

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

Cousins Supermarket Inc. #1,

Appellant,

v.

Case Number: C0215039

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 uphold the decision by the Retailer Operations Division to permanently withdraw the authorization of Cousins Supermarket Inc. #1 (hereinafter “Appellant” and/or “Cousins Supermarket Inc. #1”) 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 Cousins Supermarket Inc. #1 to participate in the SNAP on December 10, 2018.

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 Appellant applied for reauthorization to participate in the SNAP in a 252-R reauthorization application dated October 25, 2018. On question 15 of the SNAP reauthorization application, the store owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), answered “Yes” to the question “Has any officer, owner, partner, member and/or manager been convicted of any crime after June 1, 1999?”. The store owner also noted that “5 U.S.C. § 552 (b)(6) & (b)(7)(C)”. The Appellant was subsequently advised in a letter dated December 10, 2018 of the Retailer

Operations Division's decision to permanently withdraw the application of the Appellant to participate as an authorized retailer in the SNAP. The Determination Letter stated, in relevant part:

"In accordance with SNAP regulations specified in 7 CFR Section 278.1(b)(3)(i)(B), FNS has determined that based on your conviction for "5 U.S.C. § 552 (b)(6) & (b)(7)(C)", your firm has failed to maintain the necessary business integrity to further the purposes of the program and will therefore be withdrawn from participation in the program. In accordance with 278.1(k)(3)(i), the firm has been found to lack the necessary business integrity and reputation to further the purposes of the program and is therefore permanently withdrawn".

In a letter postmarked December 15, 2018, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated February 4, 2019.

The record indicates that in correspondences of December 15, 2018, February 20, 2019, March 18, 2019, and April 10, 2019, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against Cousins Supermarket Inc. #1 pursuant to the Freedom of Information Act (FOIA). The record reflects that FNS provided responses to counsel's FOIA requests, dated March 18, 2019, April 1, 2019, April 3, 2019, and April 15, 2019, and received no further communication from the Appellant or counsel with regard to the agency's responses.

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.

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

In the FOIA requests of December 15, 2018, February 20, 2019, March 18, 2019, and April 10, 2019, in the written request for review postmarked December 15, 2018, and in subsequent correspondence postmarked May 6, 2019, the Appellant, through counsel, provided information in which it was argued that:

- The store owner's prior charges, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is not reasonably related to an issue of business integrity as the conviction is not related to business activity, and that the Department has exceeded its authority under 7 U.S.C. § 2018 in qualifying a prior personal tax filing violation an issue of business integrity.
- The sanction selected by the Department (permanent withdrawal of participation in SNAP) is not reasonable in light of the regulations or the statutes governing SNAP. This 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 (and specifically, according to the regulation, the integrity of the ownership or management), there is no basis for the Department to now determine that such a severe, permanent sanction should be implemented.
- As noted by the Court of the Western District of Louisiana in the case *Spurs vs. United States*, 424 F.Supp 977 (W.D. LA 1977), the selection of SNAP retailers is important in order to keep the public confidence in the integrity of the program. However, the case also recognized that reputation and business integrity are transient concepts, and the primary focal point of the regulation and law is to prevent violations from occurring in the operation of the program. Even the nature of convictions themselves can be transient.
- In 1999, 7 CFR § 278.1(b)(3) was amended by FNS with the intent to "strengthen the integrity and eliminate fraud" within the SNAP. FNS made it clear in the guidance that the focus of the criteria in the amendment was on "business related activities". There is no reference or mention of personal conviction having any bearing on business integrity but rather an emphasis on acts done pertaining to the business itself. It is clear from the regulations that the scope of business integrity, with regard to prior convictions and civil liabilities, is limited to business related activities, such as fraud and embezzlement, not personal offenses.
- FNS exceeded the scope of § 278.1(b)(3)(i)(B) when it imposed a permanent SNAP withdrawal of the Appellant. Pursuant to FNS' interpretation/reading of §278.1(b)(3)(i)(B), the "[c]ommission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice" would have to encompass personal offenses, rather than solely business related offenses. However, this interpretation is erroneous and exceeds the scope and intention of the subject regulation. Based upon a reading of the regulation itself, and the guidance issued therewith, it is clear that the focus on crimes and/or convictions that concern business integrity matters involve business related activities, not personal offenses. A personal conviction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) does not fall within the scope of the regulation cited by FNS. Business integrity is not something that is immutable. As such, the Appellant's permanent withdrawal from the SNAP was arbitrary and capricious and therefore, should be amended.

