

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. - 102202408210045

HIGH UNIVERSE CONVENIENCE CORP.,

Respondent.

Respondent requested a hearing on November 4, 2024, for an inspection which occurred on August 21, 2024

The hearing was scheduled for and conducted on November 22, 2024.

The Respondent was represented by Michael Walker, Esq.

The Office of Cannabis Management (hereinafter “OCM”) was represented Michael Waller, Esq.

Investigator Bladimir Nunez (hereinafter “Nunez”) testified on behalf of OCM.

ISSUE

The allegations set forth in the Notice of Violation and Order to Cease Unlicensed Activity (jointly hereinafter “NOV”) 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 1498 Fulton St., Brooklyn, NY 11216.

The scope of the hearing involves determination of whether OCM, by a preponderance of the evidence were justified in issuing to Respondent the NOV and what penalty under Article 6 § 132 is justified. OCM requested the maximum fine of \$10,000.

APPLICABLE LAW

Cannabis Law Article 6 §125(1) states that “[n]o 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, or any product marketed or labeled as such, within the state without obtaining the appropriate registration, license, or permit therefor required....”

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....”

FINDINGS OF FACT

1. On August 21, 2024, OCM conducted an inspection of High Universe Convenience Corp. (hereinafter “High Universe”) located at 1498 Fulton St., Brooklyn, NY (Ex. A 1). At that time, an Order/Order to Cease Unlicensed Activity/Order to Seal was issued and the premises were sealed (Ex. A 1).¹ In November of that same year, Respondent requested a hearing, which was held on November 22, 2024. During the hearing, Nunez appeared as the sole witness. He testified that even before entering the shop, he noticed advertisements that, as a trained investigator, led him to believe that an individual may procure cannabis from High Universe. He stated that the name itself “High Universe” could suggest that cannabis sales occurred on the premises, and that the picture on the space above the door, of an individual smoking what appeared to be a joint supported such a conclusion (Ex. B 1). Upon entering High Universe, Nunez noticed a significant number of signs and symbols he recognized as demonstrating to potential customers that cannabis may be purchased from the location. Pictures of cannabis leaves, characters smoking or appearing “high” on posters, phrasing such as “high vibe” or “cannabis flower,” and other images and wording associated with cannabis were spread across

¹ The Order to Seal was later withdrawn by OCM on November 1, 2024.

the ceiling and in the display case of High Universe (Ex. B 2 & 3). Further, paraphernalia that is associated with cannabis (bongs, rolling trays, Hookah, a grinder, and an advertisement for rolling papers) as well as additional merchandise that contained images or words commonly associated with cannabis (420, cannabis leaf), bolster the claim that a consumer could associate these things with a store that sold cannabis (Ex. B 3, 8). Contained in the display case of the shop, Nunez testified, were empty bags that advertised brands or products that he stated customers would recognize and understand as cannabis products that could be purchased at that store (Ex. B 3). Additionally, Nunez found a cash register and credit card reader, which by themselves, only show that transactions (legal or illegal) were occurring (Ex. B 4-5); however, Nunez also found a menu near the register, which had items he recognized as either cannabis products or brands that produce cannabis products, along with prices for each item (Ex. B 6). Additionally, Nunez found items that are used in the processing of cannabis such as a pair digital scale, at least one of which appeared to have cannabis resin on the surface plate, and a pre-roll maker filled with empty “cones” (Ex. B 7-9). In addition to the signs of cannabis and products used in the processing of cannabis, Nunez testified that he found significant product in the store as well. Pre-rolled joints, which appear to be the result of the empty “cones” pictured in other exhibits (compare Ex. B 9 & C1), which he believed contained cannabis flower. Packages of cannabis flower with the brand “Gelato” on it, which was a brand seen on the menu (Ex B 6, C 2 & 6). Additional assorted packages of cannabis flower, many labeled as cannabis flower or with a cannabis “warning sticker” (Ex C 2-10). He also discovered cannabis extract (Ex D 2). Further, many of the products found by Nunez possessed price tags, which suggests the products were for sale (see Ex D). In addition to a large number of bags of cannabis flower, Nunez also found cannabis edibles, additional empty bags, and loose flower (Ex. E 1, 11-13). Finally, Nunez testified that High Universe possessed no type of Adult Use or Processing Cannabis License at the time of the inspection and Respondent presented no evidence to the contrary.

