

Notice of Violation

(3AAC 306.805)

This form, all information provided and responses are public documents per Alaska Public Records ACT AS 40.25

Date: License #/Type:
Licensee: Address:
DBA: AMCO Case #:

This is a notice to you as licensee that an alleged violation has occurred. If the Marijuana Control Board decides to act against your license, under the provisions of AS 44.62.330 - AS 44.62.630 (Administrative Procedures Act) you will receive an Accusation and Notice of your right to an Administrative Hearing.

Note: This is not an accusation or a criminal complaint.

3 AAC 306.805 provides that upon receipt of a Notice of Violation, a licensee may request to appear before the board and be heard regarding the Notice of Violation. The request must be made within ten days after receipt of the Notice of Violation. A licensee may respond, either orally or in writing to the Notice. 3 AAC 306.810 (2)(A)(B)(C) failed, within a reasonable time after receiving a notice of violation, to correct any defect that is the subject of the notice of violation of AS 17.8 or this chapter.

IT IS RECOMMENDED THAT YOU RESPOND IN WRITING TO DOCUMENT YOUR RESPONSE FOR THE MARIJUANA CONTROL BOARD.

***Please send your response to the address below and include your marijuana license number in your response.**

Alcohol & Marijuana Control Office
ATTN: Enforcement
550 W. 7th Ave, Suite 1600
Anchorage, Alaska 99501
amco.enforcement@alaska.gov

Issuing Investigator:

Received by:

SIGNATURE:



SIGNATURE:

Delivered VIA:

Date:



Birch Horton Bittner & Cherot
a professional corporation

Jason Brandeis

Respond to Anchorage Office
T 907.263.7243 • F 907.276.3680
jbrandeis@bhb.com

September 23, 2020

VIA ELECTRONIC DELIVERY

Alcohol & Marijuana Control Office
Attn: Enforcement
550 W 7th Avenue, Suite 1600
Anchorage, AK 99501

RE: Case #AM20-1008
Our File No.: 508190.1

Dear AMCO Enforcement Staff:

Top Shelf Herbs hereby responds to the September 14, 2020 Notice of Violation issued for AMCO Case # AM20-1008.

Any violations of the regulations present in this case were unintentional. The licensee reasonably relied on AMCO's approval of permissible signage at the time of its initial inspection, and made subsequent changes based off of that initial interpretation. However, the applicable regulation governing signage at marijuana establishments is also sufficiently vague so as to be potentially unenforceable in this situation. Accordingly, the licensee requests guidance from AMCO regarding permissible signage at its facility and that no further punitive action be taken on this case.

From the licensee's perspective, the facts in this matter are as follows:

1. On July 13, 2020 AMCO and Municipality of Anchorage inspectors were present at the facility for the initial inspection. At the time of the initial inspection, Top Shelf had three window covering stickers with the store logo in the windows on the north (Northern Lights Blvd) side of the store and a banner with the store name above the entrance. Top Shelf passed its initial inspection and was allowed to begin operating. No indication was given that Top Shelf was in violation of the sign regulations at that time.
2. Top Shelf did not consider the window coverings to be signs. To the extent the window coverings were considered signs, AMCO inspectors approved of three window covers and one banner sign on the building at the time of the initial inspection. It was therefore reasonable for Top Shelf to rely on this action as approval of their signage. Since this format was approved, AMCO inspectors either considered this to be one sign only (the banner sign) or two signs (the banner sign and all of the window covers collectively equaling one additional sign).

3. At the time of the inspection, licensee Chism Leimbach explained that the establishment planned to install an additional banner sign on the building and the AMCO inspector did not provide any warning that such action would be a violation of the regulations. This supports the conclusion that AMCO did not consider the window coverings to be signs, and only the one banner was considered a sign, which would allow the addition of another banner sign.
4. A second banner was added on or about July 19, 2020 that stated "Marijuana Store Now Open." Top Shelf considered that tantamount to a standard "open for business" sign that would appear on any establishment, and not the type of signage prohibited by the regulations.
5. On or about July 23, 2020, Top Shelf added a third banner on the west (Photo Ave.) side of the store. That banner included the Top Shelf Herbs of Alaska Logo. Top Shelf considered this to be its second sign, as it did not consider the window coverings or the "open for business" banner to be signs.
6. On August 3, 2020 AMCO issued Advisory Notice #20-0802 identifying lack of compliance with State of Alaska regulations and Municipality of Anchorage ordinances governing signage on marijuana retail stores and advertising. This Advisory Notice stated: "On 7-31-20, AMCO Investigator Hamilton observed two males standing on the South side of East Northern Lights Blvd, just West of Arctic Blvd holding and waving two signs. The two signs depicted what appeared to be advertising for Alaska Top Shelf, a marijuana retail store. One of the signs had cloth attached to it which displayed a large marijuana leaf. When cars would come toward them, both would enter the public right of way, wave the signs at traffic and when traffic slowed, would retreat back to the concrete planters just off the sidewalk."

