

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION
Inspection No. 206202411190001

SMOKERS PALACE 716 INC.

Respondent.

Respondent requested an emergency hearing on November 19, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on November 19, 2024.

The emergency hearing was conducted on November 27, 2024 pursuant to a mutual agreement between the parties.

The Respondent was represented by Phil Modrzynski, Esq.

Salem Al-Khulaqi testified on behalf of the Respondent.

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

Senior Investigator Charles Dittmer 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 at 74 Webster Street, North Tonawanda, NY, 14120.

The scope of the emergency hearing was limited solely to the issue as to whether or not the padlocking provisions Cannabis Law Article 6 § 138-b of have been met by a preponderance of the evidence.

Should either party file a request for an additional hearing to adjudicate the sufficiency of the Notice of Violation and the Order to Cease Unlicensed Activity, that hearing will be scheduled for a later date.

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 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...*” (emphasis added).

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)).

FINDINGS OF FACT

1. According to the credible testimony of Investigator Dittmer, Respondent was offering cannabis products for sale without a license issued by OCM (Exh A). According to the Investigator, he observed cannabis flower, cannabis concentrate, and cannabis edibles at the location (Exh B7-30). While the majority of the products identified by Investigator Dittmer were labeled THC-A, he explained that the “A” stands for acid which once heated, burns off and turns

into THC. Respondent was offering for sale, a large variety of pre-rolls for sale including a brand identified as “ZOMBIE JOINT” which was labeled as “PREMIUM THC-A JOINTS” (Exh B9-11). The language on the side of the jar stated “This product has not been evaluated by the FDA or any other regulatory body for safety or efficacy. This product may induce intoxicating/psychoactive effects which can be delayed up to 4 hours. Use of this product can result in failing a drug test for marijuana” (Exh B11). In further support of the assertion that THC-A constitutes adult use cannabis, the gummies depicted in Exh B22, under the brand name HALF BAK’D SUMO and labeled as THC-A, THC-P, and Delta 9, contain language on the back of the product which states “Do not operate machinery after consuming this product. Consuming this product may result in a failed drug test.” Some of the products contain a cannabis warning symbol from California or other states which Investigator Dittmer testified are not legal to sell in New York State (Exh B9-10, 12, 25). In addition to the THC-A products, Respondent was offering THC gummies (Exh B24) as well as a large number of canned beverages which indicated on one can that it contained 5mg THC and on the back of the can indicated that it was a “cannabis-infused” beverage (Exh B26-28). In addition, another type of canned beverage was labeled as a “CANNABIS-INFUSED MOCKTAIL” which contained 10 mg Delta-9 THC and had a cannabis leaf depicted on it (Exh B29). Many of the beverages contained price tags including another labeled CHERRY SOUR which contained 10 mg Delta 9 THC (Exh B30). Also entered into evidence was an invoice dated November 11, 2024 from Smoke Nation, LLC located in Hallandale, FL, billed and shipped to Mike Colakey who Respondent’s witness identified as the owner of SMOKERS PALACE, at the address on record, which reflected the purchase of four different flavors, ¼ pound each, of THC-A products (Exh B31). In addition, a two-sided invoice dated November 12, 2024 from Einnahmen LLC (Florida) with an address which reflected Irvine, California, billed and shipped to Smokers Palace Shop, at the address on record, and reflected the purchase of 24 products, 19 of which were THC-A products and the other were 15000mg Hulk Gummies in various flavors (Exh B32-33). Investigator Dittmer testified that he found a scale and bulk empty packages which Respondent testified that he used to break down flower, which he testified was “hemp-derived,” into smaller packages which he testified he purchased at the corner store (Exh B9, 12-14). These packages also contained the California label and the warning at the bottom of the package which stated “THIS PRODUCT CONTAINS CANNABIS” (Exh B12). Furthermore, like many of the products, it was on display and offered for sale to the public (Exh B14).

2. According to the testimony of Investigator Dittmer, no part of the premises to be sealed was used in part as a residence and pursuant to local law or ordinance, is zoned and lawfully occupied as a “residence.” Respondent did not refute this testimony.

