

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

Futa African Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0215929

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to permanently withdraw the authorization of Futa African Market (Futa African Market or Appellant) from participation as an authorized retailer 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 (I)(1)(iv), 7 CFR § 278.1 (b)(3)(i)(a), and 7 CFR § 278.1(k)(3) in its administration of the SNAP when it permanently withdrew the authorization of the Appellant to participate as an authorized SNAP retailer.

AUTHORITY

7 USC § 2023 and the 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

As part of a routine reauthorization process, the owner of Futa African Market submitted an online reauthorization form FNS-252-R, entitled Supplemental Nutrition Assistance Program (SNAP) Reauthorization Application for Stores, on November 27, 2018. In response to Question 10 on the FNS-252-R, “was any officer, owner, partner, member, and/or manager convicted of any crime after June 1, 1999?” the Appellant answered “Yes.” In response to the FNS-252-R instructions to provide further information, the Appellant indicated that it was convicted for selling counterfeit DVDs and CDs.

The Retailer Operations Division followed up on the response and obtained court records showing that the owner of Futa African Market was convicted in the State of North Carolina of one misdemeanor count of Criminal Use of Counterfeit TR (Trademark) on August 24, 2011. In a letter dated February 20, 2019, the Retailer Operations Division informed Appellant that the application of Futa African Market to participate as an authorized retailer in SNAP was being permanently withdrawn. The letter states that the authorization of Futa African Market to participate in the SNAP was permanently withdrawn under 7 CFR § 278.1(b)(3)(i)(A) and 7 CFR 278.1(l)(1)(iv) because the firm has been found to lack the necessary business integrity and reputation to further the purposes of the program.

In a letter postmarked February 26, 2019, ownership appealed the Retailer Operations Division's determination and requested an administrative review of this action. The appeal was granted.

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, 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 law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 USC § 2018, and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(l) establishes the authority upon which the FNS shall withdraw the authorization of any firm authorized to participate in the program.

7 CFR § 278.1(l)(1)(ii) Withdrawing authorization reads, in part:

FNS may withdraw the authorization of any firm authorized to participate in the program for any of the following reasons:

- (ii) The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section

7 CFR § 278.1(b)(3)(i)(A) states, in part:

FNS **shall deny** [emphasis added] 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;

7 CFR § 278.1(k)(3)(i) states, in part:

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** [Emphasis added.]

APPELLANT'S CONTENTIONS

Appellant made the following summarized contentions in its administrative review request postmarked February 26, 2019, in relevant part:

- Appellant has been doing business for eight years and trying to stay out of trouble.
- The business takes care of the owner's family.
- The crime was committed eight years ago when the owner was young.
- Thirty percent of the business comes from EBT.

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

ANALYSIS AND FINDINGS

The case record documents that on August 24, 2011, the owner of Futa African Market was convicted in the State of North Carolina of one misdemeanor count of Criminal Use of Counterfeit TR. 7 CFR § 278.1(b)(3)(i)(A) is specific in its requirement that "FNS shall deny the authorization of any firm from participation in the program . . . based on . . . [c]onviction of or civil judgment against the owners, officers or managers of the firm for . . . [c]ommission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;... ." The regulation at 7 CFR § 278.1(k)(3)(i) states that "[f]irms 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."

The regulations have clearly set out the position of the agency with regard to the business integrity of participating retailers. Therefore, there is no discretion in the determination of eligibility or the seriousness of a business integrity violation. If the matter violates the provisions of 7 CFR § 278.1(b)(3) and §278.1(l), action to permanently deny or permanently withdraw must be taken accordingly. Therefore, the permanent withdrawal cannot be reversed.

Appellant Hardship

Appellant contends that a permanent withdrawal will adversely affect its business. With regard to this contention, there is no provision that would allow a store that is ineligible due to a conviction on a business integrity issue to be authorized for the SNAP on the basis of economic hardship to either the owner personally or the firm. To allow an otherwise ineligible store to be

authorized for the SNAP based on a purported economic hardship would render virtually meaningless the eligibility provisions of the Food and Nutrition Act of 2008.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to permanently withdraw the authorization of Futa African Market to participate as a SNAP retailer is sustained. In accordance with SNAP regulations, this withdrawal action shall become effective 30 days after delivery of this letter.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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.

Mary Kate Karagiorgos
ADMINISTRATIVE REVIEW OFFICER

June 12, 2019