagner
Phil Modrynski, Esq.
Abir Ahmed, Esq.