

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. - 116202411260003

VAPE EMPORIUM INC.,

Respondent.

Respondent requested a hearing on December 3, 2024, for an inspection which occurred on November 26, 2024

The hearing was originally scheduled for December 6, 2024. At Respondent's request, the hearing was moved to December 13, 2024. During the hearing, both parties reported that they were confident that a settlement could be reached, eliminating the need for a hearing. After negotiations collapsed, a hearing was scheduled for and conducted on January 8, 2025.

The Respondent represented himself at the hearing and testified on his own behalf.

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

Investigative Specialist Gisela Loforte (hereinafter "Loforte") testified on behalf of OCM.

ISSUE

The allegations set forth in the Notice of Violation and Order to Cease Unlicensed Activity (jointly hereinafter "NOV") 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 941 Carmans Rd., Massapequa, NY 11758.

The scope of the hearing involves determination of whether OCM, by a preponderance of the evidence were justified in issuing to Respondent the NOV and what penalty, if any, under Article 6 § 132 is justified. OCM requested the maximum fine of \$10,000.

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....”

FINDINGS OF FACT

1. On November 26, 2024, OCM conducted an inspection of Vape Emporium, Inc. (hereinafter “Vape Emporium”) located at 941 Carmans Rd., Massapequa, NY (Ex. A). At that time, an Order/Order to Cease Unlicensed Activity was issued (Ex. A). In December of that same year, Respondent requested a hearing, which, after multiple delays, was held on January 8, 2025. During the hearing, Loforte appeared as the sole witness for OCM and Respondent testified on his own behalf. Loforte testified that even before entering the shop, she noticed advertisements, signs, and symbols that, as a trained investigator, led her to believe that an individual may procure cannabis from Vape Emporium. She stated that the advertisements on the front window of the store suggested strongly that cannabis could be bought from the store (Ex. B 1-2). These pictures, including a sign which said, “Sorry We’re Stoned” and a RAW Rolling Paper advertisement with a plane in the shape of a joint and the phrase “Prepare for Flight,” seemed to

suggest that the store traded in cannabis (Ex. B 1-2). Loforte's testimony suggested that an average consumer looking for cannabis would view such signs as indicating its availability within the store. Vape Emporium also had the telltale signs of a business open to the public, including hours of operation and a help wanted sign displayed in its front window (Ex B 1-2). Loforte testified that the store was open upon her arrival. Upon entering Vape Emporium, Loforte noticed additional signs and symbols which she testified that she recognized as demonstrating to potential customers that cannabis may be purchased from the location. Paraphenalia, commonly associated with cannabis, including bong, hookahs, other glassware, and another advertisement for RAW rolling papers were all indicators that the store could likely have cannabis products for sale (Ex. B 3). Loforte testified that within Vape Emporium, a point-of-sale system, credit card reader, and a pricing list all established that the store was a place of business and sold products to the public (Ex. B 4-11). Although Loforte testified that all the products discovered in the "show room" of Vape Emporium, as well as all the products listed on the pricing list found within the "show room," were legal for sale, illicit items were found in the office area of the store (Ex. B 12-13). This included a cloth bag with approximately 29 packages of "Puff LA" cannabis gummies (Ex. B 13). This constituted the total of illicit product found in the store according to the evidence submitted. However, a menu with illicit products listed for sale was also found in the office area of Vape Emporium (Ex. B 12).¹ Further, receipts found in the office area, dated near the time of the inspection, indicated that the store had recently traded in illicit products according to Loforte's testimony (Ex. B 21-23). Additionally, Loforte testified that she found scales in the office, a device commonly used in the processing of cannabis (Ex. B 17), but also stated that she found no cannabis flower. A number of "pre-rolled" hemp joints were found on site, and while illicit for an individual who does not have a NYS hemp license, do not factor into a determination under Cannabis Law §§ 132 or 138-a. Finally, Loforte testified that Vape Emporium possessed no type of Adult Use or Hemp license at the time of the inspection and Respondent presented no evidence to the contrary. Respondent did testify that he was in the process of applying for a hemp license on the date of the inspection.

