

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Complaint No. 202202306070002

**ROLL UP NATION,
738 Broadway, New York, N.Y. 10003,**

Respondent.

The hearing of the above noted matter was held before the undersigned, Thomas Kidera, at the Office of Cannabis Management, located at 59 Maiden Lane, New York, N.Y. on June 21, 2023.

The Office of Cannabis Management (hereinafter “OCM”) was represented by Deputy General Counsel Christopher DeLuca, Esq.

Senior Investigator Wilhelmina Boxhoorn testified on behalf of OCM.

The Respondent was represented by attorney Paula Collins, Esq.

Veronica Guerrero and Omar Eid testified on behalf of the Respondent.

ISSUE

The allegations set forth in the Notice of Violation and Order to Cease Unlicensed Activity (hereinafter “NOV”) accused the Respondent of offering cannabis products, as defined by Cannabis Law § 3, for sale without an appropriate registration, license, or permit. These allegations were based upon observations made during a regulatory inspection conducted at 738 Broadway, New York, NY, on June 7, 2023.

FINDINGS OF FACT

State Administrative Procedure Act Article 3 § 302(3) provides that: “findings of fact shall be based exclusively on the evidence and on matters officially noticed.” Article 3 § 307 further provides that if “a party submitted proposed findings of fact, the decision, determination or order shall include a ruling upon each proposed finding.”

Respondent’s attorney has submitted 52 proposed findings of fact. This decision includes the following determination and ruling upon each proposed finding.

Respondent’s proposed finding of facts numbered 23, 32, 39, 40, 41, 42, 49, and 50 are unsupported by the record and have not been considered in the determination of the decision herein.

Respondent’s proposed findings of fact numbered 1-10, 13, 15, 18, 20, 22, 24, 25, 26, 27, 28, 29, 30, 31, 33, 35, 36, 38, 43, 45, 46, 47, 48, and 52 have some support within the record and have received consideration in the determination of the decision herein.

Respondent’s proposed findings of fact numbered 11, 12, 14, 16, 17, 19, 21, 34, 44, and 51 have limited support within the record and were considered in the determination of the decision herein only to an extent consistent with the following exceptions:

-Proposed Statement of Fact 11: Boxhoorn stated that a business is chosen for an inspection by OCM based on the following generalized observations: “There’s neon signs in the shape of a cannabis leaf. The front sign will often say, "Cannabis Dispensary," or anything with the word, "Cannabis" in it. There’ll be marketing products known to use -- for pre-rolls, different types of pre-roll material. or the name of the business.” (Tr. 14). A review of the Hearing Transcript reveals that Boxhoorn made the above statement in response to the following question: “Now, is there anything you look for to see if cannabis is being marketed at a location?” (Hearing Tr. 14). Her response was not made to describe how a business is chosen for an inspection by OCM, as claimed by the Respondent.

-Proposed Statement of Fact 12: The front of the business at 738 Broadway was plain, with no signage of any sort. (Exhibit 2, Tr. 23). Exhibit 2 depicts what the outside of 738 Broadway looked like on June 7, 2023, and it needs no additional description or characterization.

-Proposed Statement of Fact 14: The regulatory inspection occurred during hours in which the business was closed. (Tr. 53). The cited transcript page does not support the statement that 738 Broadway was closed. Per the testimony of owner Omar Eid, Roll Up Nation opens for business at 12:00 PM. (Hearing Tr. 81). Additionally, per the Inspection Report, the regulatory inspection occurred at approximately 12:00 PM. (Exhibit 32).

-Proposed Statement of Fact 16: As the manager of Roll Up Nation, Veronica Guerrero, (“Guerrero”), was turning the key in the front door on June 7, 2023, to allow the Security Guard to enter in order to walk the dog prior to the start of day, inspectors pushed themselves past her

to enter the premises. (Tr. 53). The cited transcript page does not support the statement “inspectors pushed themselves past her to enter the premises.”

-Proposed Statement of Fact 17: There were no customers at Roll Up Nation at “11 - something” in the morning on June 7, 2023. (Tr. 81). The cited transcript page does not support the statement “[t]here were no customers at Roll Up Nation at “11 -something” in the morning on June 7, 2023.”

-Proposed Statement of Fact 19: The inspectors wore clothing, vests, and badges that identified themselves as “Police.” (Exhibit 18, Tr. 24). The cited transcript page and exhibit do not support the proposed Statement of Fact 19.

