

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

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION
Inspection No. 107202408060008

Smoker's Choice of Upstate New York, Inc. (Geneseo)

Respondent.

Respondent requested a hearing on August 7, 2024. The inspection occurred on August 6, 2024. The hearing was conducted on November 25 and December 3, 2024.

The Respondent was represented by Joshua Bauchner, Esq. and Natalie Diaz, Esq.

Dwayne Phillips testified on behalf of the Respondent.

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

Investigative Specialist Darrick Wakefield testified on behalf of OCM.

ISSUE

The allegations set forth in the Notice of Violation and Order to Cease Unlicensed Activity (hereinafter "NOV") and Notice of Hearing indicate that the Respondent was offering cannabis products, namely, cannabis flower, cannabis edible[s], cannabis concentrate, 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 4331 Genesee Valley Plaza Road, Geneseo, New York 14454. (Exhibit A).

APPLICABLE LAW

Cannabis Law Article 6 §125(1) provides that: "No 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 within the

state without obtaining the appropriate registration, license, or permit therefore required by this chapter unless otherwise authorized by 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 and their place of business, including a vehicle used for such business;”

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)(a) provides that “where such person has been ordered to cease such conduct pursuant to subdivision one of section one hundred thirty-eight-a of this chapter, such person may be assessed a civil penalty of no more than twenty thousand dollars per day for each day during which such violation continues after receiving such order in addition to the additional civil penalties set forth above...”

Cannabis Law Article 1 §3 (3) defines "Cannabinoid hemp" as any hemp and any product processed or derived from hemp, that is used for human consumption provided that when such product is packaged or offered for retail sale to a consumer, it shall not have a concentration of more than three tenths of a percent delta-9 tetrahydrocannabinol.

Cannabis Law Article 1 §3 (17) defines "Concentrated cannabis" means: (a) the separated resin, whether crude or purified, obtained from cannabis; or (b) a material, preparation, mixture, compound or other substance which contains more than three percent by weight or by volume of total THC, as defined in this section.

Cannabis Law Article 1 §3 (27) defines "Hemp" as the plant *Cannabis sativa* L. and any part of such plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration (THC) of not more than three-tenths of a percent on a dry weight basis. It shall not include "medical cannabis" as defined in this section.

State Administrative Procedures Act § 306 (4) Official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency. When official notice is taken of a material fact not appearing in the evidence in the record and of

which judicial notice could not be taken, every party shall be given notice thereof and shall on timely request be afforded an opportunity prior to decision to dispute the fact or its materiality.

FINDINGS OF FACT

1. OCM Investigator Darrick Wakefield testified during this hearing that following his inspection of Smoker's Choice of Upstate New York- Geneseo, he issued a Notice of Violation and Order to Cease Unlicensed Activity for the location. In doing so he asserted that the business violated Cannabis Law Article 6 §125 and 138-A. There is no dispute that at the time of inspection, the business had a retail cannabinoid hemp license but did not have an adult use cannabis license. As such, Petitioner has the burden to prove that at the time of inspection, Smoker's Choice of Upstate New York, Geneseo was, among other things, selling or offering to sell cannabis or any product marketed or labeled as such.
2. Investigator Wakefield testified that he had training and experience in identifying cannabis and cannabis product. He explained that he identifies cannabis product based on its characteristics, odor, and the information on its packaging. Investigator Wakefield also explained that he has conducted inspections of both legal and illegal businesses engaged in the sale of cannabis. He testified that despite a premises having a license to possess cannabinoid hemp, his understanding from his supervisors was that stores were required to remove all non-compliant product from the store premises. Investigator Wakefield testified that he was not aware of OCM guidance issued at the end of 2023. Of relevance, was a document propagated around December of 2023 entitled "Cannabinoid Hemp Regulations Guidance for Licensees- Revised January 2024." This guidance was issued with respect to cannabinoid hemp regulations that became effective on December 13, 2023, which changed the potency and product requirements for cannabinoid hemp. Investigator Wakefield also testified he was not aware of what the potency and product requirements were prior to December 13, 2024. Most notably, he was not acquainted with the fact that the guidance says little regarding where licensees are required to store non-compliant product. The guidance simply stated, "[l]icensees with existing cannabinoid hemp products that do not meet the requirements of the amended regulation are required to immediately remove these products from the New York State supply chain." Petitioner's case rests on this tribunal drawing the conclusion that all product that is deemed cannabis under the updated regulations, regardless of its location within the premises, was being offered for sale. OCM's own guidance does not allow for that conclusion to be drawn.
3. Respondent's witness Senior Vice President of Sales and Operations, Dwayne Phillips, testified that all products that were rendered non-compliant by the regulations revised in January of 2024 were stored in a locked storage room on the premises. He added that he was told by the store manager of the location that investigators had to try multiple keys to gain entry to the storage room. Investigator Wakefield testified that the door to the storage room was open when he entered the location, but that he was not the first investigator to enter, nor does he know how the door came to be open.

