

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION
Inspection No. 207202407160024

ROYAL SMOKE & VAPE, INC.

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 247 W. 36th Street, New York N.Y. on July 16, 2024.

The hearing request was granted, and a virtual hearing was conducted via Webex on August 21, 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 Joseph Bondy, Esq.

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

Investigative Specialist Joshua Coons 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 located at 247 W. 36th Street, New York, NY.

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 Investigative Specialist Joshua Coons. 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 cannabis flower and pre-rolls, cannabis edibles, concentrates, a list of cannabis products with prices, along with empty cannabis packaging, all located within open safes behind the sales counter. He corroborated this testimony with numerous photographs that he took at the time of the inspection. (Exhibits B9-19 and C1-46).

2. According to the credible testimony of the Investigator, no part of the premises sealed was being used as a residence. He 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 credible evidence introduced at the hearing, however, failed to establish by a preponderance of the evidence that this unlicensed activity constituted more than a “de minimis” portion of the business activity at that location, as enumerated in Cannabis Law Article 6 §138-b (7) and OCM Regulations 133.25(f)(3). (See, Respondent’s Exhibits A, B, C, D, E, F, &G). According to Investigator Coons, this convenience store was on the “small side” and that legitimate products were the larger part of what was being sold. He indicated that the illicit cannabis products were not on display so unknowing customers would not see any of those products while shopping. According to the Investigator, all of the cannabis products at the business were located within either one or two safes, which he estimated were approximately 18x18 inches in size, and that they were located in the back of the store. He also testified that he did see evidence that this convenience store sold numerous tobacco products, electronic cigarettes, lotto tickets and beer, and that the business had a NYS issued license to sell all of these items. He agreed that the business owner had a valid NYS license to sell hemp and that the green leaf depicted on the front of the store could be a symbol that hemp was sold there. Significantly, he saw no other signs advertising or marketing to the public that cannabis products were available at this location. Finally, respondent’s Exhibit F clearly demonstrated that numerous soft drinks and food items were also being sold at this relatively small convenience store. As such, it has not been shown by a preponderance of the evidence that the cannabis products for sale at this location amounted to more than a de minimis portion of the overall business activity, as required by Cannabis Law Article 6 §138-b (7).

4. 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 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). (Exhibits D1-4). 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 JULY 16, 2024, IS HEREBY VACATED AND AN ORDER TO REOPEN THIS BUSINESS SHALL BE EFFECTIVE IMMEDIATELY.

Dated: August 28, 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 August 28, 2024, to the following:

Nickolas Perry
Sheila Wagner
Joseph Bondy, Esq.
Shaquan Huntt, Esq.