

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

High End 2 Inc. DBA Red Eye 3

Respondent.

DECISION

Inspection No.: 114202410300003

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. Due to an adjournment request by the Respondent, the hearing was conducted on November 14, 2024.

The Respondent was represented by Phil Modrzynski, Esq.

The Office of Cannabis Management (hereinafter “OCM”) was represented by Abir Ahmed, Esq.

Investigative Specialist Christopher Chapman and Investigative Specialist Eva Chumsky 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 4165 Buffalo Rd, Rochester, NY 14624.

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 off 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. Prior to testimony being taken, the parties stipulated to a series of facts, which have been attached to this decision. The intention of the stipulation was that it would, “have the same effect as if OCM had proven every other required element to establish proper issuance of an Order to Seal at the hearing.” The only contested issue is whether there was, “Proper Posting, Delivery and Service of the Order to Seal [u]nder Can[nabis Law] §138-b(2) & §138-b(8)(c).

2. The owner of the business is listed on the Notice of Violation and Order to Seal hereinafter “NOV and OTS” (Exhibit C) as Mohammed Ahmed. During the course of the hearing both Investigator Chumsky and Supervising Investigator Chapman testified that neither Mr. Ahmed, nor any other employee, was present during the inspection of the premises. Therefore, the Notice of Violation and Order to Seal, as seen in Exhibit C, were not personally served during the inspection on an employee or the owner. Investigator Chumsky testified that on the date of inspection, she conducted her investigation with her supervisor, Assistant Director of Enforcement Mark LaMonte. Investigator Chumsky did not personally serve the Respondent with the NOV and OTS. She explained that she posted a pink copy of the NOV and OTS on the window of the premises and left a copy of the NOV and OTS inside of the locked premises and placed a copy in the case file. She also stated that she emailed a copy to Supervising Investigator Chapman and Assistant Director LaMonte within the hour, as directed, though she never confirmed if it was received.

Supervising Investigator Chapman also testified during this hearing that he and Assistant Director LaMonte spoke to the Respondent, Hammam Ali, and Salahaldden Ali, who were all in custody at the Greece Police Department Headquarters on October 30, 2024. Supervising Investigator Chapman stated that he thought all three individuals had or may have had an interest in the High End 2 Inc. However, the Notice of Violation and Order to Seal that were issued in this matter, named the owner as Mohammed Ahmed. Investigator Chumsky stated that during the inspection of the premises they saw Mr. Ahmed’s name on a lot of pieces of mail, in addition to the hemp license issued for the location. Given that the NOV and OTS were completed while Assistant Director LaMonte was at the premises, he was or should have been aware of who was the alleged business owner.

Assistant Director LaMonte was present at the inspection of the premises immediately proceeding his visit to the Greece Police Department. There is no explanation for why he or Supervising Investigator Chapman couldn’t have personally served the Respondent with the copy of the NOV and OTS that was left inside of the premises. Instead, Supervising Investigator Chapman testified that the Respondent had been given a blank copy of the NOV and OTS as well as one or more blank Affidavits of Compliance, and that he told Respondent that stores that he had or may have an interest in had been ordered sealed by OCM. Supervising Investigator Chapman testified that he did not name each individual store that received an OTS to the Respondent. He also stated that the Respondent didn’t want to talk or tell them which stores in which he had an interest. His testimony regarding his conversation with the Respondent made it clear that he did not notify the Respondent that this specific location, High End 2 Inc., had been issued an NOV and OTS. Supervising Investigator Chapman testified that he understood Respondent needed an Affidavit of Compliance for each individual store, and that the single blank affidavit he provided was inconsistent with Respondent’s et. al.’s potential ownership of at least seven or eight stores. Given that understanding, it’s unclear why Supervising Investigator Chapman would not provide Respondent with copies of the OTS and NOV as well as the Affidavit of Compliance corresponding to each store. The parties stipulated to the affidavit of service, Exhibit G, being entered into evidence on the condition that it is understood that the notices were placed in an outgoing mail receptacle by Ms. Pasos, and not in the possession of the United States Postal Service. Exhibit G states that the mailing of the NOV and OTS to the

Respondent's home and place of business were completed November 8th. This is the only evidence of notice directly sent to Respondent that was put into evidence during this hearing.

