

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

Dollar Store Plus,

Appellant,

v.

Case Number: C0193511

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 a finding that the initial decision by the Retailer Operations Division to withdraw the authorization of Dollar Store Plus to participate in the Supplemental Nutrition Assistance Program (SNAP) for a period of two years was properly imposed.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(3), § 278.1(k)(3), and § 278.1(l), in its administration of the SNAP when it withdrew the authorization of Dollar Store Plus for a period of two years on August 31, 2016.

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 Retailer Operations Division received an electronic reauthorization application from the Appellant for the SNAP reauthorization of Dollar Store Plus which was signed on February 19, 2016. The Retailer Operations Division subsequently advised the Appellant by letter dated August 31, 2016 of its decision to withdraw Dollar Store Plus’s authorization to participate in the SNAP for a period of two years. The regulatory citations for that withdrawal were 7 CFR § 278.1(b)(3)(ii), § 278.1(k)(3)(ii), and § 278.1(l)(1)(iv) as the firm lacked the necessary business integrity and reputation to further the purposes of the program. By letter postmarked September

2, 2016, the Appellant requested an administrative review of this action. The request was granted by letter dated September 9, 2016 and implementation of the withdrawal was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the 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 argument 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, 7 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 CFR § 271.2, § 278.1(b)(3), § 278.1(k)(3), and § 278.1(l)(1) establish the authority upon which a retail food store's or wholesale food concern's authorization to participate in the SNAP may be denied/withdrawn on the basis of a lack of business integrity.

7 CFR § 271.2 states, *inter alia*: “*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) as set forth in § 278.1(b)(1) of this chapter, or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) as set forth in § 278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, either for carryout purposes or on-premises consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter”.

7 CFR § 278.1(b)(3)(ii) states, *inter alia*: “*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: ... (ii) Administrative findings by Federal, State or local officials that do not give rise to a conviction or civil judgment but for which a firm is removed from such a program . . .”

7 CFR §278.1(k)(3)(ii) states, *inter alia* ... “*Denying authorization*. 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:(ii) Firms which

have been officially removed from other Federal, State, or local government programs through administrative action shall be denied for a period equivalent to the period of removal from any such programs.”

7 CFR §278.1(l)(1)(iv) states, *inter alia*... “*Withdrawing authorization.* (1) FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons ... (iv) 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 the 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”.

APPELLANT’S CONTENTIONS

In the written request for review postmarked September 2, 2016, the Appellant provided information in which it was argued that:

- The Appellant was honest with FNS when he noted on the Reauthorization Application that Dollar Store Plus’s alcohol license had been suspended for a period of two years effective close of business February 9, 2015;
- A two year withdrawal from participating in the SNAP is unduly harsh as the Appellant has implemented measures to ensure that these types of violations do not occur in the future to include: (1) Termination of the employee who sold synthetic cannabinoids to customers; (2) The Appellant taking over the management of Dollar Store Plus and working at the store every day; (3) Being vigilant in assuring that no more illegal sales of synthetic cannabinoids are conducted at Dollar Store Plus; and (4) Keeping store customers safe by calling the police when the Appellant suspects illegal activities are occurring inside of the store or in its vicinity;
- There was no prior action of any kind taken by FNS to warn the Appellant about the possibility that Dollar Store Plus may be withdrawn from the SNAP for two years prior to sending a Withdrawal Letter;
- The Appellant is requesting that in lieu of withdrawing Dollar Store Plus from participating in the SNAP for two years, that FNS consider sending him an official Warning Letter; and
- If a Warning Letter is not an appropriate sanction in this case, the Appellant is requesting that FNS impose a civil money penalty in lieu of a two year SNAP withdrawal.

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) and (k) provide for the 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) state: “*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: (ii) Administrative findings by Federal, State or local officials that do not give rise to a conviction or civil judgment but for which a firm is removed from such a program . . .”.

The record under review supports that the store owner of Dollar Store Plus, Ahmad S. Abduljaber, was found guilty of three counts of “permitting the licensed premises to become disorderly by selling or trafficking in synthetic cannabinoids, a controlled substance as described in KRS Chapter 218A, on the licensed premises (i.e., Dollar Store Plus). The final ruling for this case (dated January 8, 2015) was listed as “Commonwealth of Kentucky Alcoholic Beverage Control Administrative Case No. 14-ABC-177: Final Order: Based upon the foregoing Finding of Fact and Conclusions of Law, the Board (i.e., the Commonwealth of Kentucky Alcoholic Beverage Control Board) ORDERS that NQ Retail Malt Beverage Package License No. 034-NQ-3302, issued to Deya, Inc., DBA Dollar Store Plus, 680 Lima Drive, Suite 170, Lexington, Kentucky 40511, is hereby REVOKED for two years effective close of business on Monday, February 9, 2015”.

The Appellant contends that a two year withdrawal from participating in the SNAP is unduly harsh as he has implemented measures to ensure that these types of violations do not occur in the future to include: (1) Termination of the employee who sold synthetic cannabinoids to customers; (2) The Appellant taking over the management of Dollar Store Plus and working at the store every day; (3) Being vigilant in assuring that no more illegal sales of synthetic cannabinoids are conducted at Dollar Store Plus; and (4) Keeping store customers safe by calling the police when the Appellant suspects illegal activities are occurring inside of the store or in its vicinity. Although the Appellant contends that he has implemented measures to ensure that violations do not occur in the future at Dollar Store Plus by terminating the employee who sold synthetic cannabinoids to customers, taking over the management of Dollar Store Plus and working at the store every day, etc., the findings of the Appellant’s court case and Final Order stated that, in addition to a store employee selling a packet of synthetic cannabinoids to a Confidential Informant (CI) on December 4, 2013 during an undercover investigation of Dollar Store Plus by the Lexington-Metro Police Department’s Intelligence Unit, on January 15, 2014 the Appellant himself sold to a CI a packet each of three different kinds of synthetic cannabinoids. In addition, during a legal search of Dollar Store Plus on January 16, 2014, the Appellant admitted to police that he sold synthetic cannabinoids from the subject store to his friends. He also pointed out to a Kentucky Department of Alcoholic Beverage Control (ABC) Investigator the presence of three packets of synthetic cannabinoids hidden underneath a Kentucky lottery ticket machine in Dollar Store Plus and a large amount of money in the Appellant’s wallet that was the marked currency used in the January 15, 2014 investigation transaction. Therefore, while the Appellant indicated that a store employee was responsible for the violations that occurred during the undercover investigation of Dollar Store Plus by Kentucky Police Department and the Kentucky ABC, the Appellant himself also sold synthetic cannabinoids, a controlled substance under Kentucky law, to a Confidential Informant (CI).

