

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Des Moines, IA 50309**

Als Deli,)	
)	
Appellant)	
)	
v.)	Case Number: C0193434
)	
ROD Office,)	
)	
Respondent)	
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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 reverse the initial decision to permanently deny the application of Als Deli (hereinafter “Appellant”) to participate in the Supplemental Nutrition Assistance Program (SNAP) by the ROD Office (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) and § 278.1(k)(3) when it made the decision to deny 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 April 11, 2016, 7 U.S.C. 2018 (b)(6) & (b)(7)(c), signed as Owner an application for authorization to participate in the SNAP. Appellant was subsequently advised in a letter dated August 11, 2016 of the Department's decision to deny the firm’s authorization to participate in the program. The regulatory bases given for that denial were 7 C.F.R. § 278.1(b)(3) and § 278.1(k)(3). On August 29, 2016, Appellant requested an administrative review of this action. The request was granted.

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) and § 278.1(k)(3) establish the authority upon which a retail food store's or wholesale food concern's authorization to participate in the SNAP may be denied on the basis of a lack of business integrity. 7 USC 2018 (b)(7)(e).

7 C.F.R. § 271.2 states, *inter alia*:

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(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.

7 C.F.R. § 278.1(b)(3) states, *inter alia*:

FNS shall consider all of the following:

- (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, *inter alia*:

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.

Additionally, in interpretation of the regulations, relevant policy provides, *inter alia*, that:

The following situations warrant denial of authorization:

- Criminal conviction records reflecting on the honesty or integrity of owners, officers, managers, or other personnel of the applicant firm
- Judicial determinations in civil litigation adversely reflecting on the integrity of owners, officers, managers or other personnel of the applicant firm.
- Any other evidence reflecting on the business integrity or reputation of the applicant firm.

SUMMARY OF THE CHARGES

The Owner of Al's Deli, [7 U.S.C. 2018 (b)(6) & (b)(7)(c)], signed an application to participate in the SNAP on April 11, 2016. The record reflects that [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] was convicted of domestic violence in 2000 and possession of marijuana and illegally carrying a concealed weapon in 2010. As noted in the foregoing, regulations at 7 C.F.R. § 278.1(b)(3)(i) provide that certain convictions, reflecting a lack of business integrity, warrant denial of a firm's application to participate in the SNAP.

In a letter dated August 11, 2016, the ROD Office informed Appellant that its application to participate in the SNAP was denied upon a determination that Appellant lacks the necessary business integrity to further the purposes of the SNAP and, in accordance with 7 CFR § 278.1(b)(3) and § 278.1(k)(3), its application to participate was permanently denied.

APPELLANT'S CONTENTIONS

In its written request for review dated August 29, 2016 Appellant provided information in which it was argued that:

1. The denial of SNAP authorization works a hardship upon Appellant and upon its

- customers.
2. The firm sells quality food, whole grain food, meat and dairy products, frozen dinners, fruits and vegetables.
 3. The firm has been SNAP-authorized since it has been in existence and has never had a violation or complaint. The agency cannot question the integrity of a business that has never closed its doors since 1969.
 4. The fact that the Owner of the Appellant firm checked criminal history on the application and subsequently sent criminal history as requested should speak to the Owner's integrity. To use the Owner's criminal history against him while trying to make an honest living means the agency doesn't believe in rehabilitation. It seems a hypocrisy that the Owner's criminal history did not prevent obtaining cigarette, tobacco or alcohol licenses but does prevent obtaining a SNAP authorization.
 5. Appellant provides character letters from people who are considered important in its community and who know the Owner personally and can attest to his integrity.

ANALYSIS AND FINDINGS

In regard to contention 1 above, Appellant notes that a failure to authorize the firm to participate in the SNAP would work a hardship upon SNAP households, would deprive a benefit to Appellant derived from a SNAP authorization, would deprive service to SNAP customers (other than the firm's failure to meet eligibility requirements) and/or to the community, or would work a hardship upon same implied by a lack of such benefit or service; however, such cannot constitute grounds for reversing the denial decision in the present case. There are no provisions in the Act, regulations or agency policy allowing hardship to applicants and/or to SNAP customers as considerations in determining eligibility for participation in the SNAP, with the exception of co-located wholesale/retail firms, which must meet a variety of additional requirements. Appellant's store is not a co-located retail/wholesale firm and, accordingly, such provisions do not apply in this case. It is added for the record that a denial on the basis of business integrity provisions precludes the firm's eligibility regardless of its other qualifications to participate.

