

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

Os Pipe & Tobacco,

Appellant,

v.

Case Number: C0201725

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the final decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS), that there is sufficient evidence to sustain the initial decision to permanently withdraw the authorization of Os Pipe & Tobacco (hereinafter “Appellant”) to participate in the Supplemental Nutrition Assistance Program (SNAP) by the Retailer Operations Division (hereinafter “ROD Office”).

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(3), § 278.1(k)(3) and § 278.1(l)(1) when it made the decision to permanently withdraw Appellant’s application to participate in the SNAP.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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 on October 20, 2011 **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** signed as Owner an application for authorization to participate in the SNAP; the application was approved on or about November 30, 2011. The firm subsequently underwent the agency’s periodic reauthorization process in mid-2017.

Appellant was subsequently advised in a letter dated July 17, 2017 of the Department's decision to permanently withdraw the firm's authorization to participate in the program. The regulatory bases given for that denial were 7 C.F.R. § 278.1(l)(1)(iv), § 278.1(b)(3)(i)(A) and § 278.1(k)(3)(i). On July 26, 2017, Appellant requested an administrative review of this action. The request was granted and the withdrawal action held in abeyance pending a review decision.

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, 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 statute in this matter is contained in the **Food & 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. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(3), § 278.1(k)(3) and § 278.1(l) establish the authority upon which a retail food store's or wholesale food concern's authorization to participate in the SNAP may be denied or withdrawn on the basis of a lack of business integrity.

7 C.F.R. § 271.2 states, in part:

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)...or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)...Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores...

7 C.F.R. § 278.1(b)(3) states, in part:

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:

- (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 C.F.R. § 278.1(k)(3) states, in part:

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 period of 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.

7 C.F.R. § 278.1(l)(1) states, in part:

FNS shall withdraw the authorization of any firm authorized to participate in the program if the firm fails to maintain the necessary business integrity to further the purposes of the program, as specified in paragraph (b)(3).

SUMMARY OF THE CHARGES

5 U.S.C. § 552 (b)(6) & (b)(7)(C) was reported as an owner, officer, partner, member, and/or manager of the Appellant firm on Question 10 of the 252-R (Reauthorization Application) submitted as part of the 2017 SNAP reauthorization process. On Form 252-R the Authorized Representative stated, in response to Question 10, “Store owner **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** accepted a plea agreement with the State of Colorado and the Federal Government, concerning the sale of synthetic marijuana in 2014. As of now, the case has been concluded in court with the exception of fines that are currently still being paid.” Court documents were submitted showing **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** was ordered by the court to pay a Civil Penalty in the amount of \$160,000 in October of 2015. Due to 7 CFR § 278.1(l)(1)(iv) and § 278.1(b)(3)(i)(A) the store is being permanently withdrawn from the SNAP.

APPELLANT’S CONTENTIONS

In its written request for review dated July 26, 2017, Appellant provided information in which it was argued that:

1. While it is true that the Owner of the Appellant firm accepted a plea agreement in the criminal case, Case No. 13CR4875, and a stipulation in the civil case, Case No. 14CV31816, said Owner and the firm were the victims of violations of the Colorado Consumer Protection Act, CRS § 6-1-101 **et seq.**, insofar as the vendors providing Appellant with synthetic cannabinoids advertised their products as legal in the state of Colorado. Said Owner assisted federal law enforcement in the prosecution of these same vendors. While Appellant accepted responsibility for misplaced trust in said vendors, this in and of itself does not indicate a lack of integrity.
2. The Appellant firm provides an invaluable service in its neighborhood, being one of very few stores selling foodstuffs and household necessities to customers within walking distance.

ANALYSIS AND FINDINGS

In regard to contention 1 above, that Appellant entered a criminal plea agreement and a civil stipulation with regard to the sale of controlled substances and was fined, as noted in the foregoing, necessarily invokes the sanction at issue under 7 C.F.R. § 278.1(b)(3)(i)(A) and/or (C). 278.1(k)(3)(i) assigns a permanent denial/withdrawal for such business integrity failures. The regulations allow the agency no latitude to forego such sanctions when the criteria outlining a failure to maintain necessary business integrity are met.

There is no provision in the statute or regulations allowing or requiring consideration of a firm's cooperation with law enforcement officials as a mitigating factor in such cases. This review therefore finds the ROD Office's action correct and appropriate.

With regard to contention 2 above, neither the statute nor the regulations require or allow hardship considerations, whether worked upon SNAP customers or upon retailers, in business integrity-related sanction decisions and contain no provision for a civil money penalty in lieu thereof.

CONCLUSION

In view of the above, it is my determination that the ROD Office's permanent withdrawal of Appellant's authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(l)(1), § 278.1(b)(3) and § 278.1(k)(3). The withdrawal, therefore, is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the **Food & Nutrition Act of 2008** (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.

In accordance with the provisions of the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If the agency receives such a request, it will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

DANIEL S. LAY
Administrative Review Officer

February 23, 2018