

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

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**OFFICE OF CANNABIS MANAGEMENT,**

Petitioner,

-against-

**DECISION**  
**Inspection No. - 109202411200022**

**ELITE SMOKE SHOP, INC**

Respondent.

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Respondent requested an emergency hearing on November 21, 2024, which was made within seven (7) calendar days of the date of the inspection which occurred on November 20, 2024

The emergency hearing was conducted on November 26, 2024, within three business days of the request as prescribed by statute.

The Respondent was represented by Phil Modrzynski, Esq.

The Office of Cannabis Management (hereinafter “OCM”) was represented Sisi Wu Esq.

Investigator Daniel Gregory (hereinafter “Gregory”) testified on behalf of OCM and was the sole witness.

**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 229 Lake St., Hamburg, NY 14075.

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.

## 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**

1. On November 20, 2024, OCM, after receiving a report of suspicious activity, specifically the offer to sell cannabis flower to a customer, from local law enforcement, as testified to by Gregory, conducted an inspection of Elite Smoke Shop, Inc. (hereinafter “Elite Smoke”) located at 229 Lake St., Hamburg, NY (Ex. A 2). At that time, Gregory issued a Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal and the premises were sealed (Ex. A 2). The next day, November 21, 2024, Respondent requested an Emergency Hearing with

respect to the Order to Seal. A hearing was scheduled for November 26, 2024, at which Gregory appeared as the sole witness. Evidence presented at the hearing showed that Elite Smoke had a cash register, credit card reader, and that receipts from recent cash transactions were present (Ex B 4, 5, & 7). Gregory testified that an “IPAD,” which he found in the vicinity of the register, when turned on, displayed a menu of products and prices, which he recognized, due to his training and experience, as being cannabis brands and products (Ex B 6). Only a single suspected cannabis product was found in the “retail section” of the store, but significant amounts of cannabis products, both labeled and suspected, were present in the storage rooms within the building, rooms easily accessible from the retail section, and under the control of the owner (Ex B 10-36). Many of these products contained price tags (Ex B 10, 29, 30, 32, 36) and some of them corresponded to the items listed on the menu found on the IPAD (compare Ex B 6 & 14-20, & 27). Some of the products found were labeled as a cannabis product (i.e., Ex B 13, 18, 23 & 29). Other products listed THC as an ingredient of the product (i.e., Ex B 17, 20, 29). Still other products had a “stamp” which indicated that cannabis products were contained within (i.e., Ex B 20, 23-34, & 29-32).<sup>1</sup> Finally, many of the products had signs, symbols, and words on the packaging which Gregory recognized as being indicative of products that are being “advertised” as containing cannabis (generally Ex B 10-35); Gregory also testified that some of the products were known to him and that previous testing had shown that they contained THC (Ex B 32). While little time was spent during testimony discussing the signs and symbols present in the store, some can be seen in the pictures submitted into evidence. Respondent argued correctly that the outside had minimal signs which might indicate the sale of illicit cannabis (the zig-zag rolling papers being the main example) (Ex B 1); however, paraphernalia (bongs, trays, and rolling paper) and advertisements (Raw rolling papers) were present in the store (Ex B 2-3). Gregory also testified that Respondent did not possess an adult-use license; Respondent’s attorney produced no evidence of such a license.

The evidence introduced at this hearing and the testimony Gregory provided indicate by a preponderance of the evidence that Respondent was offering cannabis products for sale without the necessary license being issued by OCM. A large amount of cannabis was discovered in the store. Many of the items possessed price tags, strongly indicating that they were for sale. The cash register and credit card reader, taken in isolation, suggest that sales (legal or otherwise) were occurring, but the menu found near the register with known cannabis brands, and which correspond with products found on premises, bolster the claim of unlicensed activity. Further, signs and symbols, although not overwhelming, could indicate to an interested customer that cannabis could be purchased in the store. While Respondent seemed to argue, in part, that the illicit products not being on display and maintained in a storage room demonstrated that the products were not “for sale,” this assertion does not overcome the facts listed above. I will note that I did not factor in Gregory’s statement that OCM had been informed by law enforcement

