

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

**Dos Equis Deli Grocery Inc,**

**Appellant,**

**v.**

**Case Number: C0207075**

**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 decision by the Retailer Operations Division (Retailer Operations) to permanently deny the application of Dos Equis Deli Grocery Inc. (Appellant) to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed.

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.1(o), 7 CFR § 278.1(k)(4), and 7 CFR § 278.6(e)(1)(iii) in its administration of the SNAP, when it permanently denied the application of Appellant to participate in the SNAP as an authorized retail food store.

**AUTHORITY**

7 USC § 2023 and its implementing regulations at 7 CFR § 279.1 provide that a food retailer 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**

Retailer Operations received an electronic application from Appellant to participate in SNAP dated September 11, 2017. Retailer Operations requested additional information by letters dated December 13, 2017 and January 3, 2018. Retailer Operations advised Appellant by letter dated

February 14, 2018, of its decision to permanently deny the firm authorization to participate in the SNAP as a retail food store.

By letter dated February 26, 2018, the owner, via counsel, requested administrative review. The request was granted by letter dated March 12, 2018. Counsel did not provide the required documentation to support his representation of the owner. Therefore, counsel was not provided a copy of this decision.

A one page letter was emailed by an unknown party to this office on April 4, 2018. This letter is signed by a previous store owner at this location, who was permanently disqualified.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, 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 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR).

7 CFR § 278.1(a) states: “FNS shall approve or deny the application within 45 days of receipt of a completed application. A completed application means that all information (other than an on-site visit) that FNS deems necessary in order to make a determination on the firm’s application has been received. This information includes, but is not limited to, a completed application form, all information and documentation from the applicant, as well as any needed third-party verification and documentation.”

7 CFR § 278.6(e)(1) states: “Disqualify a firm permanently if (iii) It is determined that personnel of the firm knowingly submitted information on the application that contains false information of a substantive nature that could affect the eligibility of the firm for authorization in the program.”

7 CFR § 278.1(o) regarding applications containing false information states: “The filing of any application containing false or misleading information may result in the denial of approval for participation in the program, as specified in paragraph (k) of this section, or disqualification of a firm from participation in the program, as specified in § 278.6, and may subject the firm and persons responsible to civil or criminal action.”

7 CFR § 278.1(k) Denying authorization states in part: “FNS shall deny the application of any firm if it determines that: (4) The firm has filed an application that contains false or misleading

information about a substantive matter, as specified in § 278.6(e). Such firms shall be denied authorization for the period specified in § 278.6(e)(1) or § 278.6(e)(3);”

### **APPELLANT’S CONTENTIONS**

All contentions have been considered including any not recapitulated here. The contentions were advanced by the previous owner of a store at this location in an April 4, 2018 letter sent by email.

- I had a business since 1997; one on 5 U.S.C. § 552 (b)(6) & (b)(7)(C). for four years and then moved to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in the year of 2003 until 2017.
- I am sorry for what happened in August 11, 2017. For all the years of 2003 to 2017 I never had any violations. I became ill and I had a young boy working there.
- At the time the inspector went to review the store 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was checking the business with intention of buying it.
- The inspector wanted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to sign the paper not the cashier. For the lack of language the inspector insist to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) sign the paper.
- I am willing to pay the penalty in installment payments and please let 5 U.S.C. § 552 (b)(6) & (b)(7)(C) be free for this tremendous confusion that is deleting his license for USDA.

As noted, while attorney 5 U.S.C. § 552 (b)(6) & (b)(7)(C) requested the review, he provided no contentions to support his client’s position. He stated he wished to be contacted, but the attorney did not provide the requested letter of representation signed by the owner. The attorney did not provide any additional information to this office.

### **ANALYSIS AND FINDINGS**

It is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of Retailer Operations; as such, it 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, those requirements of law cannot be waived.

The record documents that on May 16, 2017, the owner signed a “Store Review Consent Form” as the manager of that firm which was permanently disqualified as a SNAP retailer August 11, 2017. The record confirms that the owner purchased and is leasing Appellant from the permanently disqualified owner. The record also confirms that the owner was temporarily disqualified as a SNAP owner of another firm in New York in 1998.

The owner’s initial SNAP retailer application answered “No” to question 13. The owner then submitted a required affidavit notarized December 22, 2017, indicating “Yes” to all six questions. The owner then submitted another notarized affidavit dated January 10, 2018, that

answered “No” to all six affidavit questions. The owner also submitted a statement dated February 7, 2018, stating: “This letter is to provide an explanation to the answers given in the attached affidavit. I used to be the manager by the time this grocery was under another ownership but had nothing to do with the violations with the SNAP program that occurred with the prior ownership. No owner, managers or employees involved in the violations are working in this store. No owner or managers involved in the violations are financially involved or have any other operational interest in this store.”

Retailer Operations determined that the owner’s answers on the “corrected” second affidavit were misleading as to his business integrity history. Statement 2 of the affidavit is: “One or more owners or managers of this firm has had ownership in or was a manager of a business that is or has been disqualified from SNAP or WIC.” The owner was the owner of a firm in New York that had been term disqualified from SNAP. Of substantive note, the owner was also a manager at a business that had been permanently disqualified from SNAP in 2017. Statement 4 states: “Persons who were owners or managers of any store that has been permanently disqualified from SNAP or WIC are financially involved or have other operational interest in this store.” In addition to the fact that the owner was a manager at a store permanently disqualified from SNAP, Retailer Operations found that the lease advanced by the owner contained a statement which states that the rent can exceed the monthly amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as reasonably required by the landlord. Retailer Operations found that this statement made the lease a conditional contract which, absent any further context, implied the landlord had operational control over the activities at Appellant because the rent could be tied to business performance.

Retailer Operations asked the owner to amend the lease to remove that condition or to submit the landlord’s social security card number and photo identification to be added as an owner of record on Appellant’s application. The owner was also asked to ensure the amended document was signed and notarized by the landlord. Rather than modify the lease, the owner provided a photo identification and the social security card of the permanently disqualified owner which supports that this individual is also an owner of record of Appellant.

The letter submitted by email dated April 4, 2018, is from the previous permanently disqualified owner of a store at the same location as Appellant. The previously disqualified store owner explains that the current store owner did sign the onsite store visit form. That is a fact already confirmed in the record.

The reason for the permanent denial of Appellant is because the owner provided misleading and/or false information on his application including the required affidavit regarding a substantive matter. The conflicting answers on the two affidavit submissions are suspicious. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) had the opportunity to provide clarifying information related to his answers on the original affidavit of “Yes” for all six questions, but instead submitted a new affidavit with all of his answers changed to “No.” The misleading answers on the second affidavit and the ambiguity of the owner’s February 7, 2018, explanation of the affidavit responses support that the owner is in violation of the regulations cited herein. The regulations are clear that a firm can be permanently denied if it is determined that personnel of the firm

knowingly submitted information on the application that contains false information of a substantive nature that could affect the eligibility of the firm for authorization in the program.

### **CONCLUSION**

After review of the record, the decision by Retailer Operations to permanently deny Appellant from participation as a retail food store in the SNAP is sustained.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 USC § 2023) and to Section 279.7 of the regulations (7 CFR § 279.7) with respect to applicable rights 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 the Appellant's owner resides or is 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.

M. Viens  
Administrative Review Officer

April 26, 2018