4. Given the foregoing, to find that Respondent was properly issued a Notice of Violation, it is necessary to find that the non-compliant products had not been removed from the supply chain or that they were non-compliant with OCM regulations in the first instance. The location of the products in a publicly accessible space at the time of inspection is integral step to finding that the products were not removed from the supply chain. Without this step, there would need to be strong evidence that employees were selling illicit or non-compliant products. However, Investigator Wakefield testified repeatedly that he was not sure of the original location of almost all of the products located in Exhibits B8 and B9. He explained that the items were placed on top of the display cases by OCM and New York State Department of Tax and Finance (hereinafter “DTF”) staff to be photographed. When asked if an item could have been located in the storage room at the time of his arrival, Investigator Wakefield said that he did not know as to Exhibits: B12, B17, B19-22, B25, B33-59, B65-69, and B73-76. Investigator Wakefield also did not provide any testimony showing that the products were not secured in a locked storage room at the time of the investigation. Nor did he testify to observing cannabis products being sold during his inspection.
5. A separate finding that the products were never compliant with the OCM regulations could also provide evidence that Smoker’s Choice was engaged in offers to sell unlicensed cannabis, as there would be no reason for Respondent to have the products on the premises. Investigator Wakefield was asked if numerous products were compliant prior to the guidance issued in December of 2023. He stated on almost every occasion that he was not sure. He additionally affirmed that he did not scan a QR code in a single instance during his inspection nor did he look at a single certificate of analysis. Thus, he was unable to know whether the products recovered were compliant with the current hemp regulations. Investigator Wakefield testified that he found invoices showing various products that had been ordered by Respondent, which are in evidence as Exhibit C2-C6. These invoices do not contain a date, nor is there a complete copy of the invoices in evidence. Investigator Wakefield testified that he took the document as evidence, but he did not take photos of each page of each document. It is therefore impossible to conclude when the products were ordered by Respondent.
6. The exception to Investigator Wakefield’s testimony is a Be Calm CBD Inhaler featured in Exhibit B12, which he testified was publicly displayed during the investigation. This product is a non-compliant hemp product according to the testimony of both Investigator Wakefield and Mr. Phillips. However, though it is a violation of the hemp regulations, there is no evidence this product violates Cannabis Law §125(1) or 138(a). Investigator Wakefield additionally testified that the vapes present in Exhibit B9 were publicly displayed during the inspection. The labels of these vape products are more readily visible in Exhibits B13-19. Also at issue are three products that have visible ingredient labels stating that they contain something other than full spectrum hemp extract: Slurricane Indica, Feel Goo’d Kratom Klouds Watermelon Mint, and Canna River Sativa Green Crack. The first states that it contains Hexahydrocannabinol Hemp Extract. The second purports to contain olive derived HHC, Kratom extract, and terpenes. The third

states in contains Hexahydrocannabinol (HHC), hemp derived terpenes, and assorted plant terpenes. Investigator Wakefield was questioned repeatedly regarding his belief that all three products were illicit, impermissible products. He was unable to explain how or why they were, nor did OCM put forth any other evidence, such as the testimony of a pharmacist or chemist, regarding whether HHC is considered a synthetic cannabinoid, artificially derived cannabinoid, or a cannabinoid created through isomerization.

DECISION

WHEREFORE, as OCM failed to prove by a preponderance of the evidence that Respondent engaged in the sale of illicit cannabis and cannabis products without a license on August 6, 2024, this case is dismissed.

Dated: January 16, 2024

Laurie Cartwright

Administrative Law Judge

This decision was sent via email on January 16, 2024, to the following:

Nickolas Perry
Sheila Wagner
Celena Ditcher, Esq.
Kevin Brown, Esq.
Joshua Bauchner, Esq.
Natalie Diaz, Esq.

PLEASE BE ADVISED: Either party may appeal this decision within 30 calendar days of receipt, according to the specific manner described at 9 NYCRR 133.23(g)(5).