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<sup>1</sup> Respondent’s attorney argued that the “stamp” that indicated a California origin could not reliably indicate that the product contained cannabis. He appeared to argue that both cannabis and hemp products from California may possess this stamp. This argument is unpersuasive for a number of reasons. First, many of the products introduced into evidence that possess the “CA!” stamp also have a THC content listed on the packaging (see e.g., Ex B 17). Further, Gregory testified that his training leads him to believe that this stamp indicates that the product contains cannabis. Also, it is likely that this stamp is used by the business to demonstrate the presence of cannabis for the purposes of sales. Finally, although the evidence seems to suggest that such a stamp indicates cannabis, this is not the sole reason for its relevance. Such a stamp is also evidence that the product is not from New York and is, therefore, not a legal product, having not been tested in New York and a danger to the consumer.

that a customer had been offered cannabis flower. This is hearsay within hearsay. It is unreliable, but, the other evidence provided also make it unnecessary.

2. Gregory testified that no part of the premises to be sealed was used in part as a residence. The store, which was small, and which was thoroughly photographed by Gregory, showed no indication of residential use. 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 Elite Smoke. A variety of brands were observed on premises, including: Fusion, Ghost, Get Lit, Kush King, and Treezy (Ex B). Many additional brands or unbranded products were also found (Ex B). A variety of product types were also observed including: pre-rolls, live resin, concentrate, various edibles (e.g., bars and gummies), vape inhalers, and cannabis flower (Ex B). From the photographic evidence submitted by OCM, there appears to be hundreds of individual products seized from Elite Smoke. This estimate is supported by the inventory list prepared by the Department of Taxation and Finance (Ex C).<sup>2</sup> Although there were, as Respondent claims, several legal products for sale in Elite Smoke, the volume and variety of cannabis products discovered within the store cannot be overlooked. Both volume and variety of product were significant. The photos submitted into evidence show a tremendous amount of illicit product from the store, more than necessary for making a determination that the amount constituted more than de minimis. Further, while the signs and symbols present in Elite Smoke 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 Elite Smoke 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 Elite Smoke 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), a generic stamp, or no inspection stamp at all (see Ex B). It is likely that none of the products were tested in New York, as nearly all of the products shown in the photographs and submitted into evidence lacked the inspection stamp of New York State (Ex B)(A very few product appears to possess a New York stamp/sticker (Ex B 29); even excluding these, there were significant amounts of, what is likely, untested product present at Elite Smoke. Due to the

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<sup>2</sup> There are weights listed on the final drafts of the DTF forms (C 1-4). However, respondent rightfully raised questions as to the veracity of such weights. They don't seem to make mathematical sense and no explanation for the process were provided. Further, no one testified as to how the weights are gathered, what instruments are used, and what process is followed. I will, therefore, give no evidentiary weight to these measurements. The numbers that list the total count of the products is sufficient.

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 Elite Smoke constituted an imminent threat to public health, safety and welfare.