Subsequently, Top Shelf instructed the sign-wavers to cease their activities. At the time of this Advisory Notice, Top Shelf had three window sticker coverings, two banner signs with the store name and logo, and one "open for business" banner on the store. No warning was given at that time that such signage was improper.

7. The Marijuana Regulations governing signage on marijuana establishments are vague and do not provide sufficient guidance as to what conduct is or is not permitted. For example, 3 AAC 306.770(b) states that "A licensed marijuana establishment may have not more than three signs that are visible to the general public from the public right-of-way" and only two of them may be placed on the building. However, the term "sign" is not defined in the regulations, leading to confusion about what is or is included in the definition of the term "sign." For instance, 3 AAC 306.325(b) requires a specific type of sign at the entry to a marijuana retail store: a warning that "No one under 21 years of age is allowed." Reading these regulations together, it is not clear whether the "No one under 21" sign is considered one of the three permissible signs under 3 AAC 306.770(b).

Additionally, it is common for marijuana establishments to post signs on their buildings that address security concerns, such as signs stating “No Loitering” or “Premises Under Surveillance.” All stores will have signage indicating whether they are open or closed and what their hours of operation are. Under a broad reading of 3 AAC 306.770(b), all of these informational signs may be impermissible if they combine to exceed two total signs attached to the building.

Compare this, for instance, with the Anchorage Municipal Code, which defines “Sign” as “Any visual communication display, object, device, graphic, structure or part, situated indoors or outdoors, or attached to, painted on or displayed from a building or structure, in order to direct or attract attention to, or to announce or promote, an object, product, place, activity, person, institution, organization, or business or the like, by means of letters, words, model, banner, flag, pennant, insignia, device, designs, colors, symbols, fixtures, images, illuminations or representation used as, or which is in the nature of an announcement, direction, or advertisement.” See AMC 21.15.040. Given that AMCO inspectors initially approved the presence of three window stickers and one banner sign, did not report a violation when noticing the sign-wavers on August 3, and now describe three signs “advertising” the business in the window and two signs attached to the outside of the building, it is clear that guidance regarding analysis of the sign regulation is needed.

8. At this time, Top Shelf is not clear on which signs attached to the building AMCO takes issue with (the NOV states that there are three signs “advertising your business in the window and two signs attached to the outside of the building, one on the west side of the facility and one on the north side of the facility.” This would appear to be a total of five signs, clearly beyond the limit, but by that calculation, four signs were present on the date of initial inspection. Clarification is needed.
9. Regarding the “inflatable tube with the wording ‘Marijuana’ and a marijuana symbol on it,” the NOV describes this as advertising, but the licensee argues that this could be considered a sign (see the definition of “Sign, inflatable” in AMC 21.15.080), and under Top Shelf’s reasoning that there were only two banner signs on the store, this inflatable sign would therefore be the permissible third sign that is not attached to the licensed premises. Alternatively, if this sign was found to be advertising, the licensee concedes that it did not have the appropriate warning statements. Given the lack of certainty about the status of this item as a sign or an advertisement, the licensee has removed it pending further guidance from AMCO.

For the reasons stated above (reliance on the initial approvals of AMCO and Municipality of Anchorage investigators vagueness in the regulations) and because this is the licensee’s first NOV, Top Shelf Herbs requests that this NOV be rescinded and that no further punitive action be taken against the licensee. Top Shelf further requests clarification and guidance from the Marijuana Control Board regarding the extent of the applicability of the sign prohibitions contained in the Marijuana Regulations.”

Sincerely,

BIRCH HORTON BITTNER & CHEROT

/S/ Jason Brandeis

JMB:sm