

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION
Inspection No. 104202410300074

RED EYE SMOKE SHOP 2,

Respondent.

Respondent requested a hearing to contest the validity of both the Order to Seal, and the Notice of Violation, which had been issued by enforcement agents of the Office of Cannabis Management, at the business located at 1839 East Ridge Road, Rochester, New York, 14622, on October 30, 2024.

The hearing request was granted, and a virtual hearing was held on November 14, 2024.

The Respondent was represented by Phil Modrzynski, Esq.

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

Inv. Specialist Sarah Tagliaferro, Det. Joseph DeMarco, Investigator Christopher Coons, and Alicia Pasos testified on behalf of OCM.

ISSUE

The allegations set forth in the Notice of Violation and Order to Seal indicated 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 an inspection conducted by agents of OCM on October 30, 2024, at the business known as Red Eye Smoke Shop 2, located at 1839 East Ridge Road, Rochester, N.Y. 14622.

The scope of the hearing required a determination, by a preponderance of the evidence, whether or not OCM was justified in issuing a Notice of Violation and Order to Cease Unlicensed Activity (jointly hereinafter “NOV”) and, if so, what penalty under Article 6 § 132 was warranted. Additionally, this hearing also required a determination by a preponderance of the evidence, if the sealing provisions outlined in Cannabis Law Article 6 § 138-b existed at the time of the inspection.

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 § 138-b(1) provides that: 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)(2) requires any sealing order be served 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. The sealing order must also be posted at the building or premises that was sealed, secured, or closed. Additionally, “a copy of the sealing 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...”

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 § 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) provides that: “In assessing the civil penalties under this subdivision, the board or office shall take into consideration the nature of such violation and shall assess a penalty that is proportionate to the violation.”

FINDINGS OF FACT

1. Respondent was offering cannabis products for sale without a license issued by OCM, as demonstrated by a preponderance of the evidence, according to the credible testimony of Detective Joe DeMarco of the Greece Police Department and OCM Investigative Specialist Sarah Tagliaferro. Det. DeMarco testified that this location had been a subject of an ongoing investigation that included multiple hours of surveillance, as well as controlled buys that resulted in positive field tests for cannabis. Tagliaferro credibly testified that she received training at OCM in identifying and categorizing cannabis products and that during the inspection of the location she observed what appeared to her to be a large volume and variety of cannabis flower, cannabis edibles, and cannabis concentrates being offered for sale. Her inspection was the result of the same ongoing Greece PD investigation, and it was conducted in conjunction with a judicial search warrant issued for that location. (See, Exhibit A2, page 7). She corroborated her testimony about the cannabis products found at the location with numerous photographs that she took at the time of the inspection. (See, Exhibits B1-25, C1-12 & 18-25, D1-25, E1-17, F1-4).
2. According to the credible testimony of the Investigator, it was also shown by a preponderance of evidence, that no part of the premises that was sealed was being used as a residence. She testified that she did not see a kitchen, shower, or a dresser for clothes, or any other signs indicating that it was used in any manner other than as a commercial business and no evidence was offered to contradict these observations.
3. The unlicensed activity, which warranted an order to seal, also constituted more than a “de minimis” portion of the business activity at that location, according to the

credible testimony of the Investigator. She testified that she found a large variety and volume of illicit cannabis products during the inspection at this location. Cannabis Law Article 6 §138-b (7) and OCM Regulations 133.25(f)(3) enumerate the factors to consider when determining if unlicensed activity occurring within a business is more than de minimis. From the photographs entered as evidence during the hearing and the testimony of the Investigator listing the items found at this location, it was demonstrated by a preponderance of the evidence that this location had a large variety and a substantial volume of illicit cannabis products being offered for sale.

4. This unlicensed activity constituted an imminent threat to public health, safety, and welfare due to the offers to sell cannabis products that were not tested or labeled lawfully in accordance with Cannabis Law Article 6. The Investigator established by a preponderance of evidence that many of the cannabis products contained labels indicating they were cannabis products processed from California and many others were labeled to appear to be well known non-cannabis consumer products. These included many that were brightly colored with bubble lettering and cartoonish images, all designed to have characteristics with special appeal to children in violation of New York law. (See, Exhibits C3-9). Moreover, the Investigator established that the store included a backroom where she located a trap door that concealed shelves of numerous cannabis-labeled products. (See, Exhibits C18-25).
5. The Notice of Violation and Order to Seal were properly served upon the respondent on October 30, 2024. The Investigator's credible testimony established that she provided a completed "yellow copy" of the Notice of Violation and Order to Seal to Detective DeMarco and requested that he personally serve it to the business owner Salahalden Ali, who was being held in custody at the Greece Police Department at the time she concluded her inspection. Det. DeMarco corroborated her testimony and he credibly testified that he went to the Greece Police Department and personally served Mr. Ali with that yellow copy of the Notice of Violation and Order to Seal. Investigator Coons also testified to speaking with Mr. Ali at the Greece Police Department and advising him verbally about the sealing order issued at his business and the process for requesting a hearing. He also gave him a blank copy of the NOV so he could better understand the hearing request directions. Finally, Investigator Tagliaferro established conclusively that she also conspicuously posted that Notice on the front of the premises, as required by Cannabis Law Article 6 §138(b)(2). (Exhibits F1, F4). Because service was completed by both personally serving Mr. Ali, and by posting a copy on the front of his business location, no subsequent mailing was required. Therefore, I decline to rule on the sufficiency of the mailing of the NOV by OCM, as witness Alicia Pasos described in her testimony.
6. OCM requested that the maximum fine of \$10,000 be levied for the violations that were discovered during this 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 a penalty proportionate to the violation (Cannabis Law Article 6 §132(1)(c)). In this case, Investigator Tagliaferro testified that the volume and variety of cannabis products offered was substantial. It was also

clear from her testimony that the business owner had installed a trap door in the backroom that concealed multiple shelves of cannabis products. This was obviously installed to keep the illicit cannabis products hidden from view from potential law enforcement. This fact demonstrates a noticeable consciousness of guilt and a determined intent by the business owner to violate the laws and regulations that govern the licensed sale of cannabis in New York. Therefore, after balancing all factors related to this business operation, it appears that the maximum fine of \$10,000 is proportionate to the violation.

DECISION

The Respondent engaged in the sale of cannabis and cannabis marketed products without a license, registration, or permit to do so, at 1839 East Ridge Road, Rochester, New York, 14622 on October 30, 2024. In so doing, Respondent violated Cannabis Law Articles 6 § 125(1) and §132(1)(a). The Order to Cease Unlicensed Activity 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, and

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 UNLICENSED SALE OF CANNABIS AND CANNABIS MARKETED PRODUCTS ON OCTOBER 30, 2024.

Dated: December 9, 2024

Thomas Kidera

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 9, 2024, to the following:

Celena Ditchev, Esq.
Nickolas Perry
Sheila Wagner
Phil Modrzynski, Esq.
Kevin Brown, Esq.

