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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

DECISION

-against- **Inspection No. - 134262502120093**

FREES' ICE CREAM NOVELTIES, LLC

Respondent.

Respondent requested a hearing on February 25, 2025, for an inspection which occurred on February 12, 2025.

The hearing was scheduled for and conducted on March 10, 2025.

The Respondent was represented by Lance Lazzaro, Esq.

Justen Golinski (hereinafter "Respondent") testified on his own behalf.

The Office of Cannabis Management (hereinafter "OCM") was represented by Anthony Pitnell, Esq.

Investigative Specialist 1 Jillian Agnew (hereinafter "Agnew") testified on behalf of OCM.

ISSUE

The allegations set forth in the Notice of Violation, Order to Cease Unlicensed Activity, and Order to Seal (jointly hereinafter "NOV") asserts that the Respondent was offering cannabis products, as defined by Cannabis Law Article 3, for sale without an appropriate registration, license, or permit. These allegations are based upon observations made during a regulatory inspection which was conducted at 12 Common Drive, Cooperstown, NY 13326.

The scope of the hearing involves determination whether OCM, by a preponderance of the evidence were justified in issuing to Respondent the NOV and what penalty under Article 6 § 132

is justified. OCM requested the maximum fine of $10,000. Additionally, this hearing was to determine the issue of whether the padlocking provisions of Cannabis Law Article 6 § 138-b have been met by a preponderance of the evidence.

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…."

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(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 1 §3(53) states that "'Total THC' means the sum of the percentage by weight or volume measurement of tetrahydrocannabinolic acid multiplied by 0.877, plus, the percentage by weight or volume measurement of THC."

FINDINGS OF FACT

1. The chief source of contention in this matter is whether or not tetrahydrocannabinolic acid (THC-A) contributes to the delta-9 THC content of a product. Products that purport to qualify as hemp under New York State Law "shall not have a concentration of more than three tenths of a percent delta-9 tetrahydrocannabinol" (Cannabis Law Art. 1 §3(3)). If a product for sale contains less than .3% delta-9 THC and the proprietor of the establishment in question has a valid hemp license, the product may be sold as a hemp product. Respondent argues that all of the products seized from Frees' Ice Cream Novelties, LLC (hereinafter "Frees") contained less than .3% delta-9 THC as they primarily contained THC-A. As evidence of this, respondent pointed to OCM's submissions (e.g., Ex C-2) which Agnew gathered by scanning the QR code found on the packaging of the products seized. These packages do, in fact, list the amount of Delta-9 THC and THC-A. If the analysis ended here, the matter would conclude in favor of Respondent. However, under New York's Cannabis Law, delta-9 THC is not viewed in isolation. The law requires the inclusion of a portion of THC-A when totaling delta-9 THC (Art. 1 §3(53)). This inclusion is echoed in the regulations which detail that total delta-9 THC "means [DELTA] 9-Tetrahydrocannabinol + (0.877 x tetrahydrocannabinolic acid)" (NYCRR Title 9 §114.1(ag)). Although Respondent claimed repeatedly that THC-A is legal in New York and that all of the products contained in Respondent's store, therefore, qualified as hemp under the law, the plain language of both the statute and the regulations say otherwise. I am, therefore, required to find that THC-A contributes to the total delta-9 THC referenced in the statutes and may require a product to be classified as illicit cannabis as opposed to legal hemp. I will use the calculation denoted in the law to determine this threshold question in the Matter of Frees.

2. On February 12, 2025, OCM conducted a regulatory inspection of Frees located at 12 Common Drive, Cooperstown, NY 13326 (Ex. A). At that time, an NOV was issued, and the premises were sealed (Ex. A). Later that month, Respondent requested a hearing, which was held on March 10, 2025. During the hearing, Agnew appeared as the sole witness for OCM. She testified that upon arriving at the location, she spotted a sign in the front window advertising "cannabis" (Ex. B 1). The store front also contained an hours-of-operation sign and Agnew testified that the store was opened at the time of the inspection (Ex. B 2). She further testified that customers continued to enter the store and even buy product as the inspection proceeded. She specifically mentioned that some of the products she witnessed being sold were products containing THC-A. Paraphernalia, commonly associated with cannabis use (e.g., bongs and pipes) were present in the store as were signs and symbols on merchandise and decorating the store (Ex. B 3-4, 10, 13, 22-23). Additionally, the store contained a number of products that Agnew suspected, according to her training and experience, constituted illicit cannabis for an individual without an adult use license. These products were on display in glass cases and could be easily perused by interested customers. Agnew testified that while Respondent has a retail hemp license, he did not possess an adult use license at the time of the inspection. A point-of-sale system, ATM, credit card reader, and a "discount bin" were all present on site (Ex. B 18-23).