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. Significant product was discovered in the store, some with price tags, and evidence of processing were on site (Ex. C, D, & E). The amount of product discovered was sizable, leading Nunez to state that High Universe possessed possibly the most that he had ever seized and that it was “very large.” The products discovered were labeled as cannabis, either explicitly or with a warning label, typically consisting of a cannabis leaf with an explanation mark, sometimes with the “CA” label (Ex. C 2-10). Nunez testified that empty bags in the display case allowed a customer who entered the store to select an empty bag with a type listed and purchase cannabis flower (Ex. B 2-3). The volume of cannabis and suspected cannabis products indicates that it was not for personal use and that it is more likely than not that cannabis was being sold at High Universe. The signs and symbols, which were prevalent both inside and outside the store would like to have been recognized by many customers to mean that illicit products could be purchased from the High Universe. Further, certain items found in the store, while legal, serve as indications that illicit products may be for sale due to their association with cannabis (e.g., paraphernalia) (Ex. B 2). Additionally, scales, which are frequently used in the sale or processing of cannabis, were discovered in the store, one of which appears to have cannabis residue on its surface (Ex. B 7-8). Finally, in addition to the cash register and credit card machine, which facilitates sales, the menu of cannabis products greatly bolsters the assertion that illicit products were being sold at High Universe. All of the

factors, taken together, support a finding by a preponderance of the evidence that High Universe was engaged in unlicensed cannabis sales.

2. Respondent's attorney, on cross examination, questioned Nunez almost exclusively about service and notice being delivered to the owner of the business. Nunez testified that he supplied the NOV/OTS to the individual who identified himself an employee/cashier for the business (Ex A 3).² No identity was given by this employee to OCM as to the owner of the business, nor was an alternative address provided. This failure to provide the identity or address is particularly significant when serving notice for an OTS under Cannabis Law § 138-b. Cannabis Law § 138-b delineates the method which is to be used when serving an OTS. It states that, in addition to providing the notice to the employee on site, when an employee present on site provides an address for the owner, service is to be mailed to that address. Here, there was no such address given; therefore, when considering an OTS, OCM's actions would constitute adequate service under the statute. However, the matter at hand does not involve an OTS. OCM withdrew the OTS prior to the start of the hearing. The question, therefore, is whether service was effectuated for the NOV.

It seems somewhat illogical that service may be effectuated as it pertains to an OTS (an action which constitutes a taking, placing a large burden on the owner, and being, therefore, significantly more onerous for an owner than a NOV) and not be achieved for a NOV (an action that typically happens simultaneously with the OTS). However, the process of serving notice upon a respondent for an NOV is not outlined within the statute (Cannabis Law 138-a) or the regulations. Cannabis Law mandates service and notification for an NOV by including language in Article 6 § 132(6) which directs OCM to, "promulgate rules and regulations providing for notice and opportunity to be heard, prior to the imposition of any civil penalty under this section[.]" While OCM has promulgated rules concerning the hearing process for a NOV (see 9 NYCRR § 133.25), a clear outline of any proper notice and service requirements are missing from 138-a. References to service and notice are found in the regulations (see 9 NYCRR 133.25(d)(1)(i); 133.25(e)), but no description of service is contained either in statute (Can Law 138-a) or within the regulations designed for an NOV (9 NYCRR § 133.25). Without such a procedure for an NOV, OCM must effectuate service and provide notice using undefined methods. As with all things in an administrative hearing, OCM would therefore, bear the burden, by a preponderance of the evidence, that service has been achieved. This challenge is somewhat reduced by the fact that "service of notice in the administrative context does not fulfill the same jurisdiction acquiring function vis-a-vis the parties to the proceeding as does a summons in a court proceeding." *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])(see also e.g., *Dep't of Buildings v. Owner, Occupants and Mortgagees of 845 Walton Avenue, Bronx, New York*, OATH Index No. 234/95 (Jan. 19, 1995)). Since the purpose of service for OCM is not to assert personal jurisdiction over Respondent, but rather to provide notice, actual notice would seem to overcome certain "irregularities ... since the object of the procedural requirement has been achieved" (*Drolet v. New York State Racing & Wagering Bd.*, 115 Misc. 2d 7, 10).

