

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 301202405230001

South 7 Convenience Corp.

Respondent.

Respondent requested an emergency hearing on May 29, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on May 23, 2024.

The emergency hearing was conducted on June 13, 2024 which was a date agreed upon by both parties.

The Respondent was represented by Paul Bierman, Esq.

No witnesses appeared on behalf of the Respondent.

The Office of Cannabis Management (hereinafter “OCM”) was represented by Student Intern Trent Biscone under the supervision of Ruben Espinosa, Esq.

Supervising Investigator Dawn Kiely 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 152 7th Ave. So., New York, NY.

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 including THC Edibles, THC Concentrate, THC Flower, and Hemp pre-rolls (Exh A). Investigator Kiely testified to and provided photographic evidence of what she identified as cannabis products observed during her investigation of the premises, the majority or all of which were branded with the California warning label which she testified constitutes products not legally authorized for sale in New York State (Exh C, c-4, c-5, c-6, c-7, c-8, c-9). Investigator Kiely testified that all of the cannabis products which she observed were not legal to sell in New York State. She also testified as to having observed a cash register and credit card machine at the site which she stated indicated that the products were being sold or offered for sale (Exh C, c-9, c-10).

2. According to the credible testimony of Investigator Dawn Kiely, 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.”

3. The unlicensed activity which warrants an order to seal constitutes more than a “de minimis” part the business activity. 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, Investigator Kiely provided photographic evidence of and testimony regarding multiple neon signs located on the outside of the storefront depicting a cannabis leaf and several other signs which she testified indicated brand names of cannabis products (Exh B, b-6, Exh C, c-1, c-2). It should also be noted that while Respondent was in possession of a Hemp License issued by OCM, one of the neon signs on the outside of the storefront indicated “PRE-ROLLS” which is further evidence of cannabis signage based upon Investigator Kiely’s testimony that smokeable hemp is not legally permissible to be sold in New York State (Exh C, c-1). In addition, the inside of the shop contained a sign advertising which Investigator Kiely testified represented a brand of cannabis (Exh C, c-3). Furthermore, Investigator Kiely testified that approximately 99% of the shop’s inventory consisted of illicit cannabis products. The products included a variety of different brands of edibles, vape concentrate, and cannabis flower, all of which were branded with the California label which is not legal to sell in New York State (Exh C, c-4, c-5, c-6, c-7, c-8, c-9). Accordingly, OCM has established that the unlicensed activity within the building exceeded de minimis.

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 labeled lawfully in accordance with Cannabis Law Article 6. These products were depicted in Exh C, c-4, c-5, c-6, c-7, c-8, c-9 and were not labeled lawfully in accordance with Cannabis Law Article 6 and/or were labeled improperly with the California warning label.

Respondent’s attorney argued that there was no imminent danger which would warrant issuing the order to seal. I would note that Cannabis Law Article 6 § 138-(b)(4) sets forth the factors that determine an imminent threat to public health, safety and welfare and based upon the illicit products testified to, section (g) “sales of, or offers to sell, cannabis products not tested or labeled lawfully in accordance with this chapter” is applicable. See also Regulations at 9 NYCRR 133.25(f)(1)(vii).

Respondent’s attorney also indicated that OCM was directed to investigate this shop by another agency. For the purpose of clarification, the testimony of Investigator Kiely was that the investigations are complaint driven and listed a number of potential sources of a complaint which would result in an inspection and such list included members of the public and when questioned, indicated that it could also be as a result of a complaint from another agency. The record is clear that she did not identify the source of the complaint which led them to conduct the investigation of this shop on May 23, 2024. She did however indicate that the OCM enforcement team was accompanied by the NYS Department of Taxation and Finance who initially entered the subject premises.

Respondent’s attorney further contends that the presence of a cash register and credit card reader at the site is evidence of sales, not the sale of illicit cannabis products. He is correct that the sole presence of a cash register and credit card machine is not dispositive of illicit cannabis sales. However, in this instance, considering the totality of the circumstances which include

Investigator Kiely's testimony and photographs which identify a variety of cannabis products which she indicated were in the shop, the neon cannabis signage on the outside of the shop, and her testimony that approximately 99% of the products for sale in the shop consisted of illicit cannabis, the presence of the cash register and the credit card machine are deemed to be consistent with the finding that illicit cannabis was being sold or offered for sale from the subject premises.

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

Dated: June 14, 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 14, 2024, to the following:

Nickolas Perry
Sheila Wagner
Trent Biscone
Ruben Espinosa, Esq.
Paul Bierman, Esq.