

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

Smoke Depot 1 Inc.

Respondent.

DECISION

Inspection No.: 107202408140014

Respondent requested non-emergency hearings on August 15, 22, and 30, 2024 with respect to the inspection which occurred on August 14, 2024.

The emergency hearing was conducted on October 2, 2024.

The Respondent was represented by Phil Modrzynski, Esq.

The Office of Cannabis Management (hereinafter “OCM”) was represented Abir Ahmed, Esq.

Investigative Specialist Darrick Wakefield 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 801 Millersport Highway, Amherst, NY 14226.

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. Investigator Darrick Wakefield testified that he has both in the field and online training and experience in identifying illicit cannabis products. He explained that when identifying cannabis products during a regulatory inspection he looks for the odor of cannabis, appearance of flower, and the packaging of products. Investigator Wakefield testified that during his inspection of Smoke Depot 1 Inc. he observed two jars of cannabis edibles made of a cereal treat and a box of cannabis infused gummies (Exhibit D1 and D3). He added that cannabis chocolate and edible products were observed in the refrigerator, specifically: knock off Reeses and Twix products, and two Knockout Bars by First Class labeled "lethal strength." (Exhibit F). He also observed two cannabis infused gummy products from Mad Bites and a knock off Nutty Buddy in the refrigerator. (Exhibit G5). It's highly notable that all of the products found in the refrigerator contained price tags with a similar appearance, including a partially faded initial number and currency symbol. The price tags seen in Exhibit D3 have a similar appearance. Investigator Wakefield stated that cannabis flower and vapes were recovered from the location. Cannabis can be seen in Exhibit I in the form of vape pens containing 95% THC, cannabis flower in containers, and cannabis flower in packets. (Exhibit J). Additional gummies, live resin, THC infused

gummies, and pre-rolls were observed at the location in Exhibit K. Exhibit L features alleged hemp products containing an amount of THC far in excess of the allowable 10mg per pack. Additionally, the THC type featured in that product is Delta 8 THC, an impermissible form of THC in New York.

2. 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.” Investigator Wakefield testified that the premises lacked a bed and shower but contained a rent by the hour hookah and gravity bong room. Additionally, though there was a kitchen on the premises it did not appear to be more than a kitchenette often found in commercial and office spaces.

3. The unlicensed activity which warrants an order to seal constitutes more than a “de minimis” part the business activity. The Cannabis Law outlines four non-exclusive factors to be considered when determining whether business activity should be considered as de minimis. Of those four factors, at least two were present at Smoke Depot 1 Inc. during the inspection; a relevant variety of cannabis products were present, and there was the presence of signs or symbols, indoors, advertising the sale of cannabis and indicating that cannabis is sold on the premises. During the inspection of Smoke Depot 1 Inc. the following types of cannabis product were found: multiple varieties of gummy edibles, multiple types of chocolate candy edibles, flower, salted caramel and coquito nuggets, live resin diamond infused vapes, THC vapes, pre-rolls, and Delta 8 edibles in a variety of forms. Investigator Wakefield testified that the large banner seen in Exhibit B2 read: Delta 8 THC Sold Here. That sign, in combination with the room reserved for gravity bong and hookah rentals, strongly indicates that cannabis is sold on the premises. (Exhibit E). The presence of a room for gravity bong rentals suggests that Smoke Depot 1 Inc.’s business was primarily focused on the sale and consumption of cannabis.

4. The unlicensed activity at Smoke Depot 1 Inc., 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. Multiple products observed during the hearing were not labeled in accordance with New York Law. The following products contained non-state specific cannabis warning labels: Hi-Tamins Raspberry Delta-9 THC, THC Twix by First Class, Knockout Bar by First Class, Nutty Buddy by First Class, Salted Caramel and Coquito KōKō Nuggz, ZaZa Pineapple Rings, Tapout, Pot Tarts, Torch Medicated Chocolates in Banana Split and Reese’s, D8 Hi Delta 8 vape cartridges in approximately 12 varieties, and unlabeled pre-rolls and flower. (Exhibit D, Exhibit F, Exhibit I, Exhibit J, and Exhibit K). Some of the following products contained false New York cannabis warning labels: Reese’s Knockout Honeybun and Treezy Assorted Flavor Gummies (Exhibit J). Additionally, the following products contained what appeared to be California warning labels: Mad Bites Fruity Kittles Cubes and Mad Bites Sour Blue Raspberry Rings, Mad Bites Apple Cubes, Medicated Cloverqueen THC Infused Gummies, ZaZa Lamb’s Bread vapes. (Exhibit J and Exhibit G).

Given the foregoing, in addition to the fact that Investigator Wakefield testified that Smoke Depot 1 Inc. did not have an Adult Use Cannabis Retail License or Hemp License, I find that the unlicensed sale of cannabis products was more than de minimis and posed an imminent threat to public health, safety and welfare.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON AUGUST 14, 2024, IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: October 8, 2024

Laurie Cartwright
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 October 8, 2024, to the following:

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