-Proposed Statement of Fact 21: Guerrero refused to sign the OCM Enforcement Division Description of Items. (Exhibit 33, Tr. 2, 43). The cited transcript pages do not support the proposed Statement of Fact 21.

-Proposed Statement of Fact 34: Roll Up Nation functioned as a social club, art center, and performance venue. (Tr.53). Veronica Guerrero testified that Roll Up Nation functions as a “social club.” However, the cited transcript page does not support the statement that the business functioned as an “art center” or “performance venue.”

-Proposed Statement of Fact 37: Roll Up Nation paid its rent by selling clothing, hats, and novelty items, for which receipts were kept on the counter. (Tr. 63-64). The cited transcript pages do not support the assertion that Roll Up Nation paid its rent only by selling clothing, hats, and novelty items.

-Proposed Statement of Fact 44: Asked by Judge Kidera whether they might be interested in obtaining a license, both Guerrero and the business owner, Eid, said yes. (Tr. 87). The cited transcript page does not support the statement that Veronica Guerrero was asked if she might be interested in obtaining a license and that Veronica Guerrero responded “yes.”

-Proposed Statement of Fact 51: Eid and Guerrero did not understand the MRTA, nor its amendment as it related to the daily operations of Roll Up Nation. “And so its like there’s no set standards. You don’t know what to follow, even when it became – even when it became legal, there was a big grey area. (Tr. 87). The cited transcript page does not support the statement that Veronica Guerrero does not understand the MRTA, nor its amendment as it relates to the daily operations of Roll Up Nation.

I find that Petitioner has proven by a preponderance of the evidence the following facts:

-That on June 7, 2023, Senior Investigator Wilhelmina Boxhoorn, in addition to members of the Enforcement Division from the New York State Department of Taxation and Finance, conducted a regulatory inspection during normal business hours at Respondent’s business located at 738 Broadway, New York, New York 10003.

-That at the time of the inspection, Respondent was not in possession of a license issued by OCM to sell cannabis or any products containing cannabis. (State's Exhibit 34).

-That the NOV was properly served on the Respondent and indicated that a hearing was scheduled for June 21, 2023, at 2:00 p.m. An email address for OCM's Office of Administrative Hearings was also provided to the Respondent at that time. (State's Exhibit 1).

-That during the regulatory inspection, investigators observed a point-of-sale system on a counter, as well as numerous types of cannabis products labeled as containing cannabis, some indicating the amount of THC contained in each product, cannabis edibles including gummies and chocolate bars, cannabis pre-rolls, cannabis flower, and cannabis concentrate.

-That these cannabis products were documented on voucher receipts of the property seized. (State's Exhibits 1, 24-30, 31, 32, 33).

-That the investigators further observed menus containing prices for different strains of cannabis, numerous receipts, as well as a sign offering delivery services by the Respondent. (State's Exhibits 19-23).

-That Veronica Guerrero, an employee at Roll Up Nation, admitted that the business engaged in the indirect retail sale of cannabis, in violation of Cannabis Law Article 1 § 3(46-a), whereby customers received cannabis products as a benefit of club membership. (Hearing Tr.74-76).

-That Guerrero further testified that Roll Up Nation was simultaneously engaged in a commercial business venture selling artwork, clothing, hats, T shirts, and handbags to tourists and NYU students. (Hearing Tr. 63-67).

-That Omar Eid, the owner of Roll Up Nation, also testified that his business engaged in the indirect retail sale of cannabis, whereby customers received cannabis products as a benefit for club membership, in violation of Cannabis Law Article 1 § 3(46-a) (Hearing Tr. 86).

-That Omar Eid further testified that since the regulatory inspection and the confiscation of their cannabis inventory, Roll Up Nation has been closed and has not generated income. (Hearing Tr. 90).

CONCLUSIONS OF LAW

Cannabis Law Article 6 § 125(1) provides that: "No 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 within the state without obtaining the appropriate registration, license, or permit therefor required by this chapter unless otherwise authorized by law." Furthermore, Cannabis Law Article 6 § 125(1 -a) provides that: "No person shall engage in an indirect retail sale irrespective of whether such person has obtained a registration, license or permit issued under this chapter."