3. The unlicensed activity which warrants an order to seal constitutes more than a “de minimis” part of the business activity according to the Investigator. He testified that he found a large variety and volume of illicit cannabis products during the course of the inspection of this location. Cannabis Law Article 6 § 138-b(7) and OCM Regulations part 133.25(f)(3) enumerate the factors to consider when determining if unlicensed activity occurring within a business is more than de minimis. One such factor is the presence of signs or symbols, inside or outside, which advertise the sale of cannabis or otherwise indicating that cannabis is sold there. Inside the store were various signs depicting cannabis or denoting common references to cannabis culture (Exh B4-6). While Respondent contends that these signs were offered for sale by

identifying those depicted in Exh B4 located at the top of the wall behind the point-of-sale system, I note that there were no price tags on any of them and unlike many of the other products in the store, were not accessible to a patron who wanted to purchase one. Furthermore, I note the presence of three such signs, facing the storefront and affixed to the counter on which the point-of-sale system was located (Exh B6). No price tags were affixed to these and there was no other indication that they were offered for sale as opposed to merely being a symbol advertising that cannabis was offered for sale at that location. While Respondent was in possession of a Cannabinoid Hemp Retail License issued by OCM, these signs clearly referred to cannabis not hemp as evidenced by the indicators such as “420,” “Keep Calm and Smoke Weed,” “POTHEAD PARKING ONLY,” and references to “STONED.” Based upon the photographs and testimony of Investigator Dittmer, I find that it was demonstrated by a preponderance of the evidence that this location contained a large variety and a substantial volume of illicit cannabis products being offered for sale.

4. The unlicensed activity constituted an imminent threat to public health, safety, and welfare based upon the offer to sell cannabis products which were not tested or labeled lawfully in accordance with Cannabis Law Article 6. Investigator Dittmer testified that some of the cannabis products were packaged with labels bearing the California label or labels from other states which he testified were not legal to sell in New York State (Exh B9-10, 12, 25). Many of the cannabis products were in brightly colored packages with bubble font, both of which could appeal to children which is also in violation of New York State law (Exh B7-12, 14, 16, 18, 20-27, 29-30). Furthermore, Investigator Dittmer identified bulk empty packaging bearing a California label and containing language indicating that “THIS PRODUCT CONTAINS CANNABIS” (Exh B12). According to the testimony of Investigator Dittmer, the presence of the scale, the bulk flower and the bulk empty packaging bearing that label is indicative of processing of untested and unregulated cannabis at the location (Exh B7, 12, 13).

5. The Notice of Violation and Order to Seal were properly served upon the Respondent on November 19, 2024. Investigator Dittmer’s credible and undisputed testimony established that the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was personally served upon the employee who identified himself as the manager of Smokers Palace 716 Inc. and was present at the time of the inspection as well as signed the document (Exh A). Furthermore, the Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal was also conspicuously posted on the front door of the premises, as required by Cannabis Law Article 6 §138(b)(2) (Exh C2-3). Because the address of the business owner was not supplied to the Investigator by that store employee at the time of the inspection, no further steps were required by statute or regulations to complete service. Therefore, I find that service was properly effectuated in accordance with Cannabis Law Article 6 §138(b)(2).

6. Respondent contends that all the products labeled as THC-A were “hemp derived” and thus did not constitute adult use cannabis for which Respondent would require a license issued by OCM. I accept as credible the testimony of Investigator Dittmer who confirmed that they were in fact illicit cannabis products and that THC-A once heated, becomes the equivalent of THC. I also note that Cannabis Law Article 6 §138(a)(2) authorizes OCM to “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.” Therefore, the products offered for sale as cannabis do not require testing. I would also note that the testimony and evidence establish that Respondent was selling a significant amount of pre-rolls which he contends were “hemp-derived.” While my finding is that they constitute illicit cannabis, I would direct Respondent to the Hemp Regulations 9 NYCRR § 114.11(b) which provides that “Cannabinoid hemp retailers shall not offer or sell any cannabinoid hemp product clearly labeled or advertised for the purpose of smoking, or in the form of a cigarette, cigar, or pre-roll, or packaged or combined with other items designed to facilitate smoking such as rolling papers or pipes.” Therefore, assuming arguendo that the pre-rolls were not cannabis products, selling of a pre-rolls constitutes a violation of Respondent’s Cannabinoid Retail Hemp License.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON NOVEMBER 19, 2024 IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: December 2, 2024

Karen Lavery
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:

Nickolas Perry
Sheila Wagner
Celena Ditchev, Esq.
Sisi Wu, Esq.
Phil Modrzynski, Esq.