

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Avery's Express Mart 1,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0203185

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the Retailer Operations Division's decision to deny the application of Avery's Express Mart 1 (Avery's or Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). Appellant may not reapply for six months from the date of the denial decision.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1) and § 278.1(k)(2) in its administration of the SNAP when it denied the application of Avery's to participate as an authorized SNAP retailer.

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

In a letter dated September 27, 2017, the Retailer Operations Division informed ownership that the application of Avery's to participate as an authorized retailer in

SNAP was denied because Appellant did not meet the eligibility requirements set forth in Section 278.1(b)(1) of the SNAP regulations. Based on the September 26, 2017, FNS store visit, the Retailer Operations Division determined that Avery's failed to meet Criterion A. Appellant did not offer for sale a variety of foods in sufficient quantities on a continuous basis because it carried too few items in the dairy staple food category and the meat, poultry, or fish staple food category. The Retailer Operations Division also determined that the firm failed to meet Criterion B because staple food sales comprised less than 50 percent of its total gross retail sales.

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

In a letter postmarked October 5, 2017, 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). Section 278.1(b)(1) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 states, *inter alia* that *Retail Food Store* means: "An establishment . . . 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 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. . . . Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm . . .”

7 CFR § 278.1(b)(1)(i) imparts 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)(ii)(A) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion A, it must “Offer for sale and normally display in a public area, qualifying food items *on a continuous basis* (emphasis added) evidenced by having, on any given day of operation, no fewer than three different varieties of food items in each of the four staple food categories.”

7 CFR § 278.1(b)(1)(ii)(C) clarifies “variety of staple foods” as meaning, in relevant part, “. . . different types of foods, such as apples, cabbage, tomatoes, and squash in the fruit or vegetable staple food category, or milk, cheese, butter and yogurt in the dairy category. Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes. Similar processed food items with varying ingredients such as, but not limited to, sausages, breakfast cereals, milk, sliced breads and cheeses, and similar unprocessed food items, such as, but not limited to, different varieties of apples, cabbage, tomatoes or squash, shall not each be considered as more than one staple food variety for the purpose of determining variety . . .”

7 CFR § 278.1(b)(1)(iii) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion B, it must “. . . have more than 50 percent of . . . total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services . . .”

7 CFR § 278.1(k)(2) reads, 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.”

APPELLANT'S CONTENTIONS

Appellant made the following summarized contentions in its October 5, 2017, administrative review request, in relevant part:

- Appellant has all the products required such as dairy, bread and cereal, cold meat sandwiches, candy, snacks, ice cream, and soda.
- Appellant needs SNAP authorization in order for its business to survive.

Appellant submitted eight photographs of its food stock with its administrative review request and submitted an additional 13 photographs by e-mail on November 9, 2017.

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

The record reflects that ownership submitted an application to participate as a SNAP retailer on August 31, 2017, wherein it estimated that staple foods accounted for 15% of total gross retail sales. The accessory "other" food items showed an estimate of 20% of the firm's total gross retail sales. The owner estimated 65% of sales come from non-food items. A review of Appellant's food inventory was conducted by FNS contracted staff as a routine part of the authorization process on September 26, 2017. The store visit revealed insufficient stock in the dairy staple food category and the meat, poultry, or fish staple food category; thus, not meeting Criterion A according to 7 CFR § 278.1 (b)(1)(ii).

Federal regulations at 7 CFR § 278.1(b)(1)(ii) state that in order to qualify for SNAP authorization under Criterion A (*emphasis added*), a firm shall "offer for sale . . . qualifying staple food items *on a continuous basis*, evidenced by having, *on any given day of operation*, no fewer than *three* different varieties of food items in each of the *four* staple food categories." This means that retail stores must have qualifying staple food items displayed in a public area on a continuous basis at the time of the store visit in order to qualify for SNAP authorization under Criterion A. The record shows that on the day of the store visit, Appellant only had one variety of food in the dairy staple food category (milk) and only one variety of food in the meat, poultry, or fish staple food category (jerky).

In the event of a firm's failure to meet the requirements of eligibility under Criterion A, federal regulations require that the firm's eligibility also be evaluated under

Criterion B. In order to qualify for authorization under Criterion B, more than 50 percent of a retail store's total annual gross retail sales must come from the sale of staple foods. Based on the FNS store visit photographs and the application, the Retailer Operations Division determined that Appellant was also ineligible for authorization under Criterion B according to 7 CFR § 278.1(b)(1)(iii).

Appellant's SNAP application estimates that 15 percent of its gross annual retail sales come from the sale of staple foods. The store visit photographs and report show that the items in stock were almost exclusively ineligible non-food items or accessory foods items including but not limited to, carbonated and uncarbonated drinks.

Accessory foods are not considered staple foods for the purposes of determining eligibility of any firm according to regulations at 7 CFR § 271.2.

Therefore, the Retailer Operations Division correctly determined that Appellant was not eligible under Criterion B.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the denial action by the Retailer Operations Division. Therefore, Appellant's contention that it now stocks the required food is not a valid basis to reverse the determination of the Retailer Operations Division.

With regards to Appellant's contention that the business will not survive without SNAP authorization, it is recognized that economic hardship is a likely consequence whenever a store is denied from participation in SNAP. However, there is no provision in the SNAP law or regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Moreover, giving special consideration to economic hardship of 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 the firm will incur economic hardship does not provide any valid basis for reversing the denial determination.

Appellant requests reconsideration of its application. 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 aforementioned eligibility requirements for authorization.

CONCLUSION

The decision by the Retailer Operations Division to deny the SNAP application of Avery's is sustained. In accordance with 7 CFR § 278.1(k)(2), Appellant is not eligible to submit a new application for SNAP authorization for six months from September 27, 2017, the date of the denial letter.

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

December 4, 2017