

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 111202407240007

BUSH'S BUD'S

Respondent.

Respondent requested a hearing on September 19, 2024 regarding an inspection which occurred on July 24, 2024.

After Respondent's request for an adjournment was granted on October 16, 2024, the hearing was scheduled and conducted on November 25, 2024 pursuant to a mutual agreement between the parties.

The Respondent was represented by Matthew Buzzetti, Esq.

No witnesses testified on behalf of the Respondent.

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

Investigative Specialist Scott Lustan 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 125 W. Franklin St., Horseheads, NY 14903.

The scope of the hearing involves determination as to whether OCM, by a preponderance of the evidence, was justified in issuing to Respondent the Notice of Violation and Order to Cease Unlicensed Activity (hereinafter collectively "NOV") and what penalty under Cannabis Law

Article 6 § 132 is justified. OCM requested the maximum penalty of \$10,000. Additionally, this hearing was held for purpose of determining whether the padlocking provisions of Cannabis Law Article 6 § 138-b has been met by a preponderance of the evidence.

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. 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 §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)(c) requires that any civil penalties assessed “shall take into consideration the nature of such violation and shall assess a penalty that is proportionate to the violation...”

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. According to the credible testimony of Investigator Lustan, Respondent was offering cannabis products for sale without a license issued by OCM. At the time of the inspection, he testified as to what he identified to be cannabis flower, edibles, and concentrate which were located both on display to the public as well as in a back room at the location (Exh A,B 12-27, C2-14, 17-18, 20-21, 23-30). He also observed an ATM Machine, a point-of-sale system, a portable scale and what he testified was equipment used for processing pre-rolls which contained cannabis residue on and around it (Exh B2, 28, C14-16, C18-21). Investigator Lustan described a “Specials” board which reflected a daily \$5 discount Monday through Friday which included “gummy stickers, mid shelf stickers, Dab stickers, Top shelf stickers” (Exh B3). Located next to the cash register was what Investigator Lustan described as a ledger with columns reflecting July 22 through July 28 which listed what he identified as cannabis products listed in a column to the left of the first date, and included products, including their respective prices, of cannabis products that he testified were consistent with the cannabis products which he observed at the location (Exh B 29). There were marks in the row for July 22 through July 24, the date of the inspection, which appeared to correspond to the number of each of the listed cannabis products which were sold on that particular day (Exh B 29).

2. According to Investigator Lustan, 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.” He credibly testified that he directly asked the Respondent if anyone lived at the premises to which the Respondent answered in the negative.

3. The unlicensed activity which warrants an order to seal constitutes more than a “de minimis” part of the business activity according to the Investigator. He testified that he found a large variety and volume of illicit cannabis products during the course of the inspection of this location. 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. One such factor is the presence of signs or symbols, inside or outside, which advertise the sale of cannabis or otherwise indicating that cannabis is sold there. On the outside of the storefront, visible to anyone walking by was a sign with the name of the store surrounded by pink and green depictions of cannabis leaves and a picture of a mouth with cannabis leaves all over the lip portion and with what appears to depict a cannabis “joint” sticking out of the mouth (Exh B1). Also, in the side window of the storefront was a sign that stated “DAILY SPECIALS” (Exh B1). Inside the store were various signs, markings on the

wall, and tapestries all depicting cannabis or denoting common references to cannabis culture (Exh B4-7, 9-11, 30). Furthermore, the white board affixed to the wall contained daily specials including “gummie stickers, dab stickers, and mid and Top shelf stickers” (B3). A further indicator that cannabis was being sold on the premises was a wheel which a patron could spin in the event that they spent \$100 or more (Exh C1). Some of the “prizes” that were available to win included “1/8 purple shelf, pre-roll, or dabs” (Exh B4, C1). In addition, the ledger which appeared to contain a daily tally of the illicit cannabis products sold, some including the price, also indicated that the illicit cannabis was being offered for sale (Exh B29). An evidence voucher reflecting the illicit cannabis products seized, authored by Investigator Lustan at the time of the inspection indicated that OCM Investigators counted 514 bags of cannabis flower, 71 cannabis flower pre-rolls, 266 cannabis concentrates, and 130 cannabis edibles, all of which was secured by the New York State Police (Exh D). In addition, Investigator Lustan credibly testified that Bush’s Bud’s maintained a social media presence on Facebook which he indicated was active within the last few weeks prior to the hearing, on which there was both flower and concentrate advertised for sale by Curtis Bush and that in addition, he included the weight and price for the corresponding products. Based upon the photographs and evidence voucher entered into evidence as well as the testimony of Investigator Lustan, I find that it was demonstrated by a preponderance of the evidence that this location contained a large variety and a substantial volume of illicit cannabis products being offered for sale.

