

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

Cheap Liquor & Grocery,

Appellant,

v.

Case Number: C0211692

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the Retailer Operations Division (Retailer Operations) properly imposed the withdrawal of the authorization of Dirt Cheap Liquor & Grocery (Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(l)(1)(iii), in its administration of SNAP when it withdrew Appellant's authorization to participate as a retailer in SNAP on July 13, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, a food retailer 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 administrative record reveals that Appellant applied for reauthorization to participate in SNAP on May 7, 2018. A FNS-contractor conducted an onsite visit on June 7, 2018, to ascertain Appellant's continued eligibility to participate in SNAP.

By letter dated July 13, 2018, Retailer Operations withdrew Appellant's authorization to participate as a retailer in SNAP. This withdrawal determination was based on observations

during a store visit on June 7, 2018, as well as information provided on Appellant's reauthorization application.

Retailer Operations determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of SNAP regulations. The withdrawal letter stated Appellant failed to meet the requirements of Criterion A because it did not offer for sale on a continuous basis a variety of foods, with the required minimum quantities in each, on a continuous basis in each of the four staple food categories. Specifically, Appellant failed to carry three stocking units in at least three varieties of food in the dairy products staple food category. Appellant also failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its gross retail sales.

This determination letter also stated that Retailer Operations considered Appellant's eligibility under the need for access provision at Section 278.1(b)(6) of SNAP regulations. However, the letter stated Appellant did not qualify for SNAP authorization under this provision. 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 7 CFR § 278.1(k)(2).

By letter postmarked August 3, 2018, Appellant appealed Retailer Operations' determination and requested an administrative review of this action. The appeal request was granted by letter dated August 15, 2018, and implementation of the withdrawal has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means 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 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(l)(1) establishes the authority upon which the authorization of any firm to participate in SNAP may be withdrawn 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 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 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(l)(1) reads, in part:

FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons [t]he firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section . . . for the time period specified in paragraph (k)(2) of this section.

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 6 months from the effective date of the denial.

APPELLANT'S CONTENTIONS

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

- There was no freezer to store frozen foods at the time of the visit. A freezer was recently purchased and the store will carry all required foods to meet the demands of the program.
- Please review the store again.

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.

ANALYSIS AND FINDINGS

A review of the store visit documentation illustrates that on the day of the visit Appellant was deficient in dairy products. The Appellant contends that there was no freezer to store frozen food at the time of the visit, but a freezer was recently purchased and the store will carry all the required foods to meet the demands of the program. The owner provided no evidence to demonstrate that Appellant met the requirements at the time the determination was rendered. That Appellant may now be properly stocked is not an issue under review. The regulations are clear that a store must have a variety of food in sufficient quantities in each of the four staple food categories on a continuous basis. Therefore, Retailer Operations 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 of 4%, 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, Retailer Operations correctly determined Appellant was not eligible for authorization under Criterion B.

As Appellant failed to meet Criterion A and B, Retailer Operations 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, Retailer Operations 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. Retailer Operations determined Appellant did not qualify for SNAP authorization under 7 CFR § 278.1(b)(6).

Appellant requests another store review. The regulations at 7 CFR § 278.1(l)(1)(iii) state, in part:

FNS shall withdraw the authorization of any firm if the firm fails to meet the requirements for eligibility under Criterion A or B . . . for the time period specified in paragraph (k)(2)" and 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 6 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 a preponderance of the evidence in this matter, the determination by Retailer Operations to withdraw the authorization of Dirt Cheap Liquor & Grocery to participate as a retailer in SNAP is sustained.

According to 7 CFR § 278.1(l)(1)(iii) of SNAP regulations, Appellant is ineligible to submit a new application for the subject store for a minimum period of six months from the effective date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery of this letter. The owner may call 877-823-4369 for general SNAP application information.

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 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.

Kim Dameron
Administrative Review Officer

February 13, 2019