

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION
Inspection No. 109202412100024

SMOKE VALLEY 716, Inc.

Respondent.

Respondent requested an emergency hearing on December 16, 2024, which was made within seven (7) calendar days of the date of the inspection which occurred on December 10, 2024. The emergency hearing was conducted on December 19, which is within three (3) business days of the Respondent’s request.

The Respondent was represented by Charles Gaughan, Esq.

The Respondent, Ghaleb Alwasim, testified on his own behalf.

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

Investigative Specialist Daniel Gregory 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 on 12/10/24 at 2471 Niagara Falls Blvd, Buffalo, New York 14228.

The scope of the emergency hearing was limited solely to the issue as to whether or not the sealing provisions of Cannabis Law Article 6 § 138-b have been met by a preponderance of the evidence. The basis of the sealing order included an allegation that “[t]his is a subsequent

inspection in which unlicensed activity is confirmed to be continuing more than ten days after an NOV was previously issued. The prior Notice of Violation and Order to Cease Unlicensed Activity was previously issued on ___/___/___” (*date left blank*). Although the Sealing Order issued on 12/10/24 included allegations of an imminent threat to public safety based on findings made during the inspection on that day, OCM stipulated through the testimony of Investigator Gregory that the sole basis of the sealing order was the allegation that there was unlicensed activity continuing at this location more than ten days after a previous inspection per Cannabis Law Article 6 §138-b(5).

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 of 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(5) sets forth an additional basis for issuing an order to seal: “Notwithstanding the factors listed in subdivision four of this section and the restriction set forth in paragraph (b) of subdivision six of this section, the office may issue an order to seal with an immediate effective date upon a second or subsequent inspection in which unlicensed activity is confirmed to be continuing more than ten calendar days after a notice of violation and order to cease unlicensed activity was previously issued by the office, provided that the office has also provided notice pursuant to subparagraph (ii) of paragraph (a) of subdivision thirteen of section one hundred thirty-eight-a of this article.”

FINDINGS OF FACT

The underlying facts in this emergency hearing are generally not in dispute. Respondent testified that his business location at 2471 Niagara Falls Blvd. had previously been the subject of an OCM inspection during October of 2024 and that OCM had issued a Notice of Violation against him at that time. He testified that he gave that initial NOV (Exhibit A) to his attorney the day after he had received it. He also agreed that his business had not been subjected to a sealing order following that October inspection, nor had that NOV ever been the subject of an administrative hearing prior to the date of the second inspection. Respondent has not raised any issue relative to personal service of either NOV (Exhibits A & B). Investigator Gregory did not offer any testimony concerning the facts or circumstances involved with the initial inspection, other than to indicate he was aware it had occurred and to identify photos he took on 12/10/24 that showed that the warning stickers placed at the business by OCM investigators following the initial October inspection were still in place. (Exhibit D 2&3). He agreed that no administrative proceeding was conducted concerning the first NOV at any time prior to his issuance of the subject sealing order on 12/10/24. Setting aside the issue as to the sufficiency of proof surrounding the second Notice of Violation, the sole issue to be determined at this emergency hearing is whether or not Cannabis Law Article 6 §138-b (5) authorizes OCM to issue a sealing order under these particular circumstances.

Respondent's attorney has cited the holding in the matter of *OCM vs M&A 716, Inc* (#204-2024-1001-0011) as being dispositive on this issue. In that holding, ALJ Cartwright took the position that if OCM issues a sealing order based solely on Cannabis Law Article 6 §138-b (5), there must be an administrative or judicial finding that the initial NOV has been proven. Dismissing the sealing order issued following a second inspection in that case, ALJ Cartwright stated: "There was no evidence presented during this hearing that there has been a finding by the Office of Administrative Hearings for OCM or any other adjudicatory body, that Respondent was in violation of the Cannabis Law. As such, the Respondent did not have an opportunity to contest the observations and findings of OCM. To allow OCM to seal Respondent's premises without such a finding would be both in contradiction of the Cannabis Law and in violation of basic principles of due process, as it would allow OCM the power to seal a premises based on a previous allegation which has not been adjudicated, and that even if true, on its own did not give OCM the power to seal."

OCM takes the position that ALJ Cartwright applied a condition that is not required by the plain reading of the statute. They argued that the Cannabis Law does not state that a hearing on the initial NOV is required before they can issue a sealing order pursuant to Cannabis Law Article 6 §138-b (5). While I agree that a hearing requirement is not explicitly mentioned in the statute, I also agree with Judge Cartwright's reasoning that such a requirement is implicitly mandated by basic principles of due process, as well as a logical reading of the statute. The statute authorizes a sealing order in these circumstances only if the unlicensed activity has been "*confirmed to be continuing*" (emphasis added) more than ten days following the issuance of the initial NOV. The use of this phrase can only mean there must be a "confirmation" that the alleged unlicensed activity continues, and that the confirmation must be made by an impartial

judicial or administrative tribunal, and not simply by the agency that made the allegation in the first instance. In the case at hand, to date no such confirmation has been made. Therefore, a sealing order cannot be justified under the terms of Cannabis Law Article 6 §138-b (5).

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON DECEMBER 10, 2024, IS HEREBY VACATED FROM THE DATE OF THIS DECISION.

Dated: December 27, 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 27, 2024, to the following:

Nickolas Perry
Sheila Wagner
Celena Ditchev, Esq.
Luwick Francois, Esq.
Charles Gaughan, Esq.