4. The unlicensed activity constituted an imminent threat to public health, safety, and welfare based upon the offer to sell cannabis products which were not tested or labeled lawfully in accordance with Cannabis Law Article 6. Investigator Lustan testified that many of the cannabis products were packaged with labels bearing the California label or labels from other states which he testified were not legal to sell in New York State (Exh C2-4, 6). According to Investigator Lustan, some of the cannabis products were even labeled with a spurious New York State Label (Exh C10-11). Many of the cannabis products were in brightly colored packages and depicted candy or other products which are commonly known, all of which could appeal to children which is also in violation of New York State law (Exh C4-11, 22-23, 25-26). Furthermore, Investigator Lustan identified empty packaging for cannabis pre-rolls, a bump box, grinder, and a portable scale, surrounded by and containing cannabis residue which he testified is indicative of processing of untested and unregulated cannabis at the location (Exh C14-21).

5. The Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was properly served upon the Respondent on July 24, 2024. Investigator Lustan’s credible and undisputed testimony established that the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was personally served upon and signed by Curtis Bush who identified himself as the father of the owner of Bush’s Bud’s and was present at the time of the inspection. Furthermore, the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was also conspicuously posted on the front door of the premises, as required by Cannabis Law Article 6 §138(b)(2) (Exh E2). Therefore, I find that service was properly effectuated in accordance with Cannabis Law Article 6 §138(b)(2).

6. OCM requested that the maximum penalty of \$10,000 be levied for the violations that were discovered during the inspection. While the statute does not provide extensive guidance for determining the penalty for violations under Cannabis Law Article 6 §125, 132, and 138-a, it does require that a penalty be proportionate to the violation (Cannabis Law Article 6 § 132 (1)(c)). In the Matter of Bush’s Bud’s, Investigator Lustan testified that provided an evidence

voucher which established that a large variety and volume of illicit cannabis products were seized from the store (Exh D). He also indicated a significant number of signs and symbols, both outside and inside the store as well as a white board with daily specials (Exh B3), multiple containers of cannabis flower sitting on the display counter on top of a card identifying the product and providing additional information (Exh B12-17, 19-27), additional cannabis products located in other parts of the store as well as a free spin wheel which identified some cannabis products as “prizes” (Exh C1). Furthermore, the presence of the ledger next to the cash register specifically identified cannabis products and their prices and reflected a daily tally for each product sold (Exh B29). The amount of cannabis at the location as well as the advertising, the ledger, and the continued sale of cannabis product via Facebook despite the sealing of the premises, warrants the maximum penalty. As such, I am assessing Bush’s Bud’s a penalty of \$10,000.

DECISION

The Respondent engaged in the sale of illicit cannabis and cannabis products without a license issued by OCM, at the location of 125 W. Franklin St., Horseheads, NY 14903. In so doing, Respondent violated Cannabis Law Article 6. The Order to Cease Unlicensed Activity and Order to Sear are hereby affirmed and a penalty is assessed.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON JULY 24 2024 IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

FURTHERMORE, PURSUANT TO CANNABIS LAW ARTICLE 6 § 132 (1), THE RESPONDENT IS HEREBY ORDERED TO PAY A \$10,000 FINE, AS A PROPORTIONATE PENALTY FOR THE UNLICESED SALE OF CANNABIS AND CANNABIS MARKETED PRODUCTS ON JULY 24, 2024.

Dated: November 29, 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 29, 2024 to the following:

Nickolas Perry

Sheila Wagner

Celena Ditchev, Esq.

Luwick Francois, Esq.

Matthew Buzzetti, Esq.