

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION
Inspection No. 119202508140013

Dream Falls Convenience, Inc.

Respondent.

Respondent requested an emergency hearing on August 20, 2025, which was made within seven (7) calendar days of the date of the inspection which occurred on August 14, 2025.

The emergency hearing was conducted on August 25, 2025, which is within three (3) business days of the Respondent's request.

Phil Modrzynski, Esq., represented the Respondent, Dream Falls Convenience Inc.

Anthony Pitnell, Esq. represented the Petitioner, the Office of Cannabis Management (hereinafter "OCM").

Investigative Specialist Antonino Giovenco testified on behalf of OCM.

I. 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 82 Falls Street, Seneca Falls, New York 13148.

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.

II. 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(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).

III. FINDINGS OF FACT

1. According to the testimony of Investigator Giovenco, the OCM search of Dream Falls Convenience on August 20, 2025, was based on a search warrant issued to the Seneca Falls Police Department and OCM. (Exhibit A). Investigator Giovenco was the lead OCM Investigator during this search.

2. Investigator Giovenco testified that he has been employed by OCM for approximately 10 months. He explained that he received both in office and field training, since being employed by OCM. That training consisted of reviewing the Marihuana Regulation and Tax Act (hereinafter "MRTA"), identifying cannabis and cannabis products by smell, look, bubble font, and reading the label. He also stated that a cannabis product in his understanding was a product with greater than .3% Delta 9 THC¹. Investigator Giovenco, when asked, agreed with Respondent that "synthetic" forms of cannabis such as Delta 8 THC, HHC, and other forms are not considered cannabis under New York Law.

¹ It should be noted that Investigator Giovenco was asked if the permissible limit of Delta 9 THC for hemp was .03% he agreed.

3. During the search he stated products marketed or labeled as cannabis products were recovered from a black plastic bag in a drawer under the cash register. The bag contained 4 Honey King All in One concentrate vape pens, 1 ZaZa vape, 1 Muha Meds Vape, 1 Cake Vape, and 1 bag of Surge Pure THC Live Sugar Gummies. (Exhibit C5). The Honey King All in One concentrate vape pens are comprised of 90% THC by weight with the ingredients containing “premium cannabis oil.” (Exhibit C9). The Zaza vape is 95% THC; the label stated, “Zaza farm puts cutting-edge vape technology together with top-shelf cannabis oils to create a superior vaping experience.” (Exhibit C9). The Cake vape which was located in the rear of the location, label says, “Contains hemp derived Δ 8 THC, CBD, CBN and $<.3\%$ Δ 9 THC.” (Exhibit C6). The Muha Meds Vape also does not state the amount of total THC, however it is marketed as, “Premium Cannabis Extract.” (Exhibit E10).

4. Investigator Giovenco initially stated that these products were all cannabis products. However, on cross examination he stated that the Cake vape was not a cannabis product, though it contains Δ 8 THC which is not authorized by New York State.

5. Investigator Giovenco testified that 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.” Exhibit D, containing photographs of the rear of the store, does feature a mattress, vacuum cleaner, bowls, and clothes in a closet. However, Investigator Giovenco testified that there was no shower or kitchen, and that the businesses employee stated that he did not live there, and no one lived there.

6. Investigator Giovenco’s testimony regarding where certain products were located was unclear. The Investigator’s testimony reflects that the products that were most likely located in the backroom, in a black bag, featured in Exhibits D12, E11, and E24-37. Investigator Giovenco stated that the open- burnt vape (Exhibit E11) was pulled from the black bag on the shelf in the back, in addition to approximately 5 or 6 other vapes, some of which are seen in Exhibits E25-37. A Donut vape by Fryd, seen in Exhibit E21, was also found in the back of the location, according to the Investigator.

7. There is not a singular picture that captures all the products the Investigator said were in the bag in the back room. The products, he testified were most likely from this room are: approximately 4 bags of product labeled Hawaiian, 5 bags of a product labeled King Gorilla and depicting a gorilla smoking, a Cake vape which the investigator stated was not a cannabis product, a Life Line Delta 8 vape, a pill bottle containing cannabis flower, and at- least one Mellow Fellow Live Resin THCP and Delta 8 Vape, and 5-6 other vapes.

8. Investigator Giovenco testified that he did not know if there were two Cake vapes, one in front and one in back, or not. The Hawaiian products do not state what product is contained within. Investigator Giovenco stated he believed Cannabis flower was in the Hawaiian bags (Exhibit C2) because of the bubbled font, color, and characters.

9. In total, approximately 5 bags of cannabis flower, 10-11 vape pens, 1 bag of cannabis gummies, and 1 pill bottle of cannabis flower was recovered from the location. The Investigator

testified that he agreed the lawful amount of cannabis for personal use would be approximately 3 ounces of flower and 24 grams of concentrate. He also agreed that there was less than 3 ounces of suspected cannabis flower located at the business. When asked if there was around 24 grams of concentrate at the location, the Investigator did not directly respond.

IV. ANALYSIS AND OPINION

Based on the location of the cannabis products found underneath the cash register, I believe that cannabis products were being offered for sale at Dream Falls Convenience Store. As such, OCM has proven by a preponderance of the evidence that Dream Falls Convenience was selling or offering for sale, cannabis products without a license. My finding is not based on the undercover buys that were alleged to have occurred at the location. Investigator Giovenco testified that the search warrant obtained for this location was premised on three undercover buys. OCM did not call any individuals with personal knowledge of those buys, nor did they give any specifics as to when they occurred. As such I find the testimony related to those buys to be unreliable hearsay, and I did not consider those statements in finding that products marketed or labeled as cannabis were being sold or offered for sale at the location.

