

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review
Alexandria, VA 22302**

Plowed-Under Inc d/b/a Morty’s Convenience Store,)	
)	
Appellant,)	
)	
v.)	Case Number: C0194736
)	
Retailer Operations Division,)	
)	
Respondent.)	
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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 an eighteen (18) month denial of authorization to participate as a retailer in the Supplemental Nutrition Assistance Program¹ was properly imposed against Plowed-Under Inc d/b/a Morty’s Convenience Store, (hereinafter “Morty’s Convenience Store” or “Appellant”) by the FNS Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(3)(ii) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the retailer authorization of Morty’s Convenience Store for a period of 18 months in a letter dated October 12, 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

On August 4, 2016 FNS received a Form FNS-252 *Supplemental Nutrition Assistance Program Application for Stores* (application) on behalf of Morty’s Convenience [Convenience] Store for authorization to participate as a SNAP retailer signed by 7 U.S.C. 2018 (b)(6) & (b)(7)(c) as President-Owner.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

On the application, in response to Question 13a, on page 2, 7 U.S.C. 2018 (b)(6) & (b)(7)(c) answered “yes” to “*Has any officer, owner, partner, member and/or manager ever been denied, withdrawn or suspended, or been fined for license violations?*” In answer to Question 13b, requesting explanation, the materials indicate “*Pharmacy License was suspended but could reapply in 2005.*”

The Retailer Operations Division requested clarification of the information and was provided evidence that as of August 16, 2016 the Michigan Board of Pharmacy Licensure status of 7 U.S.C. 2018 (b)(6) & (b)(7)(c), co-owner of record, was “*Lapsed – Suspended*”, noting disciplinary actions as follow:

<i>“Reinstatement Denied</i>	<i>02/25/2013</i>
<i>Reprimanded</i>	<i>08/12/1992</i>
<i>Summary Suspension</i>	<i>10/18/2004”</i>

In a letter dated October 12, 2016, the Retailer Operations Division informed Appellant that it was being denied authorization as a retailer in SNAP, for a period of 18 months, because it lacked the necessary business integrity to further the purposes of the program. The letter informed Appellant that the determination was based on evidence that the Michigan Pharmacy License was suspended for a period of 18 months.

In a letter shipped via FedEx on October 18, 2016, Appellant submitted an appeal of the Retailer Operations Division decision, requesting an administrative review of the action.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an 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 (the “Act”)², 7 USC 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR).³

7 CFR §278.1(b) – “*Determination of authorization. An applicant shall provide sufficient data and information on the nature and scope of the firm’s business for FNS to determine whether the applicant’s participation will further the purposes of the program. Upon request, an applicant shall provide documentation to FNS to verify information on the application. In determining whether a firm qualifies for authorization, FNS shall consider all of the following...*

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246, further amended effective February 7, 2014 through PL 113-79.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title07/7tab_02.tpl

(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:...(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, or the firm is not removed from the program but FNS determines a pattern exists (3 or more instances) evidencing a lack of business integrity on the part of the owners, officers or managers of the firm.”

7 CFR §278.1(k) – “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...(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.**” [Emphasis added]

APPELLANT’S CONTENTIONS

Appellant, through its self-reported co-owner of record 7 U.S.C. 2018 (b)(6) & (b)(7)(c) requested appeal of the denial of Morty’s Convenience Store in a letter shipped via FedEx on October 18, 2016 indicating that:

- He does not understand how his business integrity can be determined by just the fact that his pharmacy license was suspended many years ago;
- Appellant had been authorized as a SNAP retailer for many years, obeying all rules and regulations during that time, with no incidences or complaints with any agencies involved or affiliated with SNAP;
- He carries a State of Michigan liquor license;
- Morty’s Convenience Store operates in a depressed area where residents are seasonally employed in the summer and laid off in the winter;
- There are only a few businesses in the small town where Appellant operates;
- He has been recognized as Elk of the year in 2016 following membership with that organization for 39 years; and
- He is actively involved in his church in the Knights of Columbus through which he donates hundreds of dollars to many organizations.

The preceding represents only a brief summary of Appellant’s contentions in this matter. However, 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

The administrative record indicates that Retailer Operations Division received evidentiary documentation both directly from [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] and through research on the State of Michigan Licensing and Regulatory Affairs (LARA) automated system that [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] had his pharmacy license suspended on October 18, 2004 for a period of 18 months; had been reprimanded on August 12, 1992; and that a request for reinstatement of the pharmacy license had been denied on February 25, 2013.

Retailer Operations Division determined that the evidence as provided demonstrated a lack of business integrity as specified in 7 CFR § 278.1(b)(3)(ii); and, that in accordance 7 CFR § 278.1(k)(3)(ii) the period of denial would be 18 months which is equivalent to the pharmacy license suspension period.

Although Appellant correctly cites that the pharmacy license suspension occurred many years ago no regulatory provisions were identified that would take into consideration the age of the initial finding as a mitigating factor.

As noted by [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] the administrative record does evidence that [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] and [7 U.S.C. 2018 (b)(6) & (b)(7)(c)], were identified as co-owners of “Morty’s” at the same address as Appellant; and, Morty’s was SNAP authorized from April 28, 2011 through July 20, 2016. On July 20, 2016 Morty’s was involuntarily withdrawn as a SNAP retailer for non-response to a request for the provision of materials for a required periodic reauthorization. However, the SNAP history of Morty’s is not relevant to the actions taken on a new application made on behalf of Morty’s Convenience Store by [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] on August 4, 2016. Similarly, neither the Food and Nutrition Act of 2008 nor the pursuant SNAP regulations allow for discretion or considerations of the holding of a liquor license; the economic situation or availability of alternative SNAP authorized shopping of the community in which Appellant operates; nor the personal recognition or contributions to the community by [7 U.S.C. 2018 (b)(6) & (b)(7)(c)].

CONCLUSION

Based on the discussion above, the Retailer Operations Division has provided a preponderance of evidence that its decision to deny the application of Morty’s Convenience Store for a period of 18 months based on the business integrity regulations as recounted is sustained.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 7 U.S.C. 2021 and to Section 279.7 of the Regulations (7 CFR §279.7) with respect to applicable rights to judicial review of this determination. Please note that if 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 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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

December 27, 2016

NANCY BACA-STEPAN
ADMINISTRATIVE REVIEW OFFICER

DATE