

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

Eldridge Rolle,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0217176

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service, finds there is sufficient evidence to support the determination by the Retailer Operations Division to deny the application of Eldridge Rolle (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is 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 SNAP, when it denied the application of Appellant to participate in SNAP by letter dated April 1, 2019

AUTHORITY

According to 7 U.S.C. § 2023 and the 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

The firm was withdrawn as a SNAP retail store on June 16, 2018, for failure to respond to a letter advising store ownership that FNS was considering withdrawing the firm’s SNAP retail authorization since no SNAP benefits had been redeemed in more than one year. The store owner subsequently reapplied for SNAP retailer authorization. In a letter dated April 1, 2019, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not meet the definition and eligibility requirements of a retail food store as established by Federal regulations at 7 CFR § 271.2 and 278.1(b)(1) and is therefore ineligible to participate in the SNAP as an authorized retailer.

Specifically, FNS has determined that the firm is operating as a wholesale distributor and issuing IRS form 1099 to employees, not as a retailer, and the firm is not, therefore, considered eligible for SNAP authorization. As a result, the firm is being denied under 7 CFR § 278.1(k)(1).

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). Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

By letter postmarked April 9, 2019, Appellant appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Subsequent correspondence postmarked May 9, 2019, was received from Appellant.

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 Part 278.1(k)(1) and Part 278.1(l)(1) establish the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet the definition of an eligible firm.

7 CFR § 278.1 (c) Wholesalers reads, in part, "A wholesale food concern may be authorized to accept coupons 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 and redeem coupons concurrently as both a retail food store and a wholesale food concern." Authorizations of wholesale food concerns granted prior to January 28, 1982 shall expire on May 31, 1982. Wholesale food concerns desiring to participate in the program after that date must reapply for authorization in accordance with the provisions of this paragraph.

7 CFR § 278.1(h) stipulates that FNS may limit the authorization of house-to-house trade routes to those trade routes whose services are required by participating households in such areas in order to obtain food. In deciding whether such routes are required in certain areas, the

regulations call for FNS to consider the volume of food business the trade route does and the availability of alternate sources of comparable food.

7 CFR § 278.1(b)(1)(i)(A) states: An establishment or house-to-house trade route shall normally be considered to have food business of a nature and extent that will effectuate the purposes of the program if it sells food for home preparation and consumption and 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 as defined in § 271.2 of this chapter, 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 or route in staple foods (Criterion B).

7 CFR § 278.1(k)(1) and (2) reads, in relevant 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. (2) Any firm that has been denied authorization on these bases shall not be eligible to submit a new authorization for authorization in the program for a minimum period of six months from the effective date of the denial.

APPELLANT'S CONTENTIONS

The following may represent 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:

- The owner's application was denied because he is qualified as a wholesaler because his wife works for him as a 1099 contractor. The majority of his business is direct to customer so he should not be considered a wholesaler. He is making provisions to change to a W-2 immediately if that is what it takes to become SNAP authorized again;
- The firm has been in business for 11 years and a SNAP retailer for seven years as a produce vendor at 18 local farmers markets in southwest Florida. For the last eight years the firm has been the only produce vendor that accepts EBT at local farmers markets;
- The owner has always been in compliance with USDA rules and regulations. His EBT service was recently suspended for inactivity, but never received the letter stating he had 10 days to respond. The owner is saddened that he lost his SNAP authorization for not using his EBT services and accepts full responsibility for it. He now realizes how important it is that he get back into the program so he can help educate, promote, and provide fresh produce to his EBT customers; and,
- The owner was handpicked by the Collier County Department of Health to start a farmers market on their site and for the last eight years has been the only vendor that accepts EBT. The owner also has worked with Feeding Florida and Blue Zone of Naples Community Hospital to bring fresh produce to SNAP customers.

Appellant submitted 10 letters from supporters and information on the Fresh Access Bucks program in support of these contentions.

ANALYSIS AND FINDINGS

The authorization of a firm to participate in SNAP must be in accord with the Act, as amended, and regulations. These requirements of law cannot be waived. Thus, 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 as such it is limited to consideration of the relevant facts and circumstances that existed at the time of the denial determination.

In reaching its decision to deny the firm's SNAP retailer application, the Retailer Operations Division reviewed documents received from the Appellant in support of its application which included a "Delivery Route Questionnaire". Ownership responded to questions on this form stating that compensation for all drivers is reported to the Internal Revenue Service using Form 1099-MISC. IRS.gov states this form is generally used to report payments made in the course of a trade or business to a person who is not an employee. A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that the Appellant firm does operate as a wholesale distributor based on procedures established by FNS.

Although firm ownership may not consider the firm to be a wholesale distributor, under procedures established by FNS in November 2018, firms that submit Form 1099s are considered to be operating as a wholesale distributor, not a retailer, and are not eligible for SNAP retailer authorization and their applications should be denied in accordance with 7 CFR § 278.1(k)(1).

In regards to Appellant's contention that it is making provisions to change to a W-2 form, this review is limited to those facts and circumstances that existed at the time of the denial action.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny the application of the Appellant firm to participate as an authorized SNAP retailer is sustained.

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 a judicial review is desired, 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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

July 22, 2019