OCM has also proven that the premises in this case was not being used as a residence. Despite the mattress, bowls and clothes present at the location, I find there were not sufficient indicia that an individual resided on the premises. There were no sheets or towels, nor was there a kitchen, makeshift or otherwise, or a shower, slop sink or other indication of a location where someone resided. I also strongly credit the Investigator's testimony that the employee stated that neither he nor anyone else lived on the premises.

However, for the following reasons, I find that OCM has failed to meet its burden in proving beyond a fair preponderance of the evidence that there was more than a de minimis amount of unlicensed activity at this location. Investigator Giovenco on one or more occasion, on cross examination, corrected his statements as to which products were cannabis and which were impermissible hemp products. Additionally, he was not sure where the Cake vape product was located during the initial search, and then later stated that he wasn't sure if there was one Cake vape or two. Certain photographs (Exhibits E25, E27, and E28) placed into evidence were blurry. There was testimony that some cannabis vapes recovered were not all placed into evidence. Many of the photos of products were not placed into evidence with all the other products found in the same location, nor were the photos of them in their original location placed into evidence. All these factors together, made it difficult to ascertain exactly which products were recovered and from which locations.

The provisions of 138-b(7) prescribe the factors that may be taken into consideration when finding whether unlicensed activity within a building is more than de minimis. Investigator Giovenco testified that there was not a volume of cannabis. He stated that while walking through the store there was signage of cannabis, however none of these signs or symbols were pointed out in evidence, during OCM's case. Additionally, Exhibit B featuring pictures of the inside of the premises, does not feature prominent signs or symbols advertising the sale of

cannabis aside from a movie poster for Cheech and Chong. I do not find that a movie poster, alone, is a reliable indicator that cannabis products are being sold at a location.

Investigator Giovenco stated that he did find that there was a variety of product at the location, in that he found cannabis concentrate, edibles, and flower. However, he did not go through the various brands and flavors he observed at the location, and three general categories of cannabis product does not necessarily make variety. We do not have clear pictures of each of the 5 or 6 vape products found in the backroom and laid out side by side. As such, it is hard to determine that there were more than approximately 2 types of flowers, and 4 brands of cannabis vapes- one in two flavors, and a singular pack of edibles, present at the location. See *OCM v. Exotic Discount Store Inc.* Inspection No. 103202410010068 (2024) and *OCM v. Mo's Food Mart Inc.* Inspection No. 10320240604003 (Finding the de minimis factors of variety and signs and symbols but not volume).

The testimony regarding the location of various products as well as whether the photographs in evidence capture the entirety of the products, was confusing. At times the Investigator did not seem to be completely sure where a particular product was initially located. A few cannabis products were found underneath the register and in a back cabinet, located in a store with a vast array of smoking devices, nicotine and flavored vapes, rolling papers, and other legal product. The investigator admitted that there was not a large volume of cannabis product on site, and there was less than the personal use amount of cannabis flower. Though OCM argues that no one claimed that the flower was theirs, that is irrelevant to the fact that the amount of flower was so small as to constitute an amount permissible for personal use. Additionally, a used vape product was found in one of the bags with product that was alleged for sale, a strong indication that personal products may have been mixed in with ones being offered for sale. All these factors indicate that the illicit cannabis products found at Dream Falls Convenience were a de minimis part of the business activity taking place on the premises.

Under 9 NYCRR § 133.18(d)(6), OCM bears the burden of establishing violations by a fair preponderance of the evidence. This standard requires proof that it is more likely than not that the alleged unlicensed cannabis activity constituted more than a de minimis part of the Respondent's business operations. Here, OCM has failed to satisfy this burden. The Investigator's testimony was inconsistent and uncertain regarding the location and presentation of the alleged cannabis products. Photographic evidence was incomplete and did not clearly establish the scope or display of products as they were allegedly found. The admitted confusion surrounding whether the photographs reflected the entirety of the items further undermines OCM's evidentiary showing.

The record demonstrates that the quantity of cannabis discovered was minimal. The Investigator conceded that the volume was not large, and the cannabis flower seized was below the statutory threshold for personal possession permitted under Penal Law § 222.25. Therefore, OCM has not demonstrated by a fair preponderance of the evidence that Dream Falls Convenience engaged in unlicensed cannabis sales constituting more than a de minimis portion of its business activity. As required by 9 NYCRR §§ 133.25(f) and 133.18(d)(6), the issuance of an Order to Seal or the imposition of sanctions must be supported by a fair preponderance of the evidence of ongoing or substantial unlicensed activity. That threshold was not met in this case.

V. DECISION

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON August 20, 2025, IS HEREBY VACATED FROM THE DATE OF THIS DECISION.

This constitutes the final decision of the Office of Administrative Hearings. A copy of this decision shall be served upon the parties.

Please be advised that either party may appeal this decision within 30 calendar days of receipt, according to the specific manner described in

Dated: August 29, 2025

Laurie Cartwright
Laurie J. Cartwright
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 §§ 133.23(g)(5) and 133.25(k).

This decision was sent via email on August 29, 2025, to the following:

Nickolas Perry
Sheila Wagner
Celena Ditchev, Esq.
Anthony Pitnell, Esq.
Phil Modrzynski, Esq.