

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch**

Kenyes Market #1,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0260827

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to uphold the decision by the Retailer Operations Division to permanently withdraw the authorization of Kenyes Market #1 (hereinafter “Kenyes Market #1” or “Appellant”) to participate in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(3)(i) and 7 CFR § 278.1(k)(3), in its administration of the SNAP, when it permanently withdrew the authorization of Kenyes Market #1 to participate in the SNAP.

AUTHORITY

7 U.S.C. 2023 and its implementing regulations at 7 CFR § 279.1 provide that “[A] food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

The record reflects that the USDA Office of Inspector General conducted an undercover investigation of Kenyes Market #1 between January 1, 2014 and May 24, 2017. As a result of this investigation, on April 7, 2022, in the United States District Court, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the owner of Kenyes Market, plead guilty to two counts of felony conspiracy to distribute controlled substances and analogues (5 U.S.C. § 552 (b)(6) & (b)(7)(C)). 5 U.S.C. § 552

(b)(6) & (b)(7)(C). The record reflects that on October 3, 2022, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was sentenced to 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

In a letter dated December 6, 2022, the Retailer Operations Division determined that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) criminal conviction constituted a lack of business integrity in accordance with SNAP regulations at 7 CFR § 278.1(b)(3)(i). As a result, the Appellant's application was permanently withdrawn pursuant to 7 CFR § 278.1(l)(1)(iv) and § 278.1(k)(3)(i). Per UPS confirmation of delivery, the withdrawal letter was delivered to the Appellant at the store address of record on December 7, 2022.

In a letter postmarked December 19, 2022, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review. FNS granted the Appellant's request for administrative review by letter dated January 24, 2023. Upon acceptance of the administrative review request, implementation of the permanent withdrawal was held in abeyance pending completion of this review. In an email correspondence of February 14, 2023, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 218, 7 CFR § 271.2, § 278.1(b)(3), and § 278.1(k)(3) establish the authority upon which a retail food store's or wholesale food concern's authorization to participate in the SNAP may be denied on the basis of a lack of business integrity. There also exist FNS policy memoranda and clarification letters which further clarify the basis for such decision.

7 CFR § 271.2 states, inter alia:

Retail Food Store means: . . . Public or private communal dining facilities and meal delivery services; private nonprofit drug addict or alcoholic treatment and rehabilitation programs; publicly operated community mental health centers which conduct residential programs for drug addicts and/or alcoholics; public or private nonprofit group living arrangements; public or private nonprofit shelters for battered women and children; public or private nonprofit establishments, approved by an appropriate State or local agency, that feed homeless persons; or a restaurant that contracts with an appropriate State agency to provide meals at concessional (low or reduced) prices to homeless SNAP households . . .

7 CFR § 278.1(b)(3) states, inter alia:

FNS shall deny the authorization of any firm from participation in the program for a period of time specified in paragraph (k) of this section based on consideration of information regarding the business integrity and reputation of the firm as follows:

- (i) Conviction of or civil judgment against the owners, officers or managers of the firm for:
 - (A) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
 - (B) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims or obstruction of justice; or
 - (C) Violation of Federal, State, and/or local consumer protection laws relating to alcohol, tobacco, firearms, controlled substances and/or gaming licenses.

7 CFR § 278.1(k)(3) states, inter alia:

FNS shall deny the application of any firm if it determines that the firm has been found to lack the necessary business integrity and reputation to further the purposes of the program. Such firms shall be denied authorization in the program for the following time:

- (i) Firms for which records of criminal conviction or civil judgment exist that reflect on the business integrity of the owners, officers, or managers as stipulated in § 278.1(b)(3)(i) shall be denied authorization permanently.

7 CFR § 278.1(l)(1) states, inter alia:

FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons:

- (iv) The firm fails to maintain the necessary business integrity to further the purposes of the program as specified in paragraph (b)(3) of this section. Such firms shall be withdrawn for a lack of business integrity for periods of time in accordance with those stipulated in paragraph (k)(3) of this section for specific business integrity findings.

Additionally, in interpretation of the regulations, relevant policy provides, inter alia, that:

The following situations warrant denial of authorization:

- Criminal conviction records reflecting on the honesty or integrity of the owners, officers, managers, or other personnel of the applicant firm.
- Judicial determinations in civil litigation adversely reflecting on the integrity of the owners, officers, managers, or other personnel of the applicant firm.

- Any other evidence reflecting on the business integrity or reputation of the applicant firm.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the request for administrative review and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant refutes the facts that the owner and store should be disqualified for an alleged violation of the SNAP regulations.
- The store owner is an immigrant from Palestine and was the first member of the family to come to the United States.
- The store owner began owning and operating convenience stores in the area. Since opening the first store 26 years ago, the owner has worked tirelessly in low-income areas and has eventually been able to move nearly his entire family to the United States.
- The Appellant has not been cited for prior SNAP violations.
- The offenses to which the store owner pled guilty are regulatory offenses, not crimes of moral turpitude that should result in the loss of any further rights and liberties afforded under the SNAP.
- In 2017, the Appellant was swept up in a large investigation regarding alleged offenses regarding cigarette taxes. The case is on appeal to the 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- As of January 4, 2023, the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) stayed the execution of the sentence pending the resolution of the appeal.
- As such, the case is not final and therefore should not be considered under Section 278.1(b)(3) of the SNAP regulations.
- The Appellant is willing to submit to other conditions imposed upon it short of a permanent SNAP withdrawal.
- The Appellant is located in a low income area and a SNAP withdrawal would impose a hardship on area participating SNAP households.
- A SNAP disqualification would impose a financial hardship on the Appellant.

