

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

Big Easy Food Mart,,

Appellant,

v.

Case Number: C0205764

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the final decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS), that there is sufficient evidence to sustain the initial decision to withdraw the authorization of Big Easy Food Mart(hereinafter “Appellant”) to participate in the Supplemental Nutrition Assistance Program (SNAP) for a period of one year, by the Retailer Operations Division (hereinafter “ROD Office”).

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(3), § 278.1(k)(3) and § 278.1(l)(1) when it made the decision to deny Appellant’s application 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.”

CASE CHRONOLOGY

The record reflects that on 9/25/2014, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) signed as Owner an application for authorization to participate in the SNAP. The firm was authorized to participate in the SNAP on or about October 20, 2014. Appellant was subsequently advised in a letter dated January 5, 2018 of the Department’s decision to withdraw the firm’s authorization to participate in the program. The regulatory bases given for that denial were 7 C.F.R. § 278.1(l)(1), § 278.1(b)(3) and § 278.1(k)(3). On January 18, 2018, Appellant requested an administrative review of this action. The request was granted.

STANDARD OF REVIEW

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, would 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)(3), § 278.1(k)(3) and § 278.1(l) establish the authority upon which a retail food store's or wholesale food concern's authorization to participate in the SNAP may be denied or withdrawn on the basis of a lack of business integrity.

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(b)(3) states, in part:

FNS shall deny the authorization 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:

(vi) 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 C.F.R. § 278.1(k)(3) states, in part:

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 period of time:

- (vi) 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 § 278.1(b)(3)(vi) shall be denied for a period of one year...

7 C.F.R. § 278.1(l)(1) states, in part:

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).

SUMMARY OF THE CHARGES

The ROD Office found that the Appellant firm had violated Louisiana State Statutes with specific regard to Louisiana Revised Statutes § 26:911A(6) and § 26:90A(11) relating to controlled substances found on the firm's premises on or about August 2, 2016. The firm was fined \$2500 for said violations via a decision rendered on March 1, 2017 by the Commissioner of the Louisiana Office of Alcohol and Tobacco Control (ATC). The ROD Office determined that these violations warranted a one-year withdrawal of authorization in accordance with the regulatory provisions noted in the foregoing.

APPELLANT'S CONTENTIONS

In its written request for review dated January 18, 2018, and in subsequent correspondence, Appellant provided information in which it was argued that:

1. The ROD Office exceeded its authority under 7 U.S.C § 2018 in viewing a past violation (for which no criminal charges were sustained) as a business integrity issue because the Owners of the Appellant firm were not involved in nor benefitted from the offense precipitating the state sanction. The violation of state statutes was in connection with a past employee of the Appellant store, who had been arrested at the store for the illegal sale of a controlled substance. The Appellants were cleared of any wrongdoing, as they did not engage in or have knowledge of the illegal activity on the premises. However, the Commissioner of the Office of Alcohol and Tobacco Control (ATC) issued a civil penalty against Appellant. Appellant's citation for an employee infraction is not reasonably related to business integrity. Appellant argues that the employee's offenses, having been committed without the authority or permission of ownership, were no reflection upon the Appellant. The sole reason Appellant was cited by the Liquor Commission was because the offense(s) took place at Appellant's store - Appellants were not charged with being negligent or permitting the offense or with benefitting from same. The actions of an employee have no connection to a store owner's business integrity.
2. A one-year disqualification is not reasonable in light of the regulations or the statutes governing the SNAP. There is no correlation between the store's ongoing business integrity (specifically, the integrity of the ownership or management) and (ARO assumes the following) and the act(s) precipitating the SNAP disqualification. The disqualification is tantamount to a jail sentence in one state for a speeding ticket in

another state. Specific offenses reflecting upon business integrity are not mentioned in the regulations or the Code, but both require that such offenses be related to the business practices of the store. Appellant cites WIC regulations at 7 C.F.R. § 246.12(g)(3)(ii), which focuses on ownership/management honesty.

3. Appellant requests that the ARO seek legal advice regarding the case law cited in Appellant's Brief. Authorization to withdraw authorization to participate in the SNAP is derived from 7 U.S.C §2018(a)(1)(D), which states in pertinent part that the Department may consider the business integrity and reputation of the applicant in authorizing or denying participation. Appellant cites examples of case law. Case law supports the notion that the Department's business integrity actions must involve owners/management and the firm must have benefitted from the offense.
4. If the Department suspends retailers where store employees violated tobacco and liquor laws on the store's premises, the Department would have to disqualify a number of larger stores and corporations, such as those noted in Appellant's Attachment 1, 2 and 3 to its Brief. The withdrawal action for the Appellant store, without taking similar action for the other stores listed in the Attachment, would be arbitrary and capricious, unconstitutional and subject to Judicial reversal.
5. If the withdrawal is not reversed, it will be judicially appealed and the Department will be forced to disqualify 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and other major retailers who have faced more severe sanctions than the fine levied on the Appellant. A one-year disqualification is going to cause a myriad of unintended consequences that the Department cannot possibly be interested in.
6. From a business administration standpoint, the business integrity portion of the statute and regulation were meant to eliminate those stores which were interested in gaining the system at the expense of the Government or the participants. Such does not apply in this case. The business integrity provision should be used sparingly and only in circumstances which clearly impact the Department's ability to make certain the SNAP is fulfilling its purposes.

