

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

---

**OFFICE OF CANNABIS MANAGEMENT,**

Petitioner,

-against-

**DECISION**

**Inspection No. - 303202410300003**

**MCCALL MARKET CORP.**

Respondent.

---

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

After respondent's request for adjournment was granted on November 4, 2024, the hearing was scheduled for and conducted on November 13, 2024, pursuant to a mutual agreement between the parties.

The Respondent was represented by Phil Modrzynski, Esq.

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

Detective Joe DeMarco (hereinafter "DeMarco") and Supervising Investigator Christopher Chapman (hereinafter "Chapman") 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 90 McCall Rd., Rochester, NY 14615.

The scope of the 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.

OCM determined that it waived its right to pursue the Notice of Violations and would not be requesting a monetary fine pursuant to any violations.

### **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(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 October 30, 2024, OCM and other law enforcement agencies conducted an inspection of McCall Market Corp. (hereinafter "McCall Market") located at 90 McCall Rd., Greece, NY (Ex. C). At that time, Chapman issued a Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal and the premises were sealed (Ex. C). That same day, October 30, 2024, Respondent requested an Emergency Hearing with respect to the Order to Seal. A hearing was scheduled for November 4, 2024, but was adjourned at the request of Respondent's attorney. A subsequent hearing was held on November 13, 2024, at which DeMarco and Chapman appeared as the witnesses. Demarco first testified that, over the course of a couple months, law enforcement (Town of Greece Police Department) conducted an undercover operation against a number of stores in the Rochester area, including McCall Market

(Ex. A).<sup>1</sup> He testified that twice during this operation, which sent a confidential source into McCall Market in order to attempt to purchase illicit product, McCall Market sold product to the confidential source. These “controlled buys” occurred during the first week of September 2024 and the second week of October 2024.<sup>2</sup> On both occasions, the confidential source did buy 3.5 grams of what DeMarco testified appeared to be prepackaged cannabis flower (see Ex. A). He also testified that on both occasions the product purchased was tested using Nik Test Kit, which resulted in the products testing positive for THC. DeMarco then used these incidences to obtain the search warrant for McCall Market, which preceded the inspection on October 30, 2024. Chapman next testified that signs and symbols were present at McCall Market, which he further testified that, according to his training and experience, indicated that cannabis sales may be occurring at the location. Among these signs and symbols were two statutes that depicted characters dressed in what Chapman testified were Rastafarian outfits, smoking joints, and carrying baskets labeled “grass” and adorned with what appear to be cannabis leaves (Ex. D9 & E23). Additionally, the store contained tobacco grinders, ashtrays with the phrase “Smoke Weed,” bong, and a “Raw Inflatable” advertising Raw rolling paper, all of which, although legal and potentially utilized or advertising products utilized in conjunction with tobacco use, Chapman testified are frequently used for cannabis usage (Ex. D 7, 9, 22, & 21). Finally, Chapman highlighted “gas masks” which were on display for sale in the store, which he testified were used as a delivery system for cannabis (Ex. D 9 & 11). Chapman next testified that he found items related to financial transactions, which included an ATM (Ex. D 12) and a register (Ex. D 25).<sup>3</sup> Additionally, Chapman testified that upon searching McCall Market, he discovered a bevy of suspected cannabis items; items that were labeled as cannabis as well as items that Chapman identified as probable cannabis items due to his training and experience (Ex. E). Finally, Chapman testified that although Respondent possessed a number of licenses, each of which is required to sell certain products, including a hemp license issued by OCM, Respondent did not possess an adult-use license; Respondent’s attorney produced no evidence of such a license.

The factors introduced into evidence and through testimony indicate by a preponderance of the evidence that Respondent was offering cannabis products for sale without the necessary license being issued by OCM. While the presence of cannabis, both suspected and labeled, and in such a volume that indicates the items were not for personal use (no evidence was presented by Respondent which would have supported such an assertion), indicates that sales were occurring, this is heavily bolstered by the testimony of DeMarco, who supervised the controlled buys from McCall Market (see Ex. A, pgs. 13 & 17). These two purchases, which DeMarco later testified were positively identified as THC products, demonstrate that sales were occurring at the store, likely over an extended period, due to the passage of time between the buys. Further, while certain products highlighted by Chapman, which he stated were indications of potential illicit sales (e.g., advertising, paraphernalia), were all legal, they do add a modicum of weight to the assertion that individuals would view these items as indications that illicit products could be

---

<sup>1</sup> This exhibit was admitted into evidence only for those portions of the exhibit which related directly to McCall Market.

