

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

Baytown SFD Market and Restaurant,

Appellant,

v.

Case Number: C0202664

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the decision of the ROD Office (hereinafter “SNAP Office”) to withdraw the authorization of Baytown SFD Market and Restaurant to participate in the Supplemental Nutrition Assistance Program (SNAP) (hereinafter “Appellant”) was in accordance with the statute and regulations. The firm may reapply to participate in the SNAP at any time.

ISSUE

The issue accepted for review is whether the SNAP Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(a), § 278.1(b), § 278.1(b)(5), (6) and § 278.1(n) and (m) when it made the decision to withdraw Appellant’s authorization to participate in the SNAP.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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.”

STATEMENT OF THE CASE

The record reflects that on or about April 15, 1998, Baytown SFD Market and Restaurant was authorized to participate in the SNAP. Appellant was subsequently advised in a letter dated August 29, 2017 of the Department's decision to withdraw the authorization. The regulatory

basis given for that withdrawal was 7 C.F.R. § 278.1(m) and (n). On September 6, 2017, Appellant requested an administrative review of this action. The request was granted.

STANDARD OF REVIEW

In administrative proceedings involving disputes of regulatory actions or inactions, USDA assumes the responsibility of establishing a sufficient factual record to prove or disprove the allegations of the appeal. The record is then reviewed in light of the evidentiary standards and analytical frameworks established by various courts of law.

In appeals of adverse actions an appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means an 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

The controlling statute in this matter is contained in the **Food & 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. § 2018, 7 C.F.R. § 271.2, § 278.1(b), § 278.1(b)(5) and § 278.1 (m) and (n) establish the authority upon which a retail food store or wholesale food concern may have its authorization to participate in the SNAP withdrawn.

7 C.F.R. § 271.2 states, in part:

Retail Food Store means: An establishment or house-to-house trade route that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods in at least two such categories (Criterion A)...or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)...Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores...

7 C.F.R. § 278.1(a) states, in part:

FNS may require that a retail food store be visited to confirm eligibility for program participation prior to authorization or reauthorization

7 C.F.R. § 278.1(b) states, in part:

An applicant shall provide sufficient data and information on the nature and scope of the firm's business for FNS to determine whether the applicant's participation will further the purposes of the program. Upon request, an applicant shall provide documentation to FNS to verify information on the application. Such information may include, but is not limited to, State and local business licenses, Social Security cards, drivers licenses, bills of sale, deeds, leases, sales contracts, State certificates of incorporation, sales records, invoice records and business-related tax records. **Failure to comply with any request for information or failure to sign a written release form shall result in denial of the application for authorization or withdrawal of a firm or concern from the program** (emphasis added).

7 C.F.R. § 278.1(b)(5) states, in part:

At the time of an initial request for authorization as well as during a subsequent reauthorization a firm must provide its employer identification number and social security numbers of the following individuals: the owner of a sole proprietorship, general partners of firms which are partnerships and up to five of the largest shareholders of privately owned corporations.

7 C.F.R. § 278.1(b)(6) states in part:

In determining whether a firm qualifies for authorization, FNS shall consider any other factors which the FNS Officer-In-Charge considers pertinent to the application under consideration.

7 C.F.R. § 278.1(m) states in part:

FNS may withdraw or deny the authorization of any firm which refuses to accept correspondence from FNS, fails to respond to inquiries from FNS within a reasonable time or cannot be located by FNS with reasonable effort.

7 C.F.R. § 278.1(n) states in part:

At the request of FNS a retail food store or wholesale food concern will be required to undergo a periodic reauthorization determination by updating any or all of the information on the firm's application form. Failure to cooperate in this process will result in withdrawal of the firm's approval to participate in the program.

CASE CHRONOLOGY

The record reflects that the SNAP Office requested Social Security information and photo identification for an additional owner of the Appellant firm via a letter dated July 12, 2017, which Appellant received on July 13, 2017. This request was based upon Appellant's earlier Reauthorization Application, submitted on or about January 30, 2017, which indicated that an owner was added to the two current owners. The letter also requested several other documents

such as business licenses, tax returns, tax reports, Z-reports, cash register receipts and recent product purchase receipts/invoices. The August 29, 2017 Withdrawal Letter was received by Appellant on September 1, 2017. Appellant requested a review of the determination via a letter postmarked September 6, 2017.

APPELLANT'S CONTENTIONS

In its written request for review dated September 6, 2017, Appellant provided information in which it was argued that:

1. The firm was affected by Hurricane Harvey for a week and is just now recovering from the devastation of the flood.
2. With its request for administrative review, Appellant notifies USDA that there is no ownership change at the firm as Appellant initially reported; that owner is no longer in the business portion as of June. So everything remains the same with the current ownership and Appellant shouldn't have to submit any further documents; Appellant refuses the decision of the ROD Office to withdraw it from the SNAP.

ANALYSIS AND FINDINGS

In regard to contention 1 above, as noted, the ROD Office's request for information was dated July 12, 2017 and received by the Appellant the next day, July 13, 2017 at 10:23 AM and signed by "5 U.S.C. § 552 (b)(6) & (b)(7)(C)," which, incidentally, is the same last name as the person Appellant states ceased involvement with the firm in June. Nonetheless, the hurricane referenced by Appellant did not make landfall in Texas until late August, so it is unclear how this could have impacted Appellant's ability to respond to an information request from the ROD Office in mid-July 2017.

Appellant received the ROD Office's August 29, 2017 Withdrawal Letter on September 1, 2017, arguably during the later stages of said hurricane; nonetheless, Appellant requested a review of the decision via a letter dated September 6, 2017, seemingly indicating that the storm did not substantially impact Appellant's ability to receive or respond to correspondence. Contention 1 above presents no compelling rationale to alter the ROD Office's withdrawal decision.

With regard to contention 2 above, while Appellant's assertion (that the additional owner noted in its January 30, 2017 Reauthorization Application was terminated from business operations at the firm in June) does constitute an attempt to respond to the information request, Appellant does not address the additional items requested in the July 12, 2017 letter, as noted above. Consequently, Appellant continues to refuse to provide requested information that the ROD Office is, by statute and regulation, well within its authority to request/require. For emphasis, 7 C.F.R. § 278.1(b) and 7 C.F.R. § 278.1(m) are again referenced below:

An applicant shall provide sufficient data and information on the nature and scope of the firm's business for FNS to determine whether the applicant's participation will further the

purposes of the program. Upon request, an applicant shall provide documentation to FNS to verify information on the application. Such information may include, but is not limited to, State and local business licenses, Social Security cards, drivers licenses, bills of sale, deeds, leases, sales contracts, State certificates of incorporation, sales records, invoice records and business-related tax records. **Failure to comply with any request for information or failure to sign a written release form shall result in denial of the application for authorization or withdrawal of a firm or concern from the program** (emphasis added).

FNS may withdraw or deny the authorization of any firm which refuses to accept correspondence from FNS, fails to respond to inquiries from FNS within a reasonable time or cannot be located by FNS with reasonable effort.

It is further added that, as noted in the ROD Office's August 29, 2017 Withdrawal Letter, Appellant may reapply to participate in the SNAP at any time; the withdrawal does not adversely impact any application Appellant may wish to submit in the future.

CONCLUSION

In view of the above, it is my determination that the SNAP Office's withdrawal of Appellant's authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 278.1(a), § 278.1(b), (l), (m) and (n). The withdrawal, therefore, is sustained. Appellant may reapply to participate in the SNAP at any time.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food & Nutrition Act of 2008 (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 provisions of the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

DANIEL S. LAY
Administrative Review Officer

April 13, 2018