

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

**B's Wine & Liquor,**

**Appellant,**

**v.**

**Case Number: C0213111**

**Retailer Operations Division,**

**Respondent.**

**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 support the Retailer Operations Division's permanent denial of the application of B's Wine & Liquor (hereinafter "Appellant") to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it permanently denied the application of B's Wine & Liquor.

**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 Appellant firm originally applied to participate as a retailer in SNAP on August 14, 2018. On the SNAP application, Question #16 asks, "Was any officer, owner, partner, member, and/or manager convicted of any crime after June 1, 1999?" The Appellant marked "yes," and explained that **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

In a letter dated August 21, 2018, the Retailer Operations Division requested from the Appellant additional information regarding the criminal conviction. Specifically, the letter requested court records showing the date of the conviction and details related to the conviction. In response to this letter, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** sent five pages of court records showing that **5 U.S.C. §**

552 (b)(6) & (b)(7)(C). The court records further showed that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) entered a plea of nolo contendere, acknowledging that such a plea was the same as a guilty plea.

After reviewing the Appellant's documentation, the Retailer Operations Division determined that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) 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 denied pursuant to 7 CFR § 278.1(k)(3)(i). A letter of denial was sent to the Appellant on September 19, 2018.

In a letter postmarked September 27, 2018, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision. The request was granted.

It is noted that on October 16, 2018, the Appellant, through counsel, requested information from the agency's case file in a request submitted under the Freedom of Information Act (FOIA). FNS responded to this request on November 7, 2018. On November 28, 2018, Appellant's counsel submitted a nine-page brief outlining its contentions in this case.

### STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established business integrity criteria.

7 CFR § 278.1(k) reads, in relevant part:

FNS shall deny the application of any firm if it determines that:

(3) 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:

(i) 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.

7 CFR § 271(b)(3) states, in relevant part:

(3) *The business integrity and reputation of the applicant.* 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:

(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 or other laws relating to alcohol, tobacco, firearms, controlled substances, and/or gaming licenses.

### APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant seeks reversal of the decision to permanently deny its application to participate as a retailer in SNAP.
- It is the Appellant's position that the criminal charges, which occurred during a time in which B's Wine & Liquor was not authorized, are not reasonably related to an issue of business integrity and that USDA has exceeded its authority under 7 U.S.C. § 2018 in determining that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is an issue of business integrity.
- Permanent denial is not reasonable in light of the regulations or statutes governing SNAP. The disqualification is tantamount to a jail sentence in one state for a speeding ticket incurred in another state.
- Without a correlation between the Appellant's ongoing business integrity (specifically the integrity of the ownership or management), there is no basis for USDA to now determine that such a severe penalty should be implemented.
- Pursuant to 7 CFR § 279.6, the Administrative Review Branch (ARB) is granted the opportunity to seek counsel regarding questions of law in these matters. As such, Appellant requests that ARB seek legal advice regarding applicable case law and the Appellant's position that the grounds for denial in this matter are not reasonably tied to business integrity. Appellant further requests that ARB seek guidance with respect to the regulation's arbitrary nature; the regulation exceeding Congress' mandate as set forth in 7 U.S.C. § 2018; a permanent withdrawal of the Appellant's application that does not fit the regulation; and the specifics of the charges brought against the Appellant. These matters are of the utmost importance to the Appellant's case and no decision would be appropriate under the circumstances without legal interpretation of the issues raised.
- The issues of law to be decided in this case are whether 5 U.S.C. § 552 (b)(6) & (b)(7)(C) prior charges are grounds for denying approval by FNS and whether the charges damaged the Appellant's business integrity and reputation to the extent that denial was justified.
- In 1999, 7 CFR § 278.1(b)(1) was amended by FNS with the intent to "strengthen integrity and eliminate fraud" within SNAP. The guidance issued with the Final Rule made it clear that the focus of the criteria in the amendment was on "business-related activities" rather than 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The guidance set forth examples

of the criminal convictions or civil liability which would have a bearing on business integrity matters, including offenses like insurance fraud, tax fraud, and embezzlement.

- Based on a clear reading of the regulation and the related guidance issued with the Final Rule, there is no doubt that the scope of business integrity, with regard to prior convictions and civil liabilities, is limited to business-related activities such as fraud or embezzlement, not 5 U.S.C. § 552 (b)(6) & (b)(7)(C) over a decade old. 5 U.S.C. § 552 (b)(6) & (b)(7)(C), while illegal, do not give rise to a question of an applicant's business integrity.
- In the denial letter, FNS stated that the permanent denial was based on 7 CFR § 278.1(b)(3)(i)(A). The agency's interpretation of this regulation would have to encompass the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) offense for which the Appellant was convicted. However, this interpretation is erroneous and exceeds the scope and intention of the regulation. Based on a reading of the regulation and the guidance that accompanied the Final Rule, it is clear that the focus on crimes and/or convictions concerning business integrity involve fraud and similar "white collar crimes" rather than 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The 5 U.S.C. § 552 (b)(6) & (b)(7)(C) charge is a decade old and occurred when 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and working as a cashier at a store in which he was neither owner nor manager.
- Following the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in 2007, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) has since been issued an Alcoholic Beverage License, a Cigarette and Tobacco Products License, and a Notary Public License. All of these required the disclosure of his prior 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and all entities in control of the issuance of these licenses found 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to be worthy thereof. Copies of these licenses have been included with the Appellant's brief.
- USDA has overreached in its authority to determine that any past 5 U.S.C. § 552 (b)(6) & (b)(7)(C) conviction, regardless of the type of violation and/or conduct involved, automatically warrants denial of a SNAP application. As such, the determination in this matter is invalid and should be amended.
- Where there is no fraud, deception, or business link to other wrongdoing, there should be no concern for USDA that the store would somehow be more prone to SNAP violations. From a public policy standpoint, a permanent denial of the Appellant's application is an unwarranted stretch of the business integrity language in the statute and regulation.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

## ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, the decision made by this review is based on the relevant facts and circumstances as they existed at the time that the Retailer Operations Division rendered its decision. This review is limited to determining whether or not the denial decision was made in accordance with existing regulation.