After reviewing the evidence submitted and the testimony of the Loforte, I find that OCM did not meet their burden of proof of showing that Vape Emporium violated cannabis law. While products containing THC were found on the premises (Ex. B 13) it is unclear whether these products constitute more than the amount an individual over the age of 21 is allowed to possess in New York State. Loforte testified that she found approximately 29 bags of gummies in the cloth bag. While it is more likely than not that the products contained THC, based on the Loforte's testimony and a single photograph submitted into evidence which gave a sub-standard view of the packets, it is unclear how much cannabis each individual bag held. Assuming that each bag contained 500 mg of THC, which is common, then the total amount would not exceed the 24 grams of concentrated cannabis which is the legal amount an adult above 21 may possess. While this threshold is not entirely relevant, if this product belongs to an employee of the store, as Respondent suggested, then the employee was in legal possession of the gummies. Even if this amount exceeds this threshold, OCM failed to prove this to be the case. Further, the products were found in the office and not on the shelves in the "show room." Also, although numerous

¹ Special Investigator Loforte testified that some of the brand names listed on the pricing guide (e.g., Runtz) were producers of cannabis products and, to her knowledge, these companies produced only products that would constitute illicit cannabis products under New York State Law – they made no non-cannabis products. No evidence was produced to refute this assertion.

pricing lists were discovered, only pricing lists that contained non-cannabis products were discovered in the customer-serving section of the store. A price list possibly containing cannabis products was found, but in the office, and this list did not contain the cannabis products (LA Puff Gummies) found on the premises. OCM argued that the receipts discovered suggested that transactions involving cannabis products had occurred, and I agree; but the receipts seem to suggest that they were memorializing a purchase made by Vape Emporium, not a record of Vape Emporium selling cannabis products. The purchases appear to be bulk orders and beyond what would typically be purchased by an average customer. While a significant purchase may support the assertion that the store was selling cannabis products (because why else would they make sure a large purchase), but OCM did not explain what happened to that product and little product was found on site. No illicit product was in the show room and there was no indication (price lists or explicit advertisements) that cannabis products were available. Even the gummies found on site failed to have prices listed on either a pricing sheet or with a price tag affixed to the individual products. Further, while scales were found on the premises, these in isolation would not support a finding of processing, primarily because no cannabis flower was discovered on site but also because Respondent stated that the store sold scales and put forth a plausible rationale for having the scales in a bin in the office.² While it is possible that Vape Emporium was selling or was “gearing up” to begin the sale of cannabis products (due to a large bulk purchase of cannabis products), OCM did not prove by a preponderance of the evidence that the store was selling products at the time of the inspection.

2. Respondent made not assertion that service was not effectuated. The respondent was pro se and likely would not have made such an argument. However, if he had, I would have found that service was proper, and that Respondent had adequate notice. An employee of the store was served with the NOV and a copy of the NOV was affixed to the store front. Further, Respondent requested a hearing shortly after the inspection using, one can assume, the instructions provided on the NOV. Since notice and not personal jurisdiction is the purpose of service in administrative matters (see *Drolet v. New York State Racing & Wagering Bd.*, 115 Misc. 2d 7, 10, 453 N.Y.S.2d 361, 363 (Sup. Ct. 1982) citing *Avelli v. Town of Babylon*, 54 Misc.2d 662, 665, 283 N.Y.S.2d 261; *Olin Industries v. NLRB*, 192 F.2d 799 [5th Cir., 1951])(see also e.g., *Dep't of Buildings v. Owner, Occupants and Mortgagees of 845 Walton Avenue, Bronx, New York*, OATH Index No. 234/95 (Jan. 19, 1995)), I find that notice was proper. I also find that Respondent's presence at the hearing supported a finding of adequate service.

DECISION

OCM failed to prove by a preponderance of the evidence that the Respondent engaged in the sale of illicit cannabis or cannabis products without a license, registration, or permit to do so, at the location of 941 Carmans Rd. Massapequa, NY 11758. I find that Respondent did not violate Cannabis Law Article 6. The Order to Cease Unlicensed Activity is hereby dismissed, and no penalty is assessed.

² Respondent stated that sometimes products are returned as being defective. The scales in the office, he posited, were defective and were destined to be returned to the manufacturer.

Dated: January 16, 2025


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 January 16, 2025, to the following:

Luwick Francois, Esq.

Mohsin Kahn

Nickolas Perry

Sheila Wagner

Celena Ditchev