² Nunez also testified that OCM's practice is to deliver notice via mailing, but no mailing was entered into evidence, and little can be assumed from Nunez's broad statement.

In this matter, Respondent's attorney suggested that, in addition to the steps OCM took, they should have taken the additional step of mailing a copy of the NOV to the name/address listed on the Hemp License, which was present on site. This would seem a logical step in attempting to effectuate notice; however, the address listed on the Hemp License is the same as the address which OCM sealed after the inspection. It is difficult to imagine how mailing the NOV to a sealed business would increase the likelihood of notice. Even if the USPS could complete delivery to a sealed store, the owner would need to physically go to the store to receive the letter, at which time they would be prevented from entering due to the seal, and thus, be provided notice. It is, therefore, unlikely that any additional steps, typically used by OCM to effectuate service, could have been taken to better provide notice to the owner of the business. This does not, however, alleviate OCM's responsibility. The lack of procedural service provided for by the statute requires OCM to effectuate service or risk failing to provide notice and, therefore, not being able to proceed with their cases. In this case, OCM gave a NOV to the employee, who was holding himself out as being an employee/cashier. Further, it is likely that notice is effectuated when OCM seals a business's property. An individual, whose livelihood is impacted by their store being shut down, would likely be placed on notice when that business is "taken" by OCM. I am not sure, however, if this alone is sufficient. In this matter, the presence of counsel for Respondent is a clear sign that Respondent received notice. The attorney's presence in this matter represents actual notice by Respondent and shows by a preponderance of the evidence that service was effectuated, notice was provided, and OCM has met their burden of proving both.

3. OCM requested that the maximum fine of \$10,000 be levied against High Universe for the violations discovered on August 21, 2024. Further, OCM requested that Respondent's hemp license be revoked. As to the revocation of the Hemp License, I believe OCM has the power to revoke Respondent's hemp license under 9 NYCRR 133.7(a). They have not, as of the time of this writing, done so. Should they choose to do so, the Respondent would then have an opportunity to challenge that revocation via an administrative hearing under 9 NYCRR 133.10. Had OCM revoked or began the revocation proceedings of the hemp license before this hearing, it likely would have been consolidated into the present matter under 9 NYCRR 133.18(b)(1), but since OCM took no such action, I will not shoehorn in a decision which I believe to be premature. As for the fine requested by OCM, while the statutes do not provide extensive guidance for determining the penalty for violations under Cannabis Law Article 6 §125, 132, and 138-a, it does require a penalty proportionate to the violation (Cannabis Law Article 6 §132(1)(c)). In the Matter of High Universe, Nunez testified that the amount of cannabis recovered from the store was quite large. While cannabis flower was almost exclusively seized from High Universe, the types and quantity of flower constitutes a significant amount. Further, the stores seemed to operate with impunity, with large, bold decorations, indicating, not so subtly, that a person could obtain cannabis from within. The product seized underwent little, if any, testing. The store appeared to be processing without a license or proper safety/sanitary measures, and the packaging violated the law due to it be colorful and with cartoon figures, thereby making it more appealing to children. Based on all these factors and, primarily, the testimony of Nunez who stated that this investigation yielded one of the larger seizures of any inspection he had ever performed, I am inclined to impose the maximum penalty in this case.

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 1498 Fulton St., Brooklyn, NY 11216. In so doing, Respondent violated Cannabis Law Article 6. The Order to Cease Unlicensed Activity is hereby affirmed, and a penalty is assessed.

WHEREFORE, THE NOTICE OF VIOLATION/ORDER TO CEASE UNLICENSED ACTIVITY, ISSUED ON AUGUST 21, 2024, IS AFFIRMED AND THE RESPONDENT IS HEREBY ORDERED TO PAY A \$10,000 FINE UNDER CANNABIS LAW ARTICLE 6 §132 FOR VIOLATIONS UNDER §125, AS A PROPORTIONATE PENALTY, FOR THE UNLICENSED SALE OF CANNABIS.

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:

Michael Waller, Esq.

Michael Walker, Esq.

Nickolas Perry

Sheila Wagner

Celena Ditchev