The primary issue under consideration is whether or not the Appellant has the necessary business integrity and reputation, in accordance with regulation, to further the purposes of the Supplemental Nutrition Assistance Program. 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.

As noted earlier, Question #16 of the SNAP application asks, “Was any officer, owner, partner, member, and/or manager convicted of any crime after June 1, 1999?” The Appellant in this case marked “yes,” and explained that 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

A review of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) offender record from 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

In accordance with 7 CFR § 278.1(b)(3)(i)(A) and § 278.1(k)(3)(i), FNS shall permanently deny the authorization of any firm in which there is a conviction or civil judgment against the owners, officers or managers of the firm for “commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction.”

Agency interpretation of these regulations holds that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) amounts to “a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction.” In this case, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As a result of this illegal transaction, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Because this conviction occurred after June 1, 1999 (which is the date that business integrity provisions of the regulations became effective), the regulations indicate that the Appellant’s SNAP application must be permanently denied because 5 U.S.C. § 552 (b)(6) & (b)(7)(C) business integrity and reputation are lacking to such a degree that his firm does not further the purposes of the program.

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 an application must be taken accordingly. This review can find no evidence of overreach on the part of the agency, as it is reasonable to conclude that the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) conviction falls within the criminal offenses described in paragraph (b)(3)(i)(A) of Section 278.1. This review can find no evidence that business integrity convictions are limited to “white collar crimes,” as the Appellant suggests. In this case, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This was done while 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worked as a cashier at a convenience store. This same 5 U.S.C. § 552 (b)(6) & (b)(7)(C) now wishes to be authorized by FNS to accept SNAP benefits at a convenience store where 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is justifiable for FNS to be gravely concerned about such an application. Because the conviction fits within the parameters of § 278.1(b)(3)(i), it is the finding of this review that permanent disqualification is appropriate and was applied in accordance with regulation at § 278.1(k)(3)(i).

It is further noted that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the criminal offense occurred and was not a SNAP-authorized retailer have no bearing on this matter. Neither does the fact that he was not an owner or manager of the store where he was working at the time. None of these is required before FNS can consider one's business integrity and reputation. The age of the conviction itself is also not a factor, provided that the conviction occurred after June 1, 1999.

It should also be made clear that it is not relevant that other public entities have issued licenses to the Appellant. The issuance of those licenses are not based on SNAP regulations.

### **Consideration of 7 CFR § 279.6**

The Appellant, through counsel, has cited Section 279.6 of the SNAP regulations, which addresses questions of law as well as extensions of time for providing information in support of a request for administrative review. The Appellant appears to be concerned primarily with paragraph (a) of this section, which states:

*Advice from Office of the General Counsel.* If any request for review involves any doubtful questions of law, the Benefit Redemption Division shall obtain the advice of the Department's Office of the General Counsel.

The Benefit Redemption Division, which has been renamed the Retailer Policy and Management Division, is the division of FNS where the Administrative Review Branch (ARB) is located. The Appellant has requested that ARB seek counsel regarding questions of law in this case. In particular, the Appellant requests that ARB seek legal advice regarding applicable case law and the Appellant's position that the grounds for denial in this matter are not reasonably tied to business integrity. The Appellant further requests that ARB "seek guidance with respect to the following issues: (1) the Regulation's arbitrary nature, (2) the Regulation exceeding Congress' mandate as set forth in 7 U.S.C. § 2018, (3) a permanent withdrawal of the Appellants' application that does not fit the regulation; and (4) the specifics of the charges brought against the Appellant." According to the Appellant, these matters are critical to its case and no decision would be appropriate under the circumstances without legal interpretation of the issues raised.

With regard to the Appellant's request that ARB seek legal advice in this matter, it must be noted that the regulation in Section 279.6(a) addresses agency discretion in the handling of administrative review cases. At the administrative review level, it is left to the agency, not the Appellant, to determine if there are "doubtful questions of law." This regulatory provision does not extend discretion to the Appellant in deciding when the agency should ask the Office of General Counsel (OGC) for legal advice. If an appellant is dissatisfied with the Final Agency Decision, 7 U.S.C. § 2023 provides for the right to a judicial review. In this case, the administrative review officer has reviewed all evidence and has concluded that the criminal conviction of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) falls within the business integrity parameters outlined in 7 CFR § 278.1(b)(3). As such, a "doubtful question of law" does not exist and an inquiry with OGC is unnecessary. Should the Appellant disagree with this finding, it has the option to file a complaint in court, where the matter can be addressed further.

## **CONCLUSION**

The documentation in the case record clearly shows that 5 U.S.C. § 552 (b)(6) & (b)(7)(C), was criminally convicted of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is USDA's position that this criminal offense shows a lack of business integrity and reputation to such a degree that the Appellant does not further the purposes of the program. Accordingly, and based on the analysis above, the decision by the Retailer Operations Division to permanently deny the authorization of B's Wine & Liquor to participate as a retailer in SNAP is sustained.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON  
Administrative Review Officer

December 6, 2018