

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 134202410300072

RED EYE WEBSTER 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 15, 2024 pursuant to a mutual agreement between the parties.

The Respondent was represented by Phil Modrzynski, Esq.

No witnesses testified on behalf of the Respondent.

The Office of Cannabis Management (hereinafter “OCM”) was represented by Student Intern Trent Biscone under the supervision of Kevin Brown, Esq.

OCM Investigative Specialist Jillian Agnew, Assistant Director of Enforcement of Mark LaMonte, Legal Assistant 2 Alicia Pesos, and Town of Greece Police Detective Joseph DeMarco 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 1900 Empire Blvd, Webster, NY 14580.

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.

Should either party file a request for an additional hearing to adjudicate the sufficiency of the Notice of Violation and the Order to Cease Unlicensed Activity, that hearing will be scheduled for a later date.

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)).

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

On October 30, 2024, OCM Investigator Agnew conducted a regulatory inspection of Red Eye Webster Inc. in conjunction with members of the Town of Greece Police Department, pursuant to a search warrant issued on October 24, 2024 (Exh B). The inspection occurred at approximately 7:00 a.m., prior to the time that the shop was open to the public and no employees were present. At the conclusion of the inspection, Investigator Agnew documented her findings pursuant a Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal (hereinafter “NOV”) (Exh D1) and posted the document on the glass storefront (Exh F 14). The premises was padlocked based upon a determination made as a result of the regulatory inspection.

OCM Assistant Director of Enforcement of Mark LaMonte (hereinafter “Investigator LaMonte”) testified that he was not present and did not participate in the regulatory inspection of Red Eye Webster Inc. He testified that there were contemporaneous regulatory inspections of other locations which Respondent either owned or in which he had a business interest with two other individuals. According to Investigator LaMonte, he went to the Town of Greece Police Department and spoke with the three individuals whom he believed owned or had ownership interests in the shops which were the subject of the regulatory inspections including Red Eye Webster, Inc. According to the Investigator, the Respondent identified himself as the owner of the Red Eye Webster, Inc., location. Investigator LaMonte testified that he identified himself to the three individuals and explained that OCM had found what they considered to be adult use cannabis in the locations and that there were orders to seal placed on some of the locations. He testified that he advised them that since no one was present at the shop at the time of the regulatory inspection, there was no one to serve the paperwork on. Investigator LaMonte testified that the Respondent was in possession of a completed NOV pertaining to an investigation of another shop however was not personally given a copy of a completed NOV reflecting the findings of the regulatory inspection at Red Eye Webster, Inc. At that time, he explained to the Respondent as well as the other individuals, as to how to request a hearing using the QR code on the back of the NOV and advised them that upon their release from the Greece Police Department, they should go to the stores to read the charges on the NOV posted on the storefronts.

Legal Assistant 2 Alicia Pasos testified that she mailed a copy of the NOV to each of the three individuals as well as the business. According to Ms. Pasos, she printed out a copy of the NOV on regular size copy paper which was smaller than the actual NOV which is the size of legal paper and that it was shrunken to fit regular letter size paper. She also testified that the document that she printed was a one-sided copy of just the front of the NOV however the actual NOV was a two-sided document with writing on the back. Ms. Pasos testified that she placed the documents to be mailed in a mail bin in the office but was not aware when those bins were picked up and taken to the mailroom.

Cannabis Law Article 6 §138(b)(2) requires that the NOV (Exh D 1) be personally served on 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 testimony of both Investigator Agnew and Investigator LaMonte establish that this did not occur. In so finding, I note that no employees were present at Red Eye Webster, Inc. at the time of the regulatory inspection to

accept service of the NOV as the inspection occurred at a time that the location was not open for business. Furthermore, the testimony of Investigator LaMonte establishes that at no time was a copy of the NOV for Red Eye Webster, Inc. provided to the Respondent during the time he met with him at the Greece Police Department. According to Investigator LaMonte, he advised the Respondent and the two other individuals that adult use cannabis was found at the locations and some of the sites were sealed. He advised the Respondent to go to the location to read the specific findings and showed him, utilizing the QR code on the back of an NOV in Respondent's possession which was issued at another location, how to request a hearing. Investigator LaMonte's directive to Respondent to physically go to the location to read the posted NOV so as to know the findings contained in the NOV specific to Red Eye Webster, Inc. assumed that Respondent could do so within the timeframe in which to request a hearing, including that he would no longer be detained by the police.

“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, (Sup. Ct. 1987), *aff'd*, 143 A.D.2d 1073 (1988) Citing *Matter of Infante v. Donohue*, 42 Misc.2d 727 [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 controlling statute in this matter provides that the NOV must be served in person, by mail sent to an address provided by the individual personally served, and by posting a copy on the building or premises to be sealed (Cannabis Law Article 6 §138(b)(2)). In the present case, as there were no employees at the location at the time of the regulatory inspection, personal service could not be effectuated at that time. Furthermore, Investigator LaMonte's reliance on an NOV in Respondent's possession pertaining to a location other than Red Eye Webster, Inc. is not sufficient to effectuate personal service. Personal service could have been accomplished had Investigator LaMonte provided Respondent with a copy of the NOV issued with respect to the subject location at the time he was at the Greece Police Department however he did not do so. Utilizing an NOV issued to another location in an attempt to advise the Respondent how to request a hearing does not suffice as personal service. In addition, advising the Respondent to physically go to the subject location to read the contents on the NOV affixed to the storefront is also insufficient as it shifts the burden to the Respondent so as to make him aware of the findings which justified the sealing of his shop.

While Ms. Pasos testified that she mailed copies of the NOV to the Respondent, I note that Cannabis Law Article 6 §138(b)(2) requires, in part, that “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.” Ms. Pasos testified that the copy that she mailed was on regular size letter paper and not legal paper which is consistent with the size of the NOV. In addition, the document that she mailed was not a true and accurate copy of the NOV as by her own admission, she mailed only a copy of the front of the NOV which is a two-sided document with writing on the back. I further find that by merely placing the mail in a bin in the office with no knowledge of when it is picked up and transported to a mail room, let alone a post office, does not ensure that the document was properly mailed.

As such, I find that Petitioner did not establish compliance with the service requirements of Cannabis Law Article 6 §138(b)(2) and thus service is deemed defective.

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

Dated: November 22, 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 November 22, 2024, to the following:

Nickolas Perry
Sheila Wagner
Celena Ditchev, Esq.
Trent Biscone
Kevin Brown, Esq.
Phil Modrzynski, Esq