A large majority of the products found on the premises had price tags. Although Respondent argued that only THC-A products were present, other products discovered on site were labeled or known to Agnew as being products which contain delta-9 THC (see B 11, 25-29, 42). Most of the remaining products seized contained THC-A, a fact which can be deduced from the label on the product, Agnew's testimony, and/or the QR code which can be "pulled" from the product. Some products also contained a label (or a QR code) which listed the precise percentage of THC-A present in the substance (see e.g., Ex. B 31, 33-34, 36, 40, & C 2-4, 6, 8-10).[1] None of the products seized from the store had proper New York State inspection stickers. While some stickers had warnings from other states (e.g., Ex. B 40) others only had generic labels that identified them as containing cannabis (e.g., Ex. B 42). In total, there were dozens, possibly hundreds, of products openly available for purchase inside the store. These products came in a variety of forms, including vapes, flower, concentrates, and edibles.

Taken as a whole, the evidence presented by OCM against Frees is sufficient to determine by a preponderance of the evidence that the store was selling illicit cannabis products to the public. The store was open to the public and had the hallmarks of a typical business. It did not possess an adult use license, which is necessary to sell cannabis products. The store had some signs and symbols which would indicate to a consumer interested in purchasing cannabis, however, these are somewhat unimportant as the illicit products in question were openly displayed, typically affixed with price tags. Significant product was discovered on site and Agnew testified that she witnessed customers purchasing cannabis items from the store. Taken as a whole, the products discovered coupled with Agnew's testimony, make it likely that Frees sold cannabis product without an adult use license. It should be noted that there were a number of products labeled as containing delta-9 THC, a fact that could lead to the conclusion that the store was trading in illicit cannabis. The THC-A products would, therefore, simply increase the size of illicit business being conducted.

2. Agnew testified that no part of the premises to be sealed was used in part as a residence. She stated that the location did not contain a shower or kitchen and that no signs of residential use were present. The photos submitted by OCM support this conclusion. Respondent made no assertion to counter Agnew's testimony that the location was being used solely as a business.

3. The unlicensed activity which warranted an order to seal constituted more than a "de minimis" part the business activity. The 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. The number of illicit products discovered at Frees was significant. The photographic evidence submitted showed not only a significant amount of product on display (dozens if not hundreds), but additional products in storage ready for sale (see e.g., Ex. D-5). The evidence submitted by OCM shows an amount of product that exceeds the amount which could reasonably be claimed as a de minimis part of Frees' business. No testimony was presented by Respondent as to the exact size of the operation, but OCM presented photographic evidence that showed a relatively small shop (see e.g., Ex. B-

[1] The large majority of the products seized which contain THC-A are well above the .3% level, even when utilizing the formula listed in the statute and, therefore only including .877 of the total. These products therefore qualify as adult use cannabis and not hemp.

1) that appears to have traded extensively in illicit cannabis. The volume of illicit product recovered from the store coupled with the variety of products that were for sale (flower, vape, concentrate, edibles) support this finding. Finally, although not prevalent, a good number of signs and symbols were present, including a bold sign above the entrance and paraphernalia. Due to the facts listed above, I find that the evidence supports a finding by a preponderance of the evidence that Frees' trade in cannabis was more than a de minimis part of its business.