ANALYSIS AND FINDINGS

In regard to contention 1 above, the owners were involved in the offenses at issue at least to the extent they occurred in their store. The decision issued by the ATC Commissioner found that the permittee (the Owners of the Appellant firm) did in fact violate the provisions of Louisiana State Statutes at § 26:911(A)(6) and 90(A)(11), in that no license holder shall do **or permit** (emphasis added) the illegal sale, offering for sale, possession or consumption of any kind/type of narcotics or controlled substance. The Owners of the firm were the permit/license holders. The decision clearly holds the Owners accountable for prohibited acts committed on store premises. The decision does not reference only those illegal acts not alleged or proven to have been personally committed by the Owners; there is no exception provided to absolve Ownership of responsibility for the specific illegal acts within the context of the Liquor license. The sanction was in fact imposed upon the Owners of the Appellant firm and not the employee otherwise involved. The employee found in possession of controlled substances by local law enforcement, not being the Liquor licensee, was not mentioned in the decision; it is reasonably safe to assume that this is because the employee was not ultimately responsible for meeting the licensing requirements, whereas ownership was the responsible party. The employee may well have been held

responsible in some other legal manner not noted in the record, though such is not necessary to a determination that the license holders were held accountable for illegal acts under Louisiana State Statutes.

Appellant may argue that the state of Louisiana should not hold licensees accountable for illegal acts under the auspices of the ATC and/or the ROD Office should not in turn regard sanctions imposed upon a liquor license holder as relevant to a SNAP authorization holder, even when the two are the same entity. The argument would negate the premise of a substantial portion of the business integrity provisions of the SNAP regulations. One of the basic provisions of the regulations in making such determinations is to consider business-related sanctions imposed by other governmental agencies and, in fact, other offenses indicating a lack of business integrity. The sanction imposed by the ATC in the present case was well within the meaning of the business integrity statute and regulatory framework at issue.

Regarding contention 2 above, 7 C.F.R. § 278.1(k)(3)(vi) clearly provides that, for violations referenced under 7 C.F.R. § (b)(3)(vi), the withdrawal period shall be one year. The ROD Office determined that the violations precipitating the ATC sanction did in fact reflect upon Appellant's business integrity, as the ATC sanctions, as noted, were in fact imposed upon the Appellant business (not upon the employee). It is noted for the record that the withdrawal period imposed by the ROD Office is the least severe provided by regulation.

With regard to contention 3 above, Appellant cites case law in support of its contention that the sanction should be reversed. However, considerations of legal precedent through case law, or the lack thereof in relation to the present case, are beyond the scope of this review. Case law considerations are more appropriately within the province of judicial review; Appellant's case law references are acknowledged in this context only and no further findings are rendered in this regard. This review relies upon the statute and regulations governing the SNAP and evaluates whether the decision of the ROD Office was in accordance with same and sustainable by a preponderance of the evidence. Additionally, as noted in the foregoing, the ATC did in fact clearly reference ownership of the Appellant firm in its decision

In regard to contention 4 above, to the extent, during the administration of the SNAP (not limited to, but typically during, authorization or reauthorization activities), the ROD Office obtains information with regard to controlled substance violations imputed to store owners, said office has very little discretion not to act upon such information. Within that context and those parameters, the agency very consistently and systematically applies the business integrity provisions of the statute and regulations. This is not to say that the statute or regulations require the agency to seek out every violation sanctioned by another Federal, State or local government body and to then apply business integrity provisions. Appellant may argue that if information on all business-related infractions is not obtained and acted upon by ROD Offices, that no information on any particular business-related infraction can be acted upon by any ROD Office. However, the business integrity provisions in the regulations are found in the same general subject area devoted to determining eligibility for the SNAP - that is, there are several considerations when authorizing or re-authorizing a store to participate, or when otherwise considering a firm's eligibility to participate, and business integrity is one of these. Appellant provides examples of alcohol-related infractions sanctioned at other firms by other government

agencies; as noted, to the extent such sanctions are revealed, as noted, typically during authorization and periodic reauthorization activities, they are routinely evaluated under the business integrity provisions and, if appropriate, acted upon.

Regarding contention 5 above, any judicial action taken with regard to this or any other agency action is beyond the scope of this review; no further findings are rendered in this regard.

With regard to contention 6 above, as noted in the foregoing, business integrity provisions of the regulations are not limited to addressing situations in which firms attempt to circumvent the SNAP statute and/or regulations, but also include consideration of actions taken by other governmental entities that reflect upon the business integrity of a particular firm. Additionally, there is no provision in the statute or regulations specifying the number of times the agency may make denial or withdrawal decisions based on business integrity considerations.

CONCLUSION

In view of the above, it is my determination that the ROD Office's one-year 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. § 271.2, § 278.1(b)(3), § 278.1(k)(3) and § 278.1(l)(1). The withdrawal, therefore, is sustained and will take effect 30 days following Appellant's receipt of this decision. The firm may reapply up to 10 days prior to the end of the one-year period.

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.

In accordance with 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 the agency receives such a request, it 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

August 13, 2018