<sup>2</sup> DeMarco explained that the exact dates of these transactions were withheld from the search warrant and testimony to protect the identity of the confidential source.

<sup>3</sup> These items support the conclusion that financial transactions were occurring, but do not necessarily support a finding of illicit transactions were being conducted.

purchased at McCall Market. While Respondent argued that the illicit products not being on display and maintained behind the counter demonstrated that the products were not “for sale,” this assertion does not overcome the facts listed above.

2. Chapman testified that no part of the premises to be sealed was used in part as a residence. He stated that a complete search of the location was conducted and that no indications that it was being used as a residence were found. The front door was locked via a “rolldown gate” which would have locked any resident inside the building. Respondent made no assertion to counter the assertion that the location was being used solely as a business.

3. The unlicensed activity which warranted an order to seal constituted 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. A large variety and volume of illicit products were discovered at McCall Market. A variety of brands were observed on premises, including: Torch, Treezy, Runtz, Naked Worm, California Gold, and Fusion (Ex. E). A variety of product types were also observed including: pre-rolls, live resin, gummy edibles, vape inhalers, and cannabis flower. From the photographic evidence submitted by OCM, there appears to be hundreds of individual products seized from McCall Market. Although there were, as Respondent claims, a plethora of additional products for sale in McCall Market – it was correctly identified as a typical convenient store by Chapman – the volume and variety of cannabis products discovered within the store cannot be overlooked. Both volume and variety of product were significant. Chapman estimated that there were “96 packages” of product which he photographed after placing on the counter (Ex. E 21 & 22). This estimate did not seem to include the vapes, pre-rolls, or large bags of gummies that were also found in the store. Further, while the signs and symbols present in McCall Market were not voluminous, they were present and could readily be seen by potential customers as indicators that cannabis may be procured from the store. The totality of the evidence and by a preponderance of the evidence demonstrates that the trade of illicit product at McCall Market was more than de minimis and that the volume and variety of product showed that the store was primed to make significant sales in illicit cannabis.

4. The unlicensed activity being conducted at McCall Market constituted an imminent threat to public health, safety, and welfare in that there were sales of, or offers to sell, cannabis products that were not tested or labeled lawfully in accordance with Cannabis Law Article 6. Many of the items found during the inspection were labeled as cannabis products and either contained an inspection stamp of production outside New York State (many appeared with a California stamp) or no inspection stamp at all (see Ex. E). It is likely that none of the products were tested in New York as the products shown in the photographs and submitted into evidence lacked the inspection stamp of New York State (Ex E). Due to the volume of product not tested in New York which was discovered during the inspection as demonstrated by the absence of labels or labels not in accordance with New York state law, and no testimony by Respondent to the contrary, the activity occurring at McCall Market constituted an imminent threat to public health, safety and welfare.

5. Respondent argued during closing that the search warrant in possession of law enforcement during the search of McCall Market was invalid as it was not signed by a Rochester City Court. He cited specifically New York Criminal Procedure Law Section 690.35 but did not expand his explanation much beyond these assertions. Looking at Section 690.35, I see a provision which allows for “any adjoining town or village...within the same county” as a city may issue a search warrant for that city. In this case, the Town of Greece issued a search warrant for a Rochester based business, which seems valid under this section of law. Regardless of the validity, Chapman testified that law enforcement did not enter the business until it was opened by Respondent at approximately 7 am on the date of the search. There is no evidence that the actions of OCM required a search warrant. OCM is granted the power to conduct regulatory inspections of “places of business” under New York Law (NY Canbs § 10). Respondent opened the store and OCM inspected the establishment. No further evidence was submitted by Respondent that led me to believe that this was anything other than a regulatory search conducted by OCM within the bounds of its powers. Further, while Respondent raised an objection concerning the search warrant during the hearing, this objection concerned only the introduction of extraneous content contained within the search warrant which might unduly prejudice Respondent. No objection was made at that time as to the Constitutionality of the search warrant, which would have been the appropriate time, prior to its admission into evidence.

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

Dated: November 18, 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 November 18, 2024, to the following:

Phil Modrzynski, Esq.

Luwick Francois, Esq.

Nickolas Perry

Sheila Wagner

Celena Ditchev, Esq.