4. The unlicensed activity being conducted at Frees constituted an imminent threat to public health, safety, and welfare in that there were sales of, or offers to sell, cannabis products that were not tested or labeled lawfully in accordance with Cannabis Law Article 6. Respondent argued that labeling was unnecessary due to the assertion that the products contained in the store qualified as hemp. However, this is not supported by New York State Law. Therefore, the lack testing and labeling of products make these products a threat to public health. None of the products discovered at Frees appear to have been tested in New York. While Respondent's attorney argued that only the front of the product could be seen in most pictures and, therefore any warnings on the back of the product could not be seen. However, a complete picture of many of the products were shown and no products submitted into evidence had a New York State inspection sticker. While some had a warning label (either generic or from out of state), none possessed the necessary labels that would allow them for sale in New York as "adult-use cannabis." The lack of testing and labeling made these products potentially dangerous. The lack of testing and labeling makes Frees actions a danger to the public health, safety, and welfare.

5. Respondent challenged service, particularly the service of the Order to Seal. The service requirements of the Order to Seal are delineated in Cannabis Law (see Cannabis Law § 138-b). Respondent argued that OCM did not perform proper service for the order to seal because they did not properly mail the NOV to Respondent. Respondent's attorney agreed that OCM provided in person service and posted the NOV on the storefront (requirements under the law) but argued that these two steps alone do not constitute service. However, I find this argument fails. OCM submitted the NOV which has the Respondent's signature at the bottom. 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. Finally, §138-b does not require a mailing to the store as Respondent stated, but rather to an "address for the owner of the business." The only address provided at the time of the inspection was the address of the store as listed on the NOV, not an alternative address for the owner (who, again, was on site during the inspection and personally served). The sending of the NOV to an address provided for the owner of the business is a method designed to best effectuate service. However, the fact that the owner only supplied the address of the shop, which after it was sealed would be impossible for Respondent to legally enter, makes any requirement to deliver the notice to this location a ludicrous ask. I believe the statute's requirement to post the NOV on the store front is sufficient especially since the address provided was the store in question, which, if OCM had

mailed the NOV, likely would have been undeliverable to a sealed shop. I find that the Respondent was properly served, and that no violation occurred due to the notice not being mailed.

7. It should be noted, although Respondent made no argument concerning the validity of OCM's search, I find that the search was valid and properly performed. Frees possesses a valid hemp license and OCM is, therefore, allowed to conduct regulatory inspections of the premises. The purpose of such an inspection is to ensure compliance with New York laws and regulations. Upon finding illicit products, OCM may seize the products pursuant to its authority.

8. OCM requested that the maximum fine of $10,000 be levied against Frees for the violations discovered on February 12, 2025. While the statutes do 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 the matter of Frees the evidence supports a finding that a significant volume and variety of illicit product was seized. OCM, however, did not provide a comparison of other inspections that they have conducted as it relates to the amount of product discovered on site. The fact that Respondent "understood" THC-A to qualify as hemp under New York Law is mostly inconsequential. While an honest mistake may occur (I believe Respondent's testimony supports a finding, for what it's worth, that he believed he was complying with New York Law) it does not excuse illegal behavior. The law is clear and OCM produced guidance more than a year prior to this search being conducted delineating that THC-A may qualify as adult use cannabis and not hemp. However, Respondent's history of compliance (he stated that he possessed his hemp license for more than six years), the facts that he appears to have purchased the products through reputable sources (although still not compliant with New York law), there was no production on site, and the fact that the products were not generally attractive to youth or of a high concentration, mitigates the culpability somewhat as it relates to the fine. For these reasons, I find a moderate penalty is warranted in the Matter of Frees.

DECISION

The Respondent engaged in the sale of illicit cannabis and cannabis products without a license, registration, or permit to do so, at the location of 12 Common Drive, Cooperstown, NY 13326. In so doing, Respondent violated Cannabis Law Article 6. The Order to Cease Unlicensed Activity and Order to Seal are hereby affirmed and a penalty is assessed.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON FEBRUARY 12, 2025, IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

FURTHER, THE RESPONDENT IS HEREBY ORDERED TO PAY A $5,000 FINE UNDER CANNABIS LAW ARTICLE 6 §132 FOR VIOLATIONS UNDER §125, AND AS

A PROPORTIONATE PENALTY, FOR THE UNLICENSED SALE OF ILLICIT CANNABIS ON FEBRUARY 12, 2025.

Dated: March 17, 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 March 17, 2025, to the following:

Lance Lazzaro, Esq.

Anthony Pitnell, Esq.

Nickolas Perry

Sheila Wagner

Celena Ditchev