In support of these contentions, the Appellant provided the Appeal from the U.S. District Court 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to validate or to invalidate the initial determination of the Retailer Operations Division, and as such is limited to consideration of the relevant facts and circumstances at the time of the decision. The

authorization of a store to participate in the SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived.

The primary issue under consideration is whether or not the Appellant has the necessary business integrity and reputation, in accordance with regulations, to further the purposes of SNAP. The USDA holds that the business integrity of a firm is critically important to the effective operation of SNAP. Therefore, the criteria outlined in the regulations focus on the business integrity and reputation of the owners, officers, and managers of firms seeking SNAP authorization. Prior criminal convictions relating to business integrity reflect on the ability of a firm to effectuate the purposes of SNAP and abide by the rules governing the program.

A review of the case record indicates that on April 7, 2022, in the United States District Court, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the owner of Kenyes Market, plead guilty to two counts of felony conspiracy to distribute controlled substances and analogues (5 U.S.C. § 552 (b)(6) & (b)(7)(C)). The record reflects that on October 3, 2022, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was sentenced to 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The SNAP regulations enunciated at 7 CFR § 278.1(b)(3) provide for the permanent denial/withdrawal of an applicant firm to participate as a SNAP retailer based on a number of reasons and for various timeframes. The statute and regulations specifically address the factors which constitute a lack of business integrity. These considerations are eligibility concerns; a firm either meets all the requirements stipulated in law and regulations or it does not. The regulations at 7 CFR § 278.1(b)(3)(i)(C) state: “FNS shall deny the authorization of any firm from participation in the program for a period of time specified in paragraph (k) of this section based on consideration of information regarding the business integrity and reputation of the firm as follows: (i) Conviction of or civil judgment against the owners, officers or managers of the firm for: . . . (C) Violation of Federal, State, and/or local consumer protection laws relating to alcohol, tobacco, firearms, controlled substances and/or gaming licenses.”.

Convictions related to business integrity are always considered to be most serious. This is reflected in 7 CFR § 278.1(k)(3)(i) which reads, that “Firms for which records of criminal conviction or civil judgment exist that reflect on the business integrity of owners, officers, or managers as stipulated in § 278.1(b)(3)(i) shall be denied authorization permanently.” In addition, 7 CFR § 278.1(l)(1)(iv) states that “FNS shall withdraw the authorization of any firm authorized to participate in the program if the firm fails to maintain the necessary business integrity to further the purposes of the program as specified in paragraph (b)(3) of this section. Such firms shall be withdrawn for a lack of business integrity for periods of time in accordance with those stipulated in paragraph (k)(3) of this section for specific business integrity findings.” 5 U.S.C. § 552 (b)(6) & (b)(7)(C) criminal conviction constitutes a lack of business integrity in accordance with SNAP regulations at 7 CFR § 278.1(b)(3)(i). The sentence pending appeal outcome does not hinder the imposition of a permanent SNAP withdrawal.

There is no agency discretion in the matter of what sanction is to be imposed when a criminal conviction related to business integrity is involved. The regulations have clearly set out the position of USDA with regard to the business integrity of participating retailers. If the matter violates the provisions of 7 CFR § 278.1(b)(3), action to deny/withdraw an application must be taken accordingly. This review can find no evidence of overreach on the part of the agency or

any evidence that it has exceeded its authority in this matter. This review finds it justifiable for USDA to take the position that applicants who have been convicted of any of the crimes listed in § 278.1(b)(3)(i) do not have the necessary business integrity needed for program participation. Regardless of the circumstances surrounding the charges, FNS has determined that a person convicted of such crimes is too great a risk to take on in such an important government program. Because the conviction fits within the parameters of § 278.1(b)(3)(i), it is the finding of this review that a permanent withdrawal is appropriate and was applied in accordance with 7 CFR § 278.1(l)(1)(iv) and § 278.1(k)(3)(i).

The Appellant contends that it has not been cited for prior SNAP violations. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

The Appellant argues that a permanent SNAP withdrawal would impose a hardship on area participating SNAP households as well as a financial hardship on the firm. However, such contentions cannot constitute grounds for reversing the withdrawal decision in the present case. There are no provisions in the Food and Nutrition Act, SNAP regulations or agency policy allowing hardship to retail store owners, SNAP customers, etc. as considerations in determining eligibility for participation in the SNAP when the firm does not meet the business integrity provisions of the SNAP.

CONCLUSION

Based on the information provided on the court record assessed by the Retailer Operations Division, it is determined that in accordance with SNAP regulations specified in 7 CFR § 278.1(b)(3)(i), the firm has failed to maintain the necessary business integrity to further the purposes of the program and is therefore withdrawn from participation in the SNAP. The withdrawal action shall be permanent in accordance with 7 CFR 278.1(l)(1)(iv) and § 278.1(k)(3)(i) of the SNAP regulations. As such, the imposition of a permanent SNAP withdrawal action on Kenyes Market #1, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), by the Retailer Operations Division is affirmed as the appropriate sanction for the program violations outlined in the subject case.

In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the permanent withdrawal of SNAP retailer authorization will become effective 30 days after receipt of this decision.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent

jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

April 25, 2023