However, even if the Appellant was not involved in the violative transactions that resulted in the sale of synthetic cannabinoids to a CI and all of the violative transactions were committed by a store employee, this contention cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all program violations that occur at Dollar Store Plus. Regardless of whom the ownership of a store may utilize to handle store business (i.e., regardless of whether a store owner, store manager, store clerk, family member, etc. was involved in the violative transactions), ownership is accountable for all program violations that occur at Dollar Store Plus. Prior to becoming authorized to participate in the SNAP on September 8, 2011, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any violations of program rules that may occur at the store that were committed by any of the store's employees. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

Under the final court ruling dated January 8, 2015, the Appellant was found guilty of three counts of "permitting the licensed premises to become disorderly by selling or trafficking in synthetic cannabinoids, a controlled substance as described in KRS Chapter 218A, on the licensed premises" (i.e., Dollar Store Plus). As a result, the NQ Retail Malt Beverage Package License No. 034-NQ-3302, issued to Deya, Inc., DBA Dollar Store Plus was revoked for two years effective close of business February 9, 2015.

Even if the Appellant had implemented measures to ensure that these types of program violations do not occur in the future, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. **5 U.S.C. § 552 (b)(7)(E)**. Therefore, the Appellant's contention that he has taken corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Regarding the Appellant's contention that there was no prior action of any kind taken by FNS to warn him about the possibility that Dollar Store Plus may be withdrawn from the SNAP for two years prior to sending a Withdrawal Letter, 7 CFR § 278.6(d)(2) and (3) of the SNAP regulations provides that "The FNS office making a disqualification or penalty determination ... shall consider ... any prior action ... to warn the firm about the possibility that violations are occurring..." The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn the Appellant about the possibility that Dollar Store Plus may be withdrawn

from participation in the SNAP because the Appellant had not been previously convicted of “selling or trafficking in synthetic cannabinoids” prior to the final court ruling dated January 8, 2015.

The Appellant is requesting that in lieu of withdrawing Dollar Store Plus from participating in the SNAP for two years, that FNS consider sending him an official Warning Letter. However, the SNAP regulations enunciated at 7 CFR § 278.1(b) provide for the 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) state: “*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: (ii) Administrative findings by Federal, State or local officials that do not give rise to a conviction or civil judgment but for which a firm is removed from such a program . . .”. As such, the Retailer Operations Division’s decision to impose a two year SNAP withdrawal action on Dollar Store Plus in lieu of imposing a Warning Letter or other penalty sanction is affirmed.

The Appellant contends that if a Warning Letter is not an appropriate sanction in this case, he is requesting that FNS impose a civil money penalty in lieu of a two year SNAP withdrawal. There are only two provisions in the SNAP regulations in which a civil money penalty (CMP) may be imposed as an alternative penalty for SNAP authorized retail stores which have been disqualified from participation in the SNAP. 7 CFR § 278.6(f)(1) of the SNAP regulations allows for the imposition of a hardship CMP as a sanction in lieu of a SNAP disqualification when . . . the firm’s disqualification would cause hardship to [SNAP] households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices.” [Emphasis added]. However, the imposition of a hardship CMP as a sanction in lieu of a SNAP disqualification is a provision that applies only to SNAP authorized stores which have been charged with accepting SNAP benefits in exchange for ineligible nonfood items in violation of 7 CFR § 278.2(a). Therefore, since the subject case does not involve Dollar Store Plus having been charged with accepting SNAP benefits in exchange for ineligible nonfood items, a hardship CMP is not an alternative sanction option for Dollar Store Plus. 7 CFR § 278.6(i) of the SNAP regulations allows for the imposition of a CMP in lieu of a permanent disqualification for trafficking if the retail store establishes that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. However, since the subject case does not involve the imposition of a permanent disqualification from the SNAP for trafficking of SNAP benefits, a trafficking CMP is not an alternative sanction option for Dollar Store Plus.

Based on the court records assessed by the Retailer Operations Division, it is determined that in accordance with SNAP regulations specified in Section 278.1(l)(1)(iv), “The firm fails to maintain the necessary business integrity to further the purposes of the program as specified in paragraph 278.1(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” which states “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: ... (ii) Firms which have been officially removed from other Federal, State, or local government programs through administrative action shall be denied for a period equivalent to the period of removal from any such program.” Therefore, since Dollar Store Plus’s NQ Retail Malt Beverage Package License No. 034-NQ-3302 was revoked for two years, the imposition of a two year SNAP withdrawal action on Dollar Store Plus by the Retailer Operations Division is affirmed as the appropriate sanction for the program violations outlined in the subject case.

CONCLUSION

After review of all the pertinent documentation and based on the discussion herein, the initial decision by the Retail Operations Division to withdraw the authorization of Dollar Store Plus to participate as a SNAP retailer for a period of two years is sustained.

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

October 3, 2017