

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

8901 Gas & More, Inc.,

Appellant,

v.

Case Number: C0215815

Retailer Operations Division,

Respondent.

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 application of 8901 Gas & More, Inc. (“Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Appellant to participate as an authorized SNAP retailer on February 7, 2019.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 February 7, 2019, the Retailer Operations Division denied the application of Appellant to participate as an authorized retailer in SNAP. This denial action was based on observations during a store visit on December 2, 2018 as well as information provided on the firm’s retailer application.

The Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations. The denial letter stated the Appellant failed to meet the requirements of Criterion A because it did not offer for sale on a continuous basis a variety of foods in the dairy products category. Also, Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its gross retail sales.

As the firm failed to meet either 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 § 278.1(k)(2). This determination letter also stated that the Retailer Operations Division considered Appellant's eligibility under the need for access provision at Section 278.1(b)(6) of the SNAP regulations. However, the letter stated Appellant did not qualify for SNAP authorization under this provision.

On February 22, 2019, Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k)(2) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet established eligibility requirements.

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 three 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 § 271.2 defines staple food, in part, as:

Those food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products.

7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis as offering for sale no fewer than three different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety on any given day of operation.

7 CFR § 278.1(b)(1)(ii)(C) of the SNAP regulations define “variety”, in part, as:

Different types of foods within each staple food category. For example: Apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk, soy yogurt, soft cheese, butter, sour cream, and cow milk yogurt in the dairy products category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken, beans, nuts, beef, pork, eggs, and tuna in the meat, poultry, or fish category. Variety of foods is not to be interpreted as different brands, nutrient values (e.g., low sodium and lite), flavorings (e.g., vanilla and chocolate), packaging types or styles (e.g., canned and frozen) or package sizes of the same or similar foods. Similar food items such as, but not limited to, tomatoes and tomato juice, different types of rice, whole milk and skim milk, ground beef and beefsteak, or different types of apples (e.g., Empire, Jonagold, and McIntosh), shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any staple food category. Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.

7 CFR § 278.1(k) reads, in part:

FNS shall deny the application of any firm if it determines that [t]he 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

Appellant’s responses regarding this matter are essentially as follows:

- The inspector said that at the time of the store visit the store had all the required varieties of food necessary for authorization. Appellant provided 14 pages of store pictures.
- Appellant requests another chance because the store is located in an area where many people use SNAP.
- Appellant carries even more products than did the previous owner, who was SNAP authorized.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant contends the inspector said that at the time of the store visit the store had all the required varieties of food necessary for authorization. It seems unlikely that the store reviewer told staff that the firm met the requirements for authorization, as this determination is not made by the store reviewer. The store visit report states that staff told the store reviewer that the firm was out of infant formula, butter and cheese, and that these items were on order for the following week. A review of the store visit documentation illustrates that on the day of the visit the store was deficient in the dairy products category. Appellant carried only milk in the dairy products category at the time of the store visit. Therefore, the Retailer Operations Division correctly concluded Appellant did not meet Criterion A because the store did not offer "qualifying staple foods on a continuous basis."

An evaluation of the percentages of staple food sales reported on Appellant's retailer application, as well as the photographs and store inventory provided from the store visit, indicate that Appellant did not receive more than 50 percent of its projected annual sales from the sale of staple foods. Accordingly, the Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B.

Appellant stated it carries even more products than did the previous owner, who was SNAP authorized. This administrative review is limited solely to those circumstances concerning Appellant's eligibility. Therefore, the firm's contention regarding the operation of the firm under previous ownership cannot be used to reverse the decision of the Retailer Operations Division.

No Need for Access

Appellant has requested another chance because the store is located in an area where many people use SNAP. SNAP regulation 7 CFR § 278.6(f)(1) provides for civil money penalties in lieu of disqualification in cases where disqualification would cause hardship to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. However, 7 CFR § 278.6(f)(1) only applies to firms that are "selling a substantial variety of staple food items."

As Appellant failed to meet Criterion A and B, the Retailer Operations Division did consider whether Appellant is located in an area with significantly limited access to food as required under SNAP regulation 7 CFR § 278.1(b)(6). In determining whether Appellant is located in such an area, the Retailer Operations Division considered factors such as the distance from Applicant to the nearest currently SNAP-authorized firm and the extent of Appellant's stocking deficiencies in meeting Criterion A and Criterion B. The Retailer Operations Division determined Appellant did not qualify for SNAP authorization under 7 CFR § 278.1(b)(6).

Some degree of inconvenience to SNAP benefit users is inherent in the failure to authorize a retailer, since the distance to the nearest SNAP-authorized firm may be longer for some SNAP benefit holders. A review of the factors and evidence considered by the Retailer Operations Division under 7 CFR § 278.1(b)(6) supported that authorization of Appellant was not necessary for access.

Therefore, the earlier determination that authorization of Appellant was not required to ensure access to food for SNAP participants, as differentiated from potential inconvenience, is sustained.

The regulations at 7 CFR § 278.1(k) state, 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 of less than six months when a firm does not meet the eligibility requirements for authorization.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny the application of 8901 Gas & More, Inc. to participate as an authorized SNAP retailer is sustained. Appellant is ineligible to submit a new application for SNAP authorization for a period of six months from the date of the denial letter, February 7, 2019.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant’s owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

RICH PROULX
Administrative Review Officer

April 8, 2019