

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. - 109202410300018

REDEYE GREECE INC.

Respondent.

Respondent requested a hearing on November 6, 2024, for an inspection which occurred on October 30, 2024

The hearing was scheduled for November 12, 2024, on which date it commenced. The hearing concluded on November 20, 2024, after two days of testimony.

The Respondent was represented by Phil Modrzynski.

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

Investigator Daniel Gregory (hereinafter “Gregory”) and Legal Secretary Donna LaForest (hereinafter “LaForest”) 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 inspection which was conducted at 1522 West Ridge Rd., Rochester, NY 14615.

The scope of the hearing involves determination whether OCM, by a preponderance of the evidence were justified in issuing to Respondent the Notice of Violation and Order to Cease Unlicensed Activity (jointly hereinafter “NOV”) and what penalty under Article 6 § 132 is justified. OCM requested the maximum fine of \$10,000. Additionally, this hearing was to

determine the issue of whether 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 §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....”

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.

Cannabis Law Article 6 §132(6) instructs the Cannabis Control Board to “promulgate rules and regulations providing for notice and opportunity to be heard, prior to the imposition of any civil penalty under this section...” 9 NYCRR §133.25(d) provides powers possessed and requirements of OCM “[i]n the event that the office issues a notice of violation and order to cease unlicensed activity to a person[.]” Among these, OCM “may affix a copy of such notice of violation and order to cease unlicensed activity on the front window, door, or exterior wall,” “may seize any cannabis,” and may require cooperation in the form of turning over “books and records” by the subject of the inspection. OCM must notify the person of any seizure that occurred as a result of the inspection.

FINDINGS OF FACT

1. On October 30, 2024, OCM conducted an inspection of Redeye Greece Inc. (hereinafter “Redeye”) located at 1522 West Ridge Rd., Rochester, NY (Ex. A). At the time of the inspection, Redeye was closed, and no one was present within the establishment. Gregory testified that no one was present to sign the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal and this necessarily meant that the typical procedure of serving an employee of the business was not followed. Instead of providing a copy 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,” since no one was immediately available, OCM posted the notice and then went to the police station in search of the owner.¹ Both parties stipulated as to what transpired next. An OCM officer spoke with Respondent while Respondent was in custody at the police station, but not having a completed copy of the NOV/OTS on their person, OCM supplied the Respondent with a blank copy of the form. While respondent may have been informed of certain aspects of the charges, he was not supplied with all the requisite information that would satisfy notice under the law (see SAP § 301 & 9 NYCRR 135.10(e)). Any statement which may have been made to Respondent indicating that a completed form could be found at the store did not correct this inadequacy. Later, as testified to by LaForest, OCM mailed a copy of the completed form to Respondent, but this mailing, even if properly executed, failed to send the form in its entirety. While the front of the form was sent, the back of the form and the information contained thereon was not. At no time before the start of the hearing was

¹ Law enforcement agencies that assisted OCM in the search informed OCM that they had arrested the owner and had him in custody. Gregory testified that this was a part of a more expansive enforcement effort by Rochester area law enforcement.

Respondent in possession of a complete NOV/OTS form. LaForest testified that she did send a complete form to Respondent, but this mailing occurred between the first and second day of the hearing, well after notice needed to be effectuated.

Administrative hearings are quasi-judicial in nature and, therefore, afforded more latitude and “may be more or less informal” (Beer Garden, Inc. v. New York State Liquor Auth., 79 N.Y.2d 266, 590 N.E.2d 1193 (1992)). Certain “legal rules of evidence and procedure may be disregarded, [but] no essential element of a fair trial can be dispensed with....” (Id.) This mean, in part, “that the party whose rights are being determined must be fully apprised of the claims” against them (Id.) Generally, as it relates to an action by OCM, this notification requirement is accomplished by issuing a NOV or an OTS. These issuances, which appear in a single, unified document -- the “Notice of Violation, Order to Cease Unlicensed Activity, and Order to Seal” (hereinafter “NOV/OTS”) -- list the statutes being violated, the evidence collected to support OCM’s assertion of violations, and other information necessary to inform the Respondent of the claims against them and the rights they possess. This form satisfies the requirements of SAP §301 and 9 NYCRR 133.10(e) (see 9 NYCRR 133.25(i)), as well as the underlying Constitutional guarantees discussed in the Beer Garden. A Respondent who has not been served with a correct NOV/OTS is not properly given notice as to the charges against them, the authority for such charges, or their rights to contest the findings. It is, therefore, imperative that a NOV or OTS must begin with the issuance of this document.

In the present matter, at no time prior to the commencement of the hearing² was Respondent served a Notice of Violation or OTS that satisfied all of the requirements under the law. While the notice posted to the front of the building and the blank form given to Respondent may have contained all the necessary information, it should not be a burden placed on Respondent to “cobble together” the necessary notice. This is a responsibility that is placed on OCM and I do not believe they achieved it. Even assuming that mailing the form to Respondent as LaForest testified she did on November 7th, would have satisfied the notice requirement, failing to place a complete form in the envelope once again fell short of providing adequate notice. While any number of actions may have satisfactorily effectuated notice, none of the actions, taken in isolation, do. The burden of notice must rest with OCM in these matters. Respondent should bear no responsibility as the actions are entirely within the control of OCM. Their use of a defective and incomplete instrument, followed by partial service, and then, finally, late service, combine to show numerous missteps on the part of OCM. The ramifications of these shortcomings must fall entirely on OCM. There are significant questions as to whether Respondent possessed a complete understanding of the charges, process, and rights he possessed under the law, due to the manners in which OCM supplied the NOV/OTS. Therefore, I am vacating the Order to Seal and dismissing the Notice of Violation. I do not find it necessary to delve into the specifics of the

² OCM’s attempt to cure service and provide notice to Respondent a week after the hearing began defies logic. The purpose of notice to a Respondent, whose property is placed in jeopardy (either by shuttering their business or through use of a fine) is to allow them to properly plan and make ready for the hearing. OCM had already begun their case, both questioning and dismissing their chief witness during the first day of hearing, before the notice was sent. The notice OCM provided on November 19th served no purpose to Respondent and was a useless act of merely trying to satisfy a procedural end without thought for the practical implications. There is also a question as to whether the method used by OCM to deliver this document satisfied the service requirement, but I find it unnecessary to consider that argument.

hearing as I believe there is a violation of due process and the facts cannot be properly adjudicated on their merits.

DECISION

The Respondent was not afforded proper notice of the charges OCM leveled against him, which violated his due process rights and denied him a fair hearing.

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

FURTHER, I AM DISMISSING THE NOTICE OF VIOLATION WITH PREJUDICE.

Dated: November 26, 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 November 26, 2024, to the following:

Phil Modrynski, Esq.

William Pham, Esq.

Nickolas Perry

Sheila Wagner

Celena Ditchev