Cannabis Law Article 6 §138-b(2) required that Exhibit C be personally served on 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. Investigator Chumsky stated that she did not personally serve the owner or anyone else in apparent control of the business, with the NOV and OTS for High End 2 Inc. Supervising Investigator Chapman testified that he spoke with the Respondent briefly, ensured that he had a blank NOV and OTS in addition to an Affidavit of Compliance, but that he did not inform him of the stores that were sealed, let alone inform him of the myriad of information contained on the NOV and OTS such as: the Statement of Charges, observations, alleged violations of cannabis law, and imminent threat factor(s). Supervising Investigator Chapman's actions indicate that he essentially expected the Respondent to be responsible for serving himself with the completed NOV and OTS relevant to this store. Without the information as to which stores were served, Respondent would have needed to visit each store he had an ownership interest in and write down or photograph the NOV and OTS that was posted. Additionally, though there was an affidavit of mailing admitted into evidence as Exhibit G, both parties agree that the NOV and OTS that were mailed to Respondent's home and place of business were not placed in the custody and care of USPS but were placed in an internal mail bin, 9 days after the inspection on November 8, 2024. Respondent was required to request an Emergency Hearing within 7 calendar days of the issuance of the notice of violation. The mailing, which was not necessarily completed on November 8th, did not even provide Respondent with adequate time in which to request an emergency hearing.

“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, 519 N.Y.S.2d 774, 775 (Sup. Ct. 1987), *aff'd*, 143 A.D.2d 1073, 533 N.Y.S.2d 411 (1988) Citing *Matter of Infante v. Donohue*, 42 Misc.2d 727, 249 N.Y.S.2d 100 (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 statute in this case has provided that service of the OTS be effectuated in person, by mail to an address provided by the individual personally served, and by placing a copy on the store front. In this case, the only way in which the Respondent could have been on notice as to the actual OTS issued in this case is by going to the store front itself. It is clear from the testimony of both Supervising Investigator Chapman and Investigator Chumsky that they understood Respondent to possibly have a financial interest in multiple stores. As Respondent was only provided a blank Affidavit of Compliance, NOV and OTS, it would have fallen on Respondent to visit each location after being released from custody in order to apprise himself of the relevant reasons for sealing, and to gather the information necessary to request a hearing. However, service is the responsibility of the Petitioner and not the Respondent. Supervising Investigator Chapman testified that Respondent didn't want to speak with him while in custody at the Greece Police Department. Respondent's desire to speak or not to speak was irrelevant. Supervising Investigator Chapman had an obligation to serve Respondent with the NOV and OTS that was completed for High End 2 Inc. Assistant Director Mark LaMonte had access to the OTS and NOV prior to his visit to the Greece Police

Department with Supervising Investigator Chapman. Investigator Chumsky testified that she also emailed the NOV and OTS to Supervising Investigator Chapman and Assistant Director LaMonte. Petitioner citing the Cannabis Control Board's decision in *Shopsmart Convenience*, states that notice "must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" New York Cannabis Control Board Decision in *Shopsmart Convenience* citing *Ruffin v. Lion Corp.*, 15 N.Y3d 578, 582-583. The actions taken in this case, serving Respondent with a blank OTS and mailing copies of the OTS and NOV after the timeframe in which Respondent had to request a hearing, could not be reasonably calculated to make the parties aware of this action, nor could it have afforded them an opportunity to present their objections. I do not feel as though simply directing Respondent to view an OTS located on one of his store locations is reasonably calculated to make him aware of the proceeding. The actions taken by Petitioner deviate so far from the methods of service proscribed in the statute that it was but by chance that Respondent was able to request a hearing in a timely manner. Proper service is not permissive, but is a requirement and obligation placed on Petitioner by the Cannabis Law.

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

Dated: December 12, 2024

Laurie Cartwright
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 12, 2024, to the following:

Nickolas Perry
Sheila Wagner
Celena Dichev, Esq.
Abir Ahmed, Esq.
Phil Modrzynski, Esq.