

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

Smoker's Choice of Mid-Hudson (Middletown)

Respondent.

DECISION

Complaint No. 118202406270027

Respondent requested an emergency hearing on July 3, 2024, and the inspection occurred on June 27, 2024.

The emergency hearing was conducted on November 4, 2024.

The Respondent was represented by Joshua Bauchner, Esq. and Natalie Diaz, Esq.

Dwane Phillips testified on behalf of the Respondent.

The Office of Cannabis Management (hereinafter "OCM") was represented Kevin Brown, Esq.

Investigative Specialist Zachary Roubelakis testified on behalf of OCM.

ISSUE AND PROCEDURAL HISTORY

The allegations set forth in the Notice of Violation and Order to Cease Unlicensed Activity (hereinafter "NOV") and Notice of Hearing indicate that the Respondent was offering cannabis products, namely THC-A concentrate, THC-A flower, THC-A edibles, cannabis flower and cannabis edibles, as defined by Cannabis Law § 3, for sale without an appropriate registration, license, or permit. This allegation was based upon observations made during a regulatory inspection which of Smoker's Choice Mid-Hudson, Inc. located at 157 Dolson Avenue, #30, Middletown, New York 10940, on June 27, 2024 (Exhibit A).

APPLICABLE LAW

Cannabis Law Article 6 §125(1) provides that: "No person shall cultivate, process, distribute for sale or sell at wholesale or retail or deliver to consumers any cannabis, cannabis product, medical cannabis or cannabinoid hemp or hemp extract product within the state without obtaining the

appropriate registration, license, or permit therefore required by this chapter unless otherwise authorized by 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.”

Cannabis Law Article 6 §132(1)(a) provides that any person who sells cannabis, or cannabis products, or any product marketed or labeled as such, without having an appropriate registration, license or permit therefor, may be subject to a civil penalty of not more than ten thousand dollars for each day during which such violation continues.

Cannabis Law Article 6 §132(1)(a) provides that “where such person has been ordered to cease such conduct pursuant to subdivision one of section one hundred thirty-eight-a of this chapter, such person may be assessed a civil penalty of no more than twenty thousand dollars per day for each day during which such violation continues after receiving such order in addition to the additional civil penalties set forth above...”

Cannabis Law Article 1 §3 (3) defines "Cannabinoid hemp" as any hemp and any product processed or derived from hemp, that is used for human consumption provided that when such product is packaged or offered for retail sale to a consumer, it shall not have a concentration of more than three tenths of a percent delta-9 tetrahydrocannabinol.

Cannabis Law Article 1 §3 (17) defines "Concentrated cannabis" means: (a) the separated resin, whether crude or purified, obtained from cannabis; or (b) a material, preparation, mixture, compound or other substance which contains more than three percent by weight or by volume of total THC, as defined in this section.

Cannabis Law Article 1 §3 (27) defines "Hemp" as the plant *Cannabis sativa* L. and any part of such plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration (THC) of not more than three-tenths of a percent on a dry weight basis. It shall not include "medical cannabis" as defined in this section.

FINDINGS OF FACT

1. On June 27, 2024, Zachary Roubelakis, in addition to members of the Enforcement Division of OCM, as well as members of the Enforcement Unit of the New York State Department of Tax and Finance (hereinafter “DTF”), and the Middletown Police Department,

conducted a regulatory inspection of Smoker's Choice Mid-Hudson, Inc. located at 157 Dolson Avenue, #30, Middletown, New York 10940.

2. Investigator Roubelakis testified that he has training and experience in identifying cannabis and cannabis containing products, as well as hemp and hemp related products. He explained that there are certain characteristics he looks for on package labels when identifying cannabis products, including the THC percentages and out of state labels, as well as other information. Additionally, he stated that when conducting a regulatory inspection he looks for proof of marketing, in addition to proof of cannabis sales by looking to see whether the premises has a menu, price list, processing equipment or a cash register, as well as whether products have prices on display. He also stated that in his specific training, he did not understand there to be a distinction in how he should inspect stores operated by hemp licensees versus how he conducts inspections of unlicensed operators. However, he stated he was given specific instructions on inspecting CAURD and Adult Retail Dispensaries.

3. Investigator Roubelakis testified that on June 27, 2024, he entered Smoker's Choice Mid-Hudson along with Middletown Police to conduct a regulatory inspection, as the police executed a search warrant.

