

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 115202406260020

THE JERK SHACK LLC

Respondent.

Respondent requested an emergency hearing on July 1, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on June 26, 2024.

The emergency hearing was conducted on July 5, 2024 which is within three (3) business days after a sworn affidavit was received from counsel for respondent requesting an emergency hearing for the case with inspection number 115202406260020.

The Respondent was represented by Lance Lazzaro, Esq.

No witnesses testified on behalf of the Respondent.

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

OCM Investigator James Lawson and NYS Department of Taxation and Finance (hereinafter “DTF”) Investigator Gregory Aurigemma 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 1263 Saint Johns Place, Brooklyn, 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.

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 (Exh E). Both Investigator Aurigemma and Investigator Lawson testified that while conducting the inspection of The Jerk Shack LLC, they observed cannabis flower, both loose and packaged, and cannabis edibles (Exh A 2, Exh B, Exh D 1-8). Investigator Lawson testified that all of the packaged cannabis products found were branded with the California warning label which he testified are not legally authorized to be sold in New York State. According to Investigator Lawson, any cannabis products offered for sale in New York State must be branded with New York State label which he testified was not present on any of the products which he observed at the location. Investigator Aurigemma also provided testimony and photographic evidence of a

cash register which he indicated was further evidence of cannabis being sold at the premises (Exh C 7). Furthermore, Investigator Lawson credibly testified that the only person who was working at the location at the time of the inspection and identified himself as a salesclerk, advised him that cannabis was being sold at the premises and that the products ranged in prices from \$10-30. Investigator Lawson also testified that the salesclerk testified to keeping a record of products being sold which Investigator Lawson testified he believes was reflected by a ledger located by the register (Exh D 9). In further support of cannabis being sold at the premises were several signs and pictures which both Investigator Aurigemma and Lawson testified were consistent with a location which is offering cannabis products for sale (Exh A 2, Exh C 1-5).

2. Investigator Lawson testified that no part of the premises to be sealed was used in part as a residence and pursuant to local law or ordinance, is zoned and lawfully occupied as a “residence.” While Respondent’s attorney noted the presence of apartments located over the location and other adjacent businesses in that area, Investigator Lawson credibly testified that he observed nothing at the subject location which would indicate that it was being used as a residence.

3. The unlicensed activity which warrants an order to seal constitutes more than a “de minimis” part the business activity. The 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, testimony and photographic evidence was introduced into evidence, of both the outside and inside of the location, which indicated that cannabis was being sold at the premises. The sign on the outside of the shop on which the the name “Smoke Good” indicated that it was a smoke shop of some type (Exh A 2, Exh C 1). Both Investigators testified regarding photographic evidence of a large picture inside the door which depicted a cartoon character holding a smokeable cannabis “joint” (Exh C 2). Inside the location was an area which the Investigators testified was separated from the shop by glass or some other transparent substance in which an employee worked and had a window through which transactions were made (Exh C 3). The area contained a cash register and was separated by a door which was not accessible to the public (Exh C 3, 6-7). It is significant that on the outside of that enclosed area, visible to any persons within the store, was a sign which stated “KEEP AMERICA HIGH,” as well as a sign with a cartoon depiction of a cannabis leaf on which was written “STONE’D GRABBA OFFICIAL MERCHANT,” a notice indicating that “YOU MUST BE 21 TO ENTER,” and a sign with a cartoon character smoking a cannabis “joint” on which was written “HOTHEAD GRABBA AUTHORIZED DEALER” a product which Investigator Lawson testified he recognized as an illicit cannabis product (Exh A 2, Exh C 1-4). Investigator Lawson testified to a picture of a white sign located on the enclosed area and visible to any persons in the shop, which he identified as three stains of cannabis, specifically “Indica,” “Sativa,” and “Hybrid” (Exh C 5). While Investigator Lawson testified that at the time of the inspection, he did not find either of the Sativa or Hybrid products listed on the sign corresponding to the two strains, I find that the presence of the names of the strains of cannabis written on this sign visible to the public in the proximity of the window through which transactions occurred, can be construed, given the totality of the evidence, as advertising cannabis products for sale. I also note the presence of a black garbage bag containing a large amount of cannabis products and another container containing cannabis products, located behind the enclosed area, both of which contained a significant volume and variety of cannabis products,

are consistent with the Investigators' testimony that cannabis was being sold at this location (Exh D 6-7). Investigator Lawson testified that the amount of cannabis products in comparison with the other products sold at the store was consisted of approximately 50 percent of the total products sold. As such, I find that the cannabis products offered for sale at the location were more than 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 lawfully labeled in accordance with Cannabis Law Article 6. Photographic evidence taken at the time of the inspection depicted various products which were not labeled lawfully in accordance with Cannabis Law Article 6, or which were labeled improperly with the California warning label (Exh B, Exh D 1-8). While Respondent's attorney contends that no evidence was presented which demonstrated an imminent threat to public health, safety, and welfare, Cannabis Law Article 6 §138-b (3)(g) enumerated one of the seven factors utilized in making a determination that an imminent threat to public health, safety, and welfare, specifically, the sales of, or offers to sell, cannabis products not tested or labeled lawfully in accordance with this chapter. I note that Investigator Lawson indicated "Volume + Variety onsite of untested products. No NY Labels" under the checked box of the "Imminent threat to the public health, safety, and welfare is based on my observation and knowledge of" section on the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal (Exh E). The testimony provided by both Investigators based upon their inspection of The Jerk Shack LLC established that the products seized were branded with the California label and none contained the New York label. Furthermore, the testimony and evidence of the Investigators established that the products were offered for sale. As such, the testimony is consistent with the language on the document. Respondent's attorney also argued that Investigator Lawson failed to write the date of the inspection on the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal under the section "STATEMENT OF CHARGES" and failed to write the time on the bottom of the page under "CERTIFICATE OF SERVICE" (Exh E). I note that while Investigator Lawson did fail to write the date in that specific section, he wrote the date at the bottom next to his signature therefore successfully documenting the date of the inspection. Furthermore, both Investigators testified that the investigation occurred on June 26, 2024, therefore there was no ambiguity as to the date of the inspection and I find that the error was harmless. In addition, while the time was not written on that document, the DTF Referral Report indicated both the date and time of the inspection, therefore I find that the omission of the documentation of the time on the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal is also harmless error (Exh A 1).

I further find that the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was properly served upon the Respondent. Investigator Lawson's credible and undisputed testimony established that the document was personally served upon the sole store employee present at the time of the inspection as well as conspicuously posted on the front door of the premises (Exh C-8-9, Exh E). Furthermore, an Affirmation of Service was mailed to both the business owner as well as the building owner (Exh F).

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON JUNE 26, 2024 IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: July 5, 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 July 5, 2024, to the following:

Nickolas Perry
Sheila Wagner
Ruben Esposito, Esq.
Lance Lazzaro, Esq.