

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

Wakelee Market LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0216339

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to permanently deny the application of Wakelee Market LLC (hereinafter Appellant or Wakelee Market), to participate 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(b)(3) and § 278.1(k)(3) in its administration of the SNAP when it advised Wakelee Market on March 12, 2019, that it was permanently denied from participation in SNAP.

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

On February 8, 2019, the Retailer Operations Division received an online application from Wakelee Market to participate in the SNAP as an authorized retail store. In response to question 16 of the application, the Appellant store answered “yes” to the question “Was any officer, owner, partner, member, and/or manager convicted of any crime after June 1, 1999?” Appellant stated on the application that there were a couple of convictions including a conviction for the sale of untaxed tobacco in 2015.

In a letter dated March 12, 2019, the Retailer Operations Division informed ownership that its application to participate as an authorized retailer in SNAP was permanently denied for a lack of business integrity under the authority of 7 CFR § 278.1(b)(3)(i) of the SNAP regulations.

By letter postmarked March 13, 2019, ownership appealed the Retailer Operations Division's decision 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 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). Parts 278.1(b)(3)(i) and 278.1(k)(3)(i) establish the authority upon which the application of any firm to participate in the SNAP may be denied on the basis of a lack of business integrity.

7 CFR § 278.1(b)(3) states: "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 transactions;"

7 CFR § 278.1(k)(3)(i) states: "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 owner, officers, or managers as stipulated in § 278.1(b)(3)(i) shall be denied authorization permanently;"

APPELLANT'S CONTENTIONS

Appellant made the following summarized contentions in its administrative review request postmarked March 13, 2019, in relevant part:

- Appellant has grown and learned from its mistakes.
- The incident should not define him as a person or his character.
- He has invested all his saving and time into this business.
- He has hired two local full-time employees.
- He expected a slow start but he is losing sales every day because he cannot accept SNAP.

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

7 CFR § 278.1(b)(3)(i)(B) 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." Appellant's SNAP application indicates that the owner of the firm was convicted of illegal sale of untaxed tobacco. 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."

Neither the Food and Nutrition Act of 2008 nor the regulations cite any number of convictions or degrees of seriousness pertaining to criminal convictions. The business integrity provisions of the SNAP regulations do not provide the agency with discretion for dismissal of any action or for mitigating the impact of those actions on the basis of the seriousness of the violations, a lack of knowledge of the law, time that may have lapsed between conviction and application, circumstances under which they occurred, or whether restitution has been paid. If the matter violates the provisions of § 278.1(b)(3), action to deny must be taken accordingly. In the same manner, neither the Food and Nutrition Act of 2008, nor SNAP regulations, provide the agency with discretion for dismissal of any action or for mitigating the impact of those actions on the basis of an owner's clean record following a criminal conviction.

The evidence supports the Retailer Operations Division's determination to permanently deny the application of Wakelee Market to participate as an authorized retailer in SNAP.

Appellant Hardship

Appellant maintains that the denial has caused a hardship and that the business is suffering. Economic hardship is a likely consequence whenever a store is permanently denied from participation in SNAP. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship to the firm would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that it will incur economic hardship due to an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CONCLUSION

The Retailer Operations Division's decision to deny the application of Wakelee Market to participate as an authorized retailer in the SNAP is sustained. Denial of a firm's authorization to participate in the SNAP under the provisions of 7 CFR § 278.1(b)(3)(i) is permanent.

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

July 9, 2019