4. He explained that during his regulatory search he observed the Respondent to be in possession of what appeared to be cannabis flower, THC-A flower, THC-A concentrate, THC-A vape cartridges, and Delta 9 THC edibles. He stated that he observed multiple bags of what appears to be a flower product produced by Catskill Exotics that he deemed to be an illicit cannabis product, offered for sale and displayed on the storeroom floor. (Exhibit B7). This product had a few parts of the label redacted with what appeared to be a Sharpie. Those parts of the label that were redacted, said 28% next to the words, "Big Dipper," which the investigator said was the name of a strain of cannabis and percentage of THC. Additionally, blacked out is writing stating, "this product contains less than .3% Delta9 THC," a circle that appears to reference a specific amount of Delta 9 THC, and a line that allegedly states, "this product is derived from hemp and may contain THC which could result in the consumer failure...(test for marijuana)." Despite Investigator Roubelakis' testimony regarding the suspect nature of the redacted label, none of the information proves by a preponderance of the evidence that the product is illicit.

5. The product by Catskill Exotics had a label which contained a QR code. Investigator Roubelakis stated that it was his understanding that, "all products must have a QR code to scan that leads to a proper lab certificate of analysis from a 3rd party lab." Alternatively, he stated that they could have the percentage of cannabinoids contained in the product, on the label. The label did not depict the percentage of cannabinoids contained in the product. OCM Regulation 114.9(a)(3) specifically states that the regulations requiring the total THC, CBD, and Cannabinoids per serving do not apply to hemp flower. OCM Regulation 114.9(7) states that, "a scannable bar code or QR code linked to a downloadable certificate of analysis, or linked to a website where the certificate of analysis can be downloaded," is required. The package featured in Exhibit B7 contained a QR code. However, Investigator Roubelakis' testimony regarding his attempts to access the QR code, was vague, inconclusive, and suggests that he either did not

attempt to do so, that he was not sure whether the QR code was broken, or that the QR code didn't work due to user error. Most interestingly, Investigator Roubelakis seemed to suggest that the redacted part of the label stating that the product could lead to a failed drug test, was evidence that the product was an impermissible cannabis product. This is in direct contradiction to the requirements of 114.9(f)(2), which state that all cannabinoid hemp products must contain on the label "this product is derived from hemp and may contain THC which could result in a failed drug test..." unless the product is topically applied, made exclusively from "isolate" or "broad spectrum" hemp extract. If anything, the label violated the regulations by redacting "failed drug test for marijuana."

6. Investigator Roubelakis testified that the other alleged impermissible products observed were contained in Exhibits B8-B12, and B15 including: THC A concentrate, THC A flower, cannabis edibles, and cannabis flower. However, he also testified that these products were contained in a locked room in a locked cabinet, which the police department had to pry open as the employee on site stated that he did not have a key. While in some cases, it may be the case that illicit products are kept in a storage room and brought out for inquiring customers, there is no evidence of that occurring in this case. Dwane Phillips, the Operations Manager for Smoker's Choice, testified during the hearing that he oversaw 45 stores, 40 of which are located in New York. He testified credibly during the hearing. He stated that the premises had a license to sell cannabinoid hemp as seen in Exhibit R1. Mr. Phillips also explained that the back storeroom at the premises had an employee only sign, and inside of that storeroom was a locked cabinet seen in Exhibit B13 and B17. Mr. Phillips testified that the cabinet was used to store hemp and hemp related products after new regulations prohibiting certain products were promulgated in approximately May of 2024. The only individuals that had a key to the storage cabinet, according to Mr. Phillips, were himself, the district manager, and maintenance staff. Products that did not comport with the updated New York hemp regulations or definition were stored in the locked cabinet. Given the fact that the products were contained in a locked room, in a locked cabinet, to which limited individuals had a key, I find that there is not sufficient evidence to show that the products were being sold or offered for sale. I do note that there was a case of beverages labeled Delta live resin that was on top of the shelf. I credit Mr. Phillips testimony that they were placed there due to the lack of space in the storage cabinet, a fact which can be observed in Exhibit B13.

7. Considering the foregoing, I find that the Petitioner is unable to prove by a preponderance of the evidence that the Respondent violated Article 4 of the Cannabis Law by selling or offering to sell a cannabis product for which they were not in possession of a license to sell.

WHEREFORE:

As OCM failed to prove by a preponderance of evidence that Respondent engaged in the sale of illicit cannabis and cannabis products without a license on June 27, 2024, this case is dismissed.

Dated: November 22, 2024

Laurie Cartwright

Administrative Law Judge

This decision was sent via email on November 22, 2024, to the following:

Nickolas Perry
Sheila Wagner
Celena Ditcher, Esq.
Kevin Brown, Esq.
Joshua Bauchner, Esq.
Natalie Diaz, Esq.

PLEASE BE ADVISED: Either party may appeal this decision within 30 calendar days of receipt, according to the specific manner described at 9 NYCRR 133.23(g)(5).