

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

**MKE Good Food Bus,  
Appellant,**

**v.**

**Retailer Operations Division,  
Respondent.**

**Case Number: C0246177**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny the authorization of MKE Good Food Bus (hereafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2 and § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied Appellant authorization to participate as a retailer in SNAP on April 20, 2021.

**AUTHORITY**

7 U.S.C. § 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**

In a letter dated April 20, 2021, Retailer Operations Division denied Appellant’s authorization to participate as a retailer in SNAP. This denial was based on information provided on the firm’s retailer application and additional information provided.

Retailer Operations Division determined that the firm did not meet the definition and requirements of a retail store as set forth in 7 CFR § 271.2 and § 278.1(b)(1) of the SNAP regulations. The denial letter states FNS has determined that the firm is operating as a wholesale

distributor, issuing 1099's, not as a retailer, and the firm is not, therefore, considered eligible for SNAP authorization. As a result, the firm is being denied per 7 C.F.R. § 278.1(k)(1).

As the firm failed to meet SNAP eligibility criterion for approval, Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in 7 CFR § 278.1(k)(2).

In a letter dated April 29, 2021, Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action. The appeal 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, 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 U.S.C. § 2018 and Section 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k)(2) establishes the authority upon which the authorization of any firm to participate in SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 defines a retail food store as (1) “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, as 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) as set forth in § 278.1(b)(1) of this chapter and has more than 50 percent of its total gross retail sales in staple foods (Criterion B) as set forth in § 278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stock keeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption, and require no additional preparation, are not eligible for FSP [SNAP] participation as retail food stores under § 278.1(b)(1) of this chapter.”

7 CFR §271.2 defines Wholesale food concern as “an establishment which sells eligible food to retail food stores or to meal services for resale to households.”

7 CFR §278.1(b)(1)(i) relays specific program requirements for retail food store participation, which reads, in part, “An establishment . . . shall . . . effectuate the purposes of the program if.

it . . . meets one of the following criteria: Offer for sale, on a continuous basis, a variety of qualifying foods in each of the four categories of staple foods . . . including perishable foods in at least two of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment . . . in staple foods (Criterion B).”

7 CFR § 278.1(b)(1)(v) states: “Wholesale food concerns, the primary business of which is the sale of eligible food at wholesale, and which meet the staple food requirements in paragraph (b) of this section, shall normally be considered to have adequate food business for the purposes of the program, **provided such concerns meet the criteria specified in paragraph (c) of this section.**” [Emphasis Added]

7 CFR § 278.1(c) states, in relevant part: “A wholesale food concern may be authorized to accept [SNAP benefits] only from a specified customer or customers if it meets the requirements of paragraphs (a) and (b) of this section, and FNS determines it is required as a redemption outlet:

- (1) For one or more specified authorized drug addict or alcoholic treatment programs,
- (2) For one or more specified authorized group living arrangements,
- (3) For one or more specified authorized shelters for battered women and children,
- (4) For one or more specified authorized nonprofit cooperative food-purchasing ventures,
- (5) For one or more specified authorized public or private nonprofit homeless meal providers, or
- (6) For one or more specified authorized retail food stores which are without access to an insured financial institution which will redeem their coupons.

No firm may be authorized to accept [SNAP benefits] concurrently as both a retail food store and a wholesale food concern...”

7 CFR §278.1(k) reads, in part, “FNS shall deny the application of any firm if it determines that:

- (1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section; or (2) The firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B, as specified in paragraph (b)(1)(i) of this section . . . for a minimum period of six months from the effective date of the denial.”

## APPELLANT’S CONTENTIONS

The Appellant made the following summarized contentions in its response to the denial letter and in the request for administrative review, in relevant part:

1. We attach a proposed plan to adjust our business model so that the role of our Community Coordinator, currently an independent contractor per IRS guidelines, is restructured to be an employee. We feel the current model better reflects the independence of this role but are willing to make the changes if that is truly the only way forward to becoming SNAP authorized.

2. The referenced section of 7 CFR 278.1(k)(1) (wholesalers) does not pertain to our firm and its mode of operation, and further, our firm meets the requirements for retailers under 278.1(c)(iii) as well as the Need for Access criteria.
3. MKE Good Food Bus is a delivery route retailer. We purchase produce from local farmers in bulk and sell it to customers directly from our vehicle, with both designated routes and customer-requested stops, focusing on Milwaukee neighborhoods that lack grocery stores and farmers markets.
4. The mailing address provided in the SNAP retailer application indicated a shared commercial kitchen space. We rent refrigerator shelf space there, but it is not our place of business, nor do we sell from there.

Appellant provided a community letter dated February 10, 2021, which included a 2020 Year End Report for the business, a June 2, 2021, letter from Feeding America Eastern Wisconsin, a May 31, 2021, letter from Kaleidoscope Gardens, four (4) customer support letters, and a copy of the business' current and proposed model change.

The preceding may represent only a 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**

Regarding Appellant's contentions, it is important to clarify that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. It is not the purpose of this review to consider what subsequent actions may have been taken so that a store may begin to comply with program requirements. Section 278.1(b)(1)(v) relays specific eligibility requirements for retail food store participation, which reads, in part, "Wholesale food concerns, the primary business of which is the sale of eligible food at wholesale, and which meet the staple food requirements in paragraph (b) of this section, shall normally be considered to have adequate food business for the purposes of the program, provided such concerns meet the criteria specified in paragraph (c) of this section"

Appellant contends that it plans to adjust the business model so that the role of the Community Coordinator, currently an independent contractor, will be restructured to be an employee. The record also reflects that Appellant corroborated this fact by submitting a copy of the tax form 1099 that were issued to individual contractors. Firms that issue 1099's to individual contractors are considered wholesale distributors and not as a retailer. Therefore, the firm is considered ineligible for SNAP authorization. As a result, the firm is being denied per 7 C.F.R. § 278.1(k)(1). Additionally, Appellant's business license also indicates that the firm is a Food Dealer-Restaurant.

It is the determination of this review that Appellant's arguments are not valid reasons to reverse the agency's denial determination. Although a firm may have a strong customer base, it must comply with regulations to obtain authorization.

The regulations also provide a definition of “Ineligible firms” as “firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from Program participation.

### **Need for Access**

SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether the Appellant firm is in an area with significantly limited access to food when the firm fails to meet Criterion A or Criterion B if it meets all other eligibility requirements. The record indicates that the Retailer Operations Division conducted a Need for Access evaluation and appropriately determined that the Appellant firm did not qualify for SNAP authorization under this provision.

7 CFR § 278.1(k)(2) states, in part, “FNS shall deny the application of any firm if it determines that the firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B, as specified in paragraph (b)(1)(i) of this section . . . for a minimum period of six months from the effective date of the denial.” There is no agency discretion to impose a sanction less than six months when a firm does not meet the eligibility requirements for authorization.

### **CONCLUSION**

Based on the discussion herein, the determination by the Retailer Operations Division to deny the authorization of MKE Good Food Bus to participate as a retailer in SNAP is sustained. Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six months, from the effective date of the denial.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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.

Under the Freedom of Information Act (FOIA), 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.

Monique Brooks  
ADMINISTRATIVE REVIEW OFFICER

August 4, 2021