

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 134202407300038

The Jerk Shack LLC

Respondent.

Respondent requested an emergency hearing on August 5, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on July 30, 2024.

The emergency hearing was conducted on August 8, 2024 which is within three (3) business days of the Respondent's request.

The Respondent was represented by Lance Lazzaro, Esq.

Alan Gordon testified on behalf of the Respondent.

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

Assistant Director of Enforcement Wilhelmina Boxhoorn 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 227-09 Linden Blvd, Jamaica, 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 of the evidence.

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 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)(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. On July 30, 2024, OCM Investigator Jillian Agnew conducted an inspection of The Jerk Shack LLC located at 227-09 Linden Blvd, Jamaica, New York (Exh A). At that time, Investigator Agnew issued a Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal and the premises was sealed (Exh A). On August 5, 2024, Respondent's attorney requested an Emergency Hearing with respect to the Order to Seal. A hearing was held on August 8, 2024 at which Investigator Agnew did not appear as a witness. Assistant Director of Enforcement Wilhelmina Boxhoorn appeared as a witness on behalf of OCM and testified that Investigator Agnew's supervisor reports to her and that she has accompanied Investigator Agnew on numerous inspections. Assistant Director Boxhoorn was not present during the July 30, 2024

inspection and testified that at no time had she been at the subject location. Her testimony was based solely upon a review of the file which included notes and photographs resulting from the inspection, both of which Investigator Agnew uploaded to the OCM enforcement database at 7:13 p.m. on July 30, 2024 (Exh B 18).

2. The pictures entered into evidence depicted approximately 13 pre-packaged bags of what Assistant Director Boxhoorn identified as various brands and flavors of cannabis flower labeled with the California label which she testified were not legally permissible to sell in New York State (Exh B 2-12). Her identification was based upon her familiarity with the various brands as well as the information depicted on the labels. She also testified to the larger empty bags of what she identified as illegal cannabis products which covered the glass door which led to the area behind the counter (Exh 14). In addition, she testified as to a white board which she described as a menu listing three strains of cannabis and their corresponding flavors (Exh B 13). Assistant Director Boxhoorn initially testified that after reviewing the photographs, she concurred with Investigator Agnew's assessment that the products constituted more than a de minimis finding as reflected in the NOV/Order to Cease Unlicensed Activity/Order to Seal, based upon the volume and variety (Exh A).

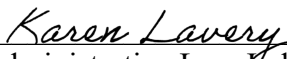
Respondent's attorney produced a witness who identified himself as an employee of the store and testified that he was present at the time of the inspection. He testified that no cannabis was sold at the location. While I find that the Respondent's witness lacked credibility as to his testimony that no cannabis was offered for sale at the location, I am constrained to accept his testimony as OCM produced no witness who was present at the time of the inspection who could refute his testimony. Even assuming arguendo that a determination was made that cannabis was being offered for sale at the location, OCM failed to provide a witness with firsthand knowledge as to whether the alleged unlicensed activity as described is more than a de minimis part of the business activity on the premises or in the building to be sealed, pursuant to Cannabis Law Article 6 §138-b(6)(b). Respondent's witness testified that the store sold a number of products such as Lysol, cereal, Febreze, snacks, condoms, cup noodles, Tylenol, lighter, papers, ashtrays, diapers, candy and various sizes of soda, water, and juice which were contained in four refrigerated units in the store. I note that when asked under cross examination, Assistant Director Boxhoorn testified that as she was not present at the inspection so as to observe the other products offered for sale at the location, therefore she could not confirm that the illicit products shown in the photographs constituted more than a de minimis part of the activity at the store. Based upon testimony of Respondent's witness as to the numerous non-cannabis products offered for sale at the location and absent any testimony to the contrary, I find that no evidence has been provided to establish that any potential unlicensed activity was more than a de minimis part of the business activity at the location.

3. Respondent's attorney also contends that service was not properly effectuated on the Respondent. Assistant Director Boxhoorn based her testimony upon a review of the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal which was completed by Investigator Agnew. According to Assistant Director Boxhoorn, based up that document, she testified that under the section denoted "CERTIFICATE OF SERVICE," a box was checked indicating that "Delivery or signature was refused. I completed service by leaving a copy of this Notice in the vicinity of the person to be served, posted same in a Conspicuous area and made

clear my intent to leave and serve this Notice of Violation, Order to Cease Unlicensed Activity and Order to Seal (if applicable).” She said that the typical procedure is to ask the person in control of the location if they would like to sign for a copy and that in the present case, the checked box indicated that at the time of the July 30, 2024 inspection, the employee refused to sign the document. Respondent’s witness testified that at no time during the inspection did he refuse to sign any documents nor did he refuse delivery but rather testified that the documents were placed on the table at the conclusion of the inspection. He further testified that he was never asked for the name or address of the business owner. I note that the employee’s name was not written on the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal despite the testimony of Respondent’s witness that he provided his identification to the investigator at the time of the inspection. Furthermore, while a photograph was identified by Assistant Director Boxhoorn as the posting of the document on the storefront (Exh B 16), Respondent’s witness was never asked to confirm if that was in fact the subject location. Therefore, based upon the document itself, the testimony of Respondent’s witness as well as the absence of testimony an OCM witness who was present at the time of the inspection, I find that service of the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was not properly served in accordance with the requirements set forth in Cannabis Law Article 6 §138(b)(2).

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON JULY 30, 2024, IS HEREBY VACATED AND THE PADLOCK SHALL BE REMOVED IMMEDIATELY.

Dated: August 12, 2024


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 12, 2024 to the following:

Nickolas Perry
Sheila Wagner
Ruben Espinosa, Esq.
Lance Lazarro, Esq.