Cannabis Law Article 1 § 3(46) provides that: “‘Retail sale’ means to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell, made by any licensed person, whether principal, proprietor, agent, or employee, of any cannabis, cannabis product, cannabinoid hemp or hemp extract product to a cannabis consumer for any purpose other than resale.”

Cannabis Law Article 1 § 3(46-a) provides that: “‘Indirect retail sale’ means to give any cannabis, cannabis product, cannabinoid hemp, hemp extract product, or any product marketed or labeled as such by any person engaging in a commercial business venture or otherwise providing or offering goods or services to the general public for remuneration for such goods and/or services, where any such cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such, accompanies (a) the sale of any tangible or intangible property; or (b) the provision of any service, including but not limited to entry to a venue or event, or a benefit of a membership to a club, association, or other organization.”

Cannabis Law Article 6 § 132(1) provides that: “Any person who sells cannabis, cannabis products, medical cannabis, or any product marketed or labeled as such, without having an appropriate registration, license or permit therefor, including a person whose registration, license or permit has been revoked, surrendered or cancelled, where such person is engaging in activity for which a license would be required under this chapter, 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-a) provides that: “Any person found to have engaged in indirect retail sale in violation of subdivision one-a of section one hundred twenty-five of this chapter, shall be subject to a civil penalty in an amount equaling the lesser of three times the revenue for such indirect retail sales or up to two thousand five hundred dollars for each such sale, provided, however, that where such conduct also constitutes a violation of subdivision one of this section, such person may only be subject to the civil penalties under one such subdivision.”

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.”

Administrative Law Judges lack jurisdiction to determine the constitutionality of statutes. *See Wang v Department of State Division of Licensing Services*, 1 DOS APP. 01, 23 DOS 00, (2000); *see also Cherry v. Brumbaugh*, 7 NYS2d 956 (2nd Dept., 1938). Because this is an administrative proceeding, the constitutionality of the Cannabis Law, as well as the constitutionality of the application of the Cannabis Law, is beyond the scope of this decision, which is merely to determine whether the Respondent violated Cannabis Law Article 6 §§ 125 and 132; whether the Notice of Violation and Order to Cease Unlicensed Activity issued pursuant to 9 NYCRR 133.23 should be enforced; and what penalties (if any) should be assessed against the Respondent.

As such, the constitutional challenges raised by Respondent's counsel, including procedural due process challenges under the Fourteenth Amendment of the United States Constitution and alleged violations of the Fourth Amendment of the United States Constitution will not be addressed. (See Respondent's Statement of Facts Sections 25-31; see also Hearing Transcript 55:4-56:14).

Finally, Respondent's counsel has argued that the regulatory inspection of June 7, 2023, at 738 Broadway was just a pretextual search, conducted in furtherance of some theoretical future criminal prosecution of her client. This claim has no support anywhere within the record and appears to be pure conjecture. As such, it also will not be addressed in this decision.

SUMMARY

The Respondent engaged in both the direct and indirect retail sale of cannabis and cannabis products without a license, registration, or permit to do so, at the location of 738 Broadway, in the city of New York, NY. By doing so, Respondent has violated Cannabis Law Article 6 §125(1) and (1-a), as well as §132(1) and (1-a).

I find, however, that OCM has proven by a preponderance of the evidence that Roll Up Nation operated primarily as a direct retail seller of cannabis. Although there is evidence that both owner Omar Eid, and his employee Veronica Guerrero, aspired to model this business as a social club offering indirect access to cannabis products, it is clear by the large-scale nature of this operation that it operated primarily as a direct retail seller.

This determination is based on the evidence of multiple price lists per cannabis strains, the existence of a delivery service, the multiple display cases of pre-packaged cannabis products throughout the store, and most convincingly, by the owner's testimony that after this inspection and product seizure, he had no source of income to pay his rent or his employees.

The Order to Cease Unlicensed Activity is hereby **Affirmed**.

WHEREFORE, RESPONDENT IS HEREBY ORDERED:

To pay a **\$10,000** fine for the unlicensed direct retail sale of cannabis and cannabis products on June 14, 2023.

DATED: November 9, 2023

Thomas Kidera

Administrative Law Judge

This decision was sent via email on November 9, 2023, to the following:

Nickolas Perry
Sheila Wagner
Christopher DeLuca, Esq.
Paula Collins, Esq.

PLEASE BE ADVISED: Either party may appeal this decision within 30 calendar days of receipt, according to the specific manner described at 9 NYCRR 133.23(g)(5).