

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

Big Apple,

Appellant,

v.

Case Number: C0213001

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of Big Apple (“Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(k)(3)(vi), when it withdrew the authorization of Appellant to participate in SNAP on August 5, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

On August 5, 2018, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in the SNAP was being withdrawn, in accordance with 7 CFR § 278.1(l)(1)(iv) and 7 CFR § 278.1(k)(3)(vi). In concluding that Appellant should be withdrawn, the Retailer Operations Division relied upon information that owner **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** violated Section 24.112(5)(e) of Florida Lottery Statue in July 2014.

7 U.S.C. 2018 (b)(6) & (b)(7)(c)

On September 12, 2018, Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k)(3)(vi) and (l)(iv) establishes the authority upon which the application of any firm to participate in the SNAP may be denied based on consideration of information regarding the business integrity and reputation of the firm.

7 CFR § 278.1(l) states, in part:

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

7 CFR § 278.1(b)(3) states, in part:

FNS shall deny the application of any firm from participation in the program for a period of time as specified in paragraph (k) of this section based on consideration of information regarding the business integrity and reputation of the firm as follows Commission of any other offense indicating a lack of business integrity or business honesty of owners, officers or managers of the firm that seriously and directly affects the present responsibility of a person.

7 CFR § 278.1(k)(3)(vi) states:

Firms for which any other evidence exists which reflects negatively on the business integrity or business honesty of the owners, officers or managers of the firm as specified in 7 CFR § 278.1(b)(3)(vi) shall be denied for a period of one year from the effective date of the denial.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

7 U.S.C. 2018 (b)(6) & (b)(7)(c)

Appellant has operated since March 5, 2003. Appellant has never been charged with selling alcohol to minors nor received publicity for any violations. A suspension will create a hardship for the firm and customers who rely upon the firm.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

With respect to Appellant's contentions, SNAP regulations, enunciated at 7 CFR § 278.1(k), and internal agency directives provide for the withdrawal of firms from continued participation in SNAP on the basis of a number of reasons, one of which is lack of business integrity.

7 U.S.C. 2018 (b)(6) & (b)(7)(c)

The evidence indicates that while an owner of Appellant's firm, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) violated Section 24.112(5)(e) of Florida Lottery Statue in July 2014. That 5 U.S.C. § 552 (b)(6) & (b)(7)(C) did not violate any other regulations or statutes does not provide any valid basis for reversing the withdrawal action imposed against Appellant. Therefore, Appellant's contentions are not a basis for dismissing the Retailer Operations Division's withdrawal action.

As previously mentioned, 7 CFR § 278.1(l) is specific in its requirement that "FNS shall withdraw the authorization of any firm authorized to participate in the program" if the firm lacks business integrity. Offenses related to business integrity are always considered serious. If the matter violates the provisions of 7 CFR § 278.1(b)(3), as is the case here, withdrawal of authorization is required.

Hardship to Appellant

Appellant asserts that withdrawal of authorization would put the business in financial jeopardy. Economic hardship is a likely consequence whenever a store's SNAP authorization is withdrawn. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship to the firm would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to economic hardship of the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully

with program regulations, but also to those retailers who have been withdrawn from the program in the past for similar deficiencies. Therefore, Appellant's contention that it will incur economic hardship based on an administrative penalty does not provide any valid basis for dismissing the withdrawal of Appellant's authorization.

No Undue Hardship to SNAP Participants

Appellant asserts that disqualification would be a hardship to SNAP households who rely on the store. Some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store, since the normal shopping pattern of such SNAP participants may be changed due to the disqualification. Section 278.6(f)(1) of SNAP regulations provides for Civil Money Penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. However, this regulation is not applicable to firms who are withdrawn for failing to meet the business integrity provisions of 7 CFR § 278.1(l).

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to withdraw the application of Big Apple to participate as an authorized retailer in SNAP is sustained. According to 7 CFR § 278.1(b)(3)(vi) of the SNAP regulations, Appellant is ineligible to submit a new application for the subject store for a minimum period of one year from the effective date of withdrawal. In accordance with SNAP regulations, this withdrawal action shall become effective 30 days after delivery of this letter.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

RICH PROULX
Administrative Review Officer

November 5, 2018