

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION
Inspection No. 111202410300039

High End 1 Inc.

Respondent.

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

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

The Respondent was represented by Phil Modrzynski, Esq.

The Office of Cannabis Management (hereinafter "OCM") was represented Luwick Francois, Esq.

Investigative Specialist Scott Lustan, Assistant Director of Enforcement Mark Lamonte, and Legal Secretary Donna LaForest, 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 1455 E. Henrietta Rochester, New York, 14623.

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).

Cannabis Law Article 6 §138-b(2) provides that any order to seal shall be served by delivery of the order 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 and shall be posted at the building or premises that have been sealed, secured and closed. A copy of the 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 pursuant to this subdivision. The order shall remain in effect pending a hearing and final determination of the board, or until such order is vacated by the office pursuant to subdivision six of this section. An order to seal shall explicitly state the procedure to request a hearing within seven days.

FINDINGS OF FACT

1. Prior to testimony being taken, the parties stipulated to a series of facts, which have been attached to this decision. The intention of the stipulation was that it would, "have the same effect as if OCM had proven every other required element to establish proper issuance of an Order to Seal at the hearing." The only contested issue is whether there was, "Proper Posting, Delivery and Service of the Order to Seal [u]nder Can[nabis Law] §138-b(2) & §138-b(8)(c).

2. As to the issue of service, OCM has failed to meet its burden under Cannabis Law Article 6 §138-b(2). The testimony of Investigative Specialist Lustan was that on the day of the regulatory inspection, neither the Respondent, nor Respondent's employees were present on the premises. Investigative Specialist Lustan posted a copy of the Notice of Violation and Order to Seal (hereinafter "NOV" and "OTS") featured in Exhibit C, on the window of the business (Exhibit H) and left a copy inside the building after the locks were changed. Investigator Lustan did not once testify that he gave a physical copy of Exhibit C to Respondent, or another person of suitable age or discretion in actual or apparent control of the premises at the time of the inspection. He explained that he sent a copy of Exhibit C to his Assistant Director of Enforcement, Mark LaMonte, who informed him that he served the Respondent at the police department. However, he could not provide specificity regarding the nature of the service. He also stated that Assistant Director LaMonte, did not tell him the name of the individual who was allegedly served.

Assistant Director of Enforcement Mark LaMonte testified that he met with the Respondent in a room at the Greece Police Department. He stated that he wanted to explain to him the actions OCM took at his store and wanted to explain the process for requesting a hearing. He testified that he gave the Respondent a blank copy of the NOV, OTS, and Order to Cease Unlicensed Activity, and explained how to request a hearing. He stated that when providing the blank NOV and OTS he didn't explain much other than that the building was sealed and it was based on charges the Respondent would be able to view when he was released and that was on the front of the store. Assistant Director LaMonte testified that he is not in fact aware of whether or not the Respondent went back to the store. He stated that the copy of Exhibit C and the property vouchers filled out with respect to the regulatory inspection, were left inside of the store after it was sealed by OCM. During the course of the hearing Donna LaForest, a Legal Secretary for OCM, testified that on November 7th she placed copies of Exhibit C in envelopes for regular mail, in a mail bin in her office so that they would be mailed to the business and home address of the Respondent and another individual. (Exhibit I). It should be noted that Ms. LaForest testified that she is not sure when mail is collected from the mail bin and stated, "I am not the person who takes the mail."

Cannabis Law Article 6 §138-b(2) required that Exhibit C be personally served on 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. Investigator Lustan and Assistant Director Lamont both stated that this did not occur. Assistant Director Lamont served a blank copy, which does not meet the requirements of the law. Additionally, Assistant Director Lamont did not provide the specific details and information contained in the completed NOV and OTS to the Respondent. Assistant Director LaMonte, essentially was relying on the Respondent to serve himself by returning to the store and viewing the completed NOV and OTS. Assistant Director LaMonte and Investigator Lustan testified that Respondent's copy of the NOV and OTS were locked inside of the premises after the sealing was effectuated. It is obvious that Respondent would not be able to enter the building in order to retrieve his copy. Respondent had seven days to request a hearing. Testimony was not taken as to when Respondent was released from police custody, but for Respondent to even be apprised of the relevant information, he would have had to be released from custody within those 7 days, and had time to return to the premises to view the completed NOV and OTS. Petitioner relied on a lot of assumptions in order to guarantee the

Respondent could come into possession of the OTS and NOV. The law additionally requires that, “copy of the 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 pursuant to this subdivision.” There was no ability for the Respondent or anyone else to provide an address for mailing. Regardless, Ms. LaForest testified that she initiated steps that she believed would lead to the documents being mailed to Respondent. It should be noted, that she actually did not in fact mail the documents by placing them in the possession of the United States Postal Service or any other postal carrier. Her testimony was that she placed the envelopes in a bin in her office, in which items are placed to be mailed. She also stated that she was not sure when the mailing took place, because she was not responsible for the mail. Additionally, Ms. LaForest placed the envelopes in the internal mail bin on November 7th, the day before the hearing. Given all of her testimony, it is clear that her actions could not have reasonably been expected to serve Respondent prior to his hearing, let alone within the 7 days Respondent had to request a hearing.

“In an administrative proceeding the standard for service is whether the notice under all the circumstances is reasonably calculated to make the parties aware of the proceeding so that they have an opportunity to be heard.” See *Reda v. Dep't of Health of City of New York*, 137 Misc. 2d 61, 63, 519 N.Y.S.2d 774, 775 (Sup. Ct. 1987), *aff'd*, 143 A.D.2d 1073, 533 N.Y.S.2d 411 (1988) Citing *Matter of Infante v. Donohue*, 42 Misc.2d 727, 249 N.Y.S.2d 100 (Sup.Ct. Albany Co., 1964). Additionally, “as with all administrative tribunals, ...[it] derives its jurisdiction and powers from the statute which created it.” *Id.* Citing *Foy v. Schechter*, 1 N.Y.2d 604, 154 N.Y.S.2d 927, 136 N.E.2d 883. The statute in this case has provided that service of the OTS be effectuated in person, by mail to an address provided by the individual personally served, and by placing a copy on the store front. In this case, the only way in which the Respondent could have been on notice as to the actual OTS issued in this case is by going to the store front itself. It is clear from Assistant Director LaMonte’s testimony that more than one store was closed. As Respondent was only provided a blank OTS and Affidavit of Compliance, it would have fallen on Respondent to remember which stores were closed, and to visit each location after being released from custody in order to apprise himself of the relevant reasons for sealing, and to gather the information necessary to request a hearing. However, service is the responsibility of the Petitioner and not the Respondent. The actions taken in this case, serving Respondent with a blank OTS and placing multiple OTS in the mail the day before a hearing could not be reasonably calculated to make the parties aware of the specific proceeding. Nor do I feel as though simply directing Respondent to view an OTS located on one of his store locations is reasonably calculated to make him aware of the proceeding. The actions taken by Petitioner deviate so far from the methods of service proscribed in the statute that it was but by chance that Respondent was able to request a hearing in a timely manner. Proper service is not permissive, but is a requirement and obligation placed on Petitioner by the Cannabis Law.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON OCTOBER 30, 2024, IS HEREBY VACATED FROM THE DATE OF THIS DECISION.

Dated: November 15, 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 November 15, 2024 to the following:

Nickolas Perry
Sheila Wagner
Celena Ditchev, Esq.
Luwick Francois, Esq.
Phil Modrzynski, Esq.