- The Appellant firm has been owned and operated by the owner for over 40 years. The Appellant operates as a grocery store serving a vast variety of foodstuffs, nearly all of which qualify as eligible under the SNAP regulations. Importantly, the Appellant has always remained in compliance with the SNAP regulations and has never even received so much as a warning for violating said regulations. This would seem to indicate that there are other factors that USDA should consider.
- In the Congressional District in which the Appellant is located, approximately 61,997 of the local residents receive SNAP benefits, wherein 37.3% are with one or more people 60 years of age and over, 42.1% are with children under the age of eighteen, and 50.4% are with disabled individual(s). The median income for said SNAP residents is \$17,270. It is crucial to note that the Appellant serves as a major grocer for the local residents, as evidenced by the EBT sales processed at the store which range from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per week. It is evident that the Appellant is an essential avenue for the local SNAP residents to obtain their necessary nutritional needs from. Shutting down the subject store will create a food desert. The Appellant is the biggest provider of Halal meats for miles in any direction, and in the depth of inventory, the quality of foods, the prices, the varieties of foods are unmatched in the neighborhood. Therefore, the Appellant should be granted a hardship status.
- The Appellant requests that FNS reverse its decision to permanently withdraw the subject firm from participation in the SNAP and allow the owner to reapply to prove that his integrity is sufficient, rather than make a rote assumption that is beyond salvage.

In support of these contentions, the Appellant provided FNS with the firm's reconciliation reports for December 30, 2017 through January 13, 2018.

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

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 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)(B) 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: . . .(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”.

With regard to the Appellant’s contentions regarding the present case, 7 CFR § 278.1(b)(3)(i)(B) is specific in its requirement that “FNS shall deny the authorization of any firm from participation in the program . . . based on consideration of information regarding the business integrity and reputation of the firm as follows . . . Conviction of or civil judgment against the owners, officers, or managers of the firm for . . . Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims or obstruction of justice”.

The Appellant applied for reauthorization to participate in the SNAP in a 252-R reauthorization application dated October 25, 2018. On question 15 of the SNAP reauthorization application, the store owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), answered “Yes” to the question “Has any officer, owner, partner, member and/or manager been convicted of any crime after June 1, 1999?”. The store owner also noted that 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

As previously mentioned, 7 CFR § 278.1(b)(3) is specific in its requirement that “FNS shall deny the authorization of any firm from participation in the program . . . based on . . . conviction of or civil judgment against the owners, officers or managers of the firm for . . . theft . . .” Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any number of convictions or degrees of seriousness pertaining to theft-related criminal convictions. While other convictions may bring more severe criminal penalties, for purposes of SNAP authorization, 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.”

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. In the same manner, neither the Food and Nutrition Act of 2008, as amended, nor SNAP regulations, provide the agency with discretion for dismissal of any action or for mitigating the impact of those actions on the basis of the Appellant’s argument that the personal charges imposed against it in the past should have no influence on its business and what the community needs. If the matter violates the provisions of 7 CFR § 278.1(b)(3), as is the case here, action to withdraw must be taken accordingly.

The Appellant argues that he was convicted several years ago and the conviction was related to a personal conviction and not to business related activities. With regard to these arguments, the business integrity provisions of the SNAP regulations became effective on June 1, 1999. This means that actions to deny or withdraw authorization on the basis of these business integrity criteria may only be made after that date, on the basis of violations committed after that date. Violations, criminal and/or civil judgments, or findings made prior to June 1, 1999 shall not be used as a basis for business integrity withdrawals or denials of retailers in the SNAP. 5 U.S.C. §

552 (b)(6) & (b)(7)(C). The owner's violations were committed after June 1, 1999 and as such, the business integrity provisions of the SNAP regulations are germane to this case.

The Appellant contends that the owner has owned and operated the subject firm for 40 years and has always remained in compliance with SNAP regulations and has never even received so much as a warning for violating said regulations. 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 will impose a hardship on the store's SNAP customers and therefore, the Appellant should be granted a hardship status. 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.

With regard to the case law cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

Therefore, based on the information provided on the Appellant's SNAP reauthorization application and 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)(B), 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(k)(3)(i) of the SNAP regulations. As such, the imposition of a permanent SNAP withdrawal action on Cousins Supermarket Inc. #1 by the Retailer Operations Division is affirmed as the appropriate sanction for the program violations outlined in the subject case.

CONCLUSION

On the basis of the discussion above, it is the decision of the USDA that the initial decision to permanently withdraw the authorization of Cousins Supermarket Inc. #1 to participate in the SNAP is sustained. Withdrawal of a firm's authorization to participate as an authorized retailer in the SNAP under the provisions of 7 CFR § 278.1(b)(3)(i)(B) and § 278.1(k)(3)(i) is permanent.

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

May 21, 2019