Regarding contention 2 above, while a firm's inventory of staple foods is a critical element in SNAP eligibility, due to the denial decision based upon 7 CFR § 278.1(b)(3), as noted above, a full evaluation of Appellant's eligibility otherwise is not affirmed in the record and thus must be completed in order for an accurate determination to be made. Thus, while Appellant may stock staple food items in the categories described, an evaluation of same does not exist in the record and such determination cannot be made on the basis of this review.

With regard to contention 3 above, the compliance of the firm under previous ownership has no direct bearing on Appellant's eligibility to participate in the SNAP, unless the issue of an attempt to circumvent a disqualification by the firm's prior ownership arises/is identified. There has been no such determination at this point in the ROD Office's evaluation of eligibility; thus SNAP compliance by prior ownership is not an issue in the present case. For the record, the agency can withdraw, in fact is *required* by regulations to withdraw, the authorization of a firm if correctly found to lack business integrity in accordance with the statute, regulations and agency policy.

In regard to contention 4 above, it is acknowledged that the Owner's forthrightness in reporting his criminal history is a positive reflection of integrity: no provision exists allowing or requiring such consideration; the statute, regulations and agency policy specifically address the factors which constitute a lack of business integrity and do not contemplate mitigating positive factors such as forthrightness. Accordingly, such cannot constitute adequate grounds for reversal of the denial decision.

The agency's denial action, as discussed below, lacked specificity in regard to its regulatory basis; however, in instances in which such specificity is provided and in which such a determination is in accordance with the statute, regulations and agency policy, the determination is simply required by that legal framework and is to be implemented in the absence of any bias or punitive intent; business integrity provisions are viewed merely as additional means by which SNAP retailer eligibility is determined. Thus there is no accurate sense in which the agency is in any position to "*hold a criminal history against*" an applicant any more than denying a firm for lack of staple food inventory is "*holding lack of inventory against*" an applicant. These considerations are simply eligibility considerations; a firm meets all the requirements stipulated in law, regulations and/or agency policy, or it does not. No bias, punitive intent or discrimination can reasonably be imputed by the agency's acting solely in accordance with this legal framework.

While the holding of other business licenses can help to demonstrate that a firm is operating an actual business, such alone does not confer SNAP eligibility upon any applicant. It is noted as well that there are provisions allowing for lack of qualification/eligibility for other business licenses for specific reasons, in certain circumstances, to negatively impact an applicant's SNAP eligibility, such as disqualification from WIC and to the extent the lack of such qualifications reflect upon an applicant's business integrity as provided in the statute, regulations and agency policy.

With regard to contention 5 above, there is no provision in the statute, regulations or agency policy directing or allowing the agency to consider such information in determinations regarding a firm's eligibility to participate in the SNAP. Eligibility requirements are prescriptive and as such are limited to those elements enumerated in the statute, regulations and agency policy.

The above notwithstanding, the ROD Office, by means of its August 11, 2016 Charge Letter, based its denial determination upon 7 C.F.R. § 278.1(b)(3) and (k)(3). The Denial Letter states that the decision is based on records of criminal conviction or civil judgment; thus while the ROD Office does not specifically cite § 278.1(b)(3)(i) in the Charge Letter it is clear that (i) is the operative provision (and not (ii), (iii), (iv), (v) or (vi)). However, the record contains no reference to the specific subsection in § 278.1(b)(3)(i) upon which the decision is based; this section contains three subsections § 278.1(b)(3)(i)(A), (B) and (C). In the present case, it is not possible that all three could apply; moreover, the ROD Office's determination is not clear that any would correctly apply. The review officer cannot safely assume that it was the ROD Office's intent to rely upon any particular one or two of the three, or conversely that it was not.

As noted above, it is acknowledged, however, that although the denial is reversed, the

record is not clear on whether the firm otherwise qualifies to participate in the SNAP, as the record does not contain a complete evaluation of the firm's qualifications beyond 7 CFR § 278.1(b)(3)(i), which as noted is insufficiently specific. Accordingly, while the decision that the firm fails to qualify on the basis of a § 278.1(b)(3)(i) is reversed, the firm may or may not otherwise qualify to participate in the SNAP and such a determination should be made upon the basis of Appellant's qualifications in accordance with the statute, regulations and agency policy.

CONCLUSION

In view of the above, it is my determination that the ROD Office's denial of Appellant's authorization to participate in the SNAP fails to specifically base its decision upon a regulatory provision at § 278.1(b)(3)(i)(A) through (C). The denial, therefore, is reversed, though this does not equate to an authorization but rather intends to precipitate a further evaluation of the firm's eligibility and determination made thereupon and which specifically addresses a regulatory basis.

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.

/S/

October 14, 2016

DANIEL S. LAY
ADMINISTRATIVE REVIEW OFFICER

DATE