

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

Bucky's Express #440,

Appellant,

v.

Case Number: C0208916

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the authorization of Bucky's Express #440 (hereinafter "Appellant") to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly withdrawn by the Retailer Operations Division, Retailer Operations Branch (hereinafter "ROD Office").

ISSUE

The issue accepted for review is whether the SNAP Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(b)(6), § 278.1(k)(2) and § 278.1(l)(1)(iii) when it made the decision to withdraw Appellant's authorization 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 4, 2013 Appellant was granted authorization to participate in the SNAP. As part of the routine reauthorization process, an inspection of Appellant's staple food inventory was conducted on April 12, 2018. The ROD Office provided the firm an additional opportunity, via a letter dated April 18, 2018, to demonstrate, by providing additional information, that it maintained the inventory necessary to qualify. Appellant did not provide this additional information; Appellant was subsequently advised of the Department's decision to withdraw the firm's authorization to participate in the SNAP in a letter dated May 7, 2018. The regulatory bases given for that denial were 7 C.F.R. § 278.1(b)(1), (6) and §

278.1(k)(2). The firm was instructed that its authorization would be withdrawn unless the firm timely requested an administrative review of the decision, in which case the decision would be held in abeyance pending the outcome of the review. On May 7, 2018, Appellant requested an administrative review of this decision. 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)(1), § 278.1(k)(2) and § 278.1(l)(1)(iii) establish the authority upon which a retail food store or wholesale food concern may be withdrawn from participation in the SNAP.

7 C.F.R. § 271.2 states, in part:

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(b)(1)(ii) further stipulates, in part:

Application of Criterion A. In order to qualify under this criterion, firms shall: Offer for sale and normally display in a public area, 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 with a depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least two staple food categories.

7 C.F.R. § 278.1(b)(1)(iii) states, in part:

Application of Criterion B: In order to qualify under this criterion, firms must have more than 50 percent of their 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, such as rental fees, professional fees and entertainment/sports/games income.

7 C.F.R. § 278.1(b)(1)(ii)(C) states, in part:

...Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes.

7 C.F.R. § 278.1(b)(1)(iv) states, in part:

Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including candy, soft drinks, tea or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

7 C.F.R. § 278.1(b)(6) states, in part,

FNS will consider whether the applicant firm is located in an area with significantly limited access to food when the applicant firm fails to meet Criterion A or B, so long as the applicant firm meets all other SNAP authorization requirements.

7 C.F.R. § 278.1(k)(2) states, in part:

FNS shall deny the application of any firm if it determines that:

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 The firm has failed to meet the eligibility requirements...under Criterion A or Criterion B....Any firm that has been denied authorization on these bases shall not be eligible to submit a new application for authorization in the program for a minimum period of six months from the effective date of the denial

7 C.F.R. § 278.1(l)(1)(iii) states, in part:

FNS shall withdraw the authorization of any firm authorized to participate... if ...The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...

APPELLANT'S CONTENTIONS

In Appellant's written request for review dated May 7, 2018 it was argued that:

1. Appellant had a staffing change at the store which allowed the dairy category to become out of line with company guidelines.
2. This has since been rectified and staff have been retrained on keeping ample supplies and selections in all categories available at all times. The firm now qualifies to participate in the SNAP. Appellant provides a listing of staple food items and photographs of inventory in support thereof.
3. The firm has qualified to participate in the SNAP for many years.

ANALYSIS AND FINDINGS

The record reflects that a contracted store visit to Appellant's firm was conducted on April 12, 2018. Documentation generated as a result of that visit includes photographs of the firm's interior and exterior, a store layout diagram and a store inventory survey reflecting that the firm had ample varieties of staple food stock in the fruits and vegetables category, in the breads and cereals category and in the meats/poultry/fish category, but had an inadequate stock of staple food in the dairy category, thus failing to qualify under Criterion A. The ROD Office duly provided the firm an opportunity to provide documentation that the firm's staple food sales met requirements. Documentation provided by Appellant was determined to fail to establish eligibility. It was additionally noted that the Appellant firm maintained a considerable stock of accessory foods and prepared, ready-to-eat food, which are not considered staple food for the purposes of the SNAP. In addition, the firm maintained a substantial inventory of tobacco products, alcohol, automotive products, health and beauty products, cleaning supplies, laundry detergent, over-the-counter medicines, paper products, clothing, pet food and supplies, cell-phone accessories, toys, sunglasses and other non-food items. The firm also operated as a gas station. Thus the store visit further corroborated that staple food sales could not have reasonably exceeded 50% of gross sales. As staple food sales must comprise more than 50 percent of a firm's gross retail sales, the store was determined ineligible for authorization under Criterion B. It is noted for the record the firm's most recent application for reauthorization (FNS – 252R, signed by Appellant on April 18, 2018) indicated that the firm's staple food sales comprised less than 2% of gross sales.

Regarding contention 1 above, it is acknowledged that extenuating circumstances may have contributed to the level and composition of staple food inventory observed at the firm on the day of the store visit; however, there is no provision in the statute, regulation or agency policy which allows such considerations to warrant a reversal of a withdrawal decision correctly made. Additionally, as noted above, 7 C.F.R. § 278.1(l)(1)(iii) clearly provides that FNS shall withdraw the authorization of any firm authorized to participate if the firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section.

In regard to contention 2 above, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the earlier decision of the SNAP Office and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. It is not within the scope of this review to consider actions Appellant may take to qualify for participation in the SNAP subsequent to that decision. Therefore, Appellants' contention that it has now taken measures to qualify under Criterion A or B of the eligibility requirements is not a valid basis upon which to reverse the decision by the SNAP Office. As noted in the foregoing, 7 CFR §278.1(l)(1)(iii) of the SNAP regulations is quite specific and does not provide for agency discretion in its requirement that "FNS shall withdraw the authorization of any firm for any of the following reasons...the firm fails to meet the requirements for eligibility under Criterion A or Criterion B." (Emphasis added.)

With regard to contention 3 above, Appellant may imply that a record of no prior non-compliance with eligibility requirements should be taken into consideration. However, such a record does not constitute valid grounds for reversing the SNAP Office's correct finding that the

firm did not qualify to participate in the SNAP. There is no provision in the Act, regulations or agency policy that allows a reversal of a correct eligibility determination based upon a lack of a firm's prior ineligibility or upon the duration of the firm's former eligibility. It is added for the record that it is not uncommon for a firm to qualify to participate in the SNAP at the time of application but for the firm's inventory to change such that the firm no longer qualifies at some later point. The purpose of periodic reauthorization procedures and store visits is to confirm continued store eligibility; the agency has a regulatory and policy-based obligation and authority to monitor firms' compliance with eligibility requirements.

As referenced in the foregoing (page 3 above), recent changes to the SNAP provide that retailers located in a low-income/low food-access area may receive an exception to the standard eligibility rules for participation; however, the record reflects that the ROD Office duly evaluated Appellant's eligibility for such exception and correctly found that the firm did not qualify.

CONCLUSION

In view of the above, it is my determination that the SNAP Office's decision to withdraw Appellant's authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), (6), § 278.1(k)(2) and § 278.1(l)(1)(iii).. Therefore the withdrawal action is sustained and shall remain in effect for a period of six months. The store may reapply to participate in the SNAP up to ten days prior to the end of the six-month period. This decision will become effective 30 days following Appellant's receipt of this document.

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.

Under 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 we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

DANIEL S. LAY
Administrative Review Officer

June 21, 2018