5. Respondent argued that the service of notice in this matter was defective. He claimed that the Affirmation of Service submitted by OCM is faulty and cannot satisfy the requirements under Cannabis Law 138-b(2). He argued that the lack of a Notice of Violation/Order to Seal (hereinafter “NOV/OTS”), which is only referenced in the document and is not attached to the exhibit, makes it impossible to know if a proper notice was sent. This argument is somewhat bolstered by the fact that two separate NOV/OTS were presented into evidence – one which appeared to be a “draft” and what appeared to be the final version. There is a question as to which version was sent, since the NOV/OTS was not included. This could be fatal to the notice requirement (see *Beer Garden, Inc. v. New York State Liquor Auth.*, 79 N.Y.2d 266, 590 N.E.2d 1193 (1992)); however, both version of the NOV/OTS appear to satisfy all of the requirements under the statutes which delineate the components of notice (see SAP § 301, 9 NYCRR 133.10(e), & 9 NYCRR 133.25(i)). The final version of the NOV/OTS does contain some information that the “draft” version does not. Both, however, contained sufficient information to put Respondent on notice and to qualify under Cannabis Law 138-b. The Affidavit’s assertion that the NOV/OTS was mailed to the business address given to OCM during the inspection is sufficient evidence of the NOV/OTS was, in fact, mailed, despite not being introduced into evidence. It should be noted that the mailing address given to OCM during the inspection is the same address as the building which was sealed (Ex A).<sup>3</sup> This makes it unlikely that the mailing was practically necessary. Anyone looking for the letter, would need to go to the store, which was sealed, at which time they likely would receive notice upon their arrival both by the notices attached to the building and their inability to access the store (Ex D 3).

Respondent further argued that the act of placing the mailing in “an outgoing mail repository under the exclusive care and custody of the Office” is insufficient to demonstrate service. He suggests that placing it in a USPS mailbox is necessary and that failure to do so constitutes a failure of service. While this argument is somewhat persuasive, it falls short for a number of reasons. First, most businesses have a mailing procedure that do not involve each employee individually delivering the outgoing mail to a post office or postal box. To assume that using a process like this fails to qualify as a mailing stretches logic. It is commonplace and is generally a reliable method since, as with any business, OCM is highly motivated to make sure that the documents which it finds important enough to mail are properly sent. Further the mail repository is “under the exclusive care and custody of the Office,” which, makes it unlikely that it would be tampered with by outside agents. OCM’s failure to outline the internal process used for mailing does harm their case somewhat. Gregory did allude to a process, as does the Affidavit, but a more thorough understanding of the process and entering that into evidence through testimony would have made rendering a determination on this specific matter much easier. Finally, it

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<sup>3</sup> It is unclear whether providing the address of the business would require a mailing under Cannabis Law § 138-b(2). The purpose of providing a name and address is to assist with notice and meet the requirements of the statute. It is unlikely that mailing notice to the same address that was placed under an order to seal increases the chances for notice. Since a notice was posted at the location the mailing may not be required under the law. I reach no conclusion on whether this is an accurate understanding of 138-b’s service requirement.

should be noted that the purpose of service in an administrative hearing is for the purpose of notice and not to assert personal jurisdiction over the Respondent (see *Drolet v. New York State Racing & Wagering Bd.*, 115 Misc. 2d 7, 10, 453 N.Y.S.2d 361, 363 (Sup. Ct. 1982) (citing *Avelli v. Town of Babylon*, 54 Misc.2d 662, 665, 283 N.Y.S.2d 261; *Olin Industries v. NLRB*, 192 F.2d 799 [5th Cir., 1951])). Therefore, Respondent's actual notice (both requesting an emergency hearing the day after the inspection, well before any letter would have been received, and being represented at the hearing by counsel) serves as a strong indication of service of notice. It is possible that actual notice may overcome "procedural irregularities ... since the object of the procedural requirement has been achieved" (*Drolet v. New York State Racing & Wagering Bd.*, 115 Misc. 2d 7, 10). It is not, however, necessary to reach such a conclusion as I find that the service requirements of Cannabis Law 138-b were satisfied by OCM.

### **DECISION**

The Respondent engaged in the sale of illicit cannabis and cannabis products without a license, registration, or permit to do so, at the location of 229 Lake St., Hamburg, NY 14075. In so doing, Respondent violated Cannabis Law Article 6. The Order to Seal is hereby affirmed.

**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: December 2, 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 December 2, 2024, to the following:

Phil Modrzynski, Esq.

Sisi Wu, Esq.

Nickolas Perry

Sheila Wagner

Celena Ditchev