

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

Esquire News,

Appellant,

v.

Case Number: C0213884

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the decision by the Retailer Operations Division (Retailer Operations) to deny the application of Esquire News (Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed.

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action consistent with 7 CFR § 278.1(b)(1) in its administration of the SNAP when it denied the application of Appellant to participate in the SNAP as an authorized retail food store.

AUTHORITY

7 USC § 2023 and the implementing regulations at 7 CFR § 279.1 provide that 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

Retailer Operations received a SNAP application from Appellant. FNS-contracted staff conducted an onsite store visit on October 12, 2018. By letter dated October 23, 2018, Retailer Operations informed the owner that the application of Appellant to participate as a SNAP authorized retailer was denied. Appellant did not meet the eligibility requirements as set forth in Section 278.1(b)(1) of the SNAP regulations. Retailer Operations determined that 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 product and the meat, poultry, or fish staple food categories, and did not meet Criterion A.

Retailer Operations also determined that the firm failed to meet Criterion B because its staple food sales comprise 50 percent or less of the total annual gross retail sales of the firm. This was based on the application information and the store visit report. Appellant was informed that in accordance with Section 278.1(k)(2) of the SNAP regulations a new application for the firm to participate in the SNAP could not be submitted for a period of six months from the date of the denial.

The owner requested administrative review by letter dated October 29, 2018. The appeal was granted by letter dated November 8, 2018.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action 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 argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

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 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, qualifying staple food items on a continuous basis, evidenced by having no fewer than seven 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, including at least one variety of perishable foods in at least two such categories, (Criterion A) as set forth in § 278.1(b)(1) of this chapter, or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) as set forth in § 278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stockkeeping units, or other accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in: Food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under § 278.1(b)(1)

of this chapter. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.”

7 CFR § 271.2 states: “Staple food, means those food items intended for home preparation and consumption in each of the following four categories: Meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (i.e., nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility under § 278.1(b)(1) of this chapter. Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will be included in the staple food category of the main ingredient as determined by FNS.”

7 CFR § 271.2 states: “Accessory food items include foods that are generally considered snack foods or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar. Items shall not be classified as accessory food exclusively based on packaging size but rather based on the aforementioned definition and as determined by FNS. A food product containing an accessory food item as its main ingredient shall be considered an accessory food item. Accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm.”

7 CFR § 278.1(b)(1)(i) states: “(A) 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(b)(1)(ii) provides that for a retail store to qualify for authorization under Criterion A, a firm shall: “(A) 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 seven 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 and at least one variety of perishable foods in at least three staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement.” 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) states: “(B) Offer for sale perishable staple food items in at least three staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks.”

7 CFR § 278.1(b)(1)(ii) states: “(C) Offer a variety of staple foods which means 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(b)(1)(iii) provides that for firms to qualify for authorization under Criterion B: “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. However, a fee directly connected to the processing of staple foods, such as raw meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B.”

7 CFR § 278.1(b)(6) deals with the need for access: “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 per paragraph (b)(1)(ii) or Criterion B per paragraph (b)(1)(iii) of this section so long as the applicant firm meets all other SNAP authorization requirements.”

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. 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.”

APPELLANT'S CONTENTIONS

All contentions, whether recapitulated here or not, have been considered.

- This store will stock three or more units of staple foods, as we were unaware of the requirements.
- I have started bakery goods, dairy products and additional fruits.

Copies of 2018 vendor receipts dated 10/12, 10/16, 10/23, 10/30, and 11/2 were advanced for review.

ANALYSIS AND FINDINGS

The purpose of this review is to validate or to invalidate the determination by Retailer Operations; as such it is limited to consideration of the relevant facts at the time of the decision. The authorization of a store to participate in the SNAP must be in accord with the Act and the regulations, as amended; those requirements of law cannot be waived. It is not within the scope of this review to consider actions the owner may take to qualify for participation as a SNAP retail food store subsequent to that decision.

The onsite review of Appellant's food inventory revealed insufficient foods in the two staple food categories. The SNAP regulations at Section 278.1(b)(1)(ii)(A) under Criterion A as currently implemented, require a firm to offer for sale and normally display in a public area, 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, and at least one variety of perishable foods in at least three staple food categories. By a preponderance of the evidence, on the date of the store visit, Appellant did not meet Criterion A.

Based on Appellant's application, Retailer Operations determined that Appellant was also ineligible for authorization under Criterion B per 7 CFR § 278.1 (b)(1)(iii). Appellant's staple food sales comprise 50 percent or less of its reported annual gross retail sales. No evidence was provided by the owner that Appellant met Criterion B at the time of the denial. Retailer Operations also properly accessed the firm for need for access as per the regulations at 7 CFR § 278.1(b)(6).

SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application. The evidence supports that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the denial decision was rendered. The owner provided vendor invoices to substantiate his claim that Appellant stocked the required staple foods for SNAP authorization. A review of the invoices shows that all but one are dated after the date of the store visit. One is on the date of the store visit. Proof of inventory under Criterion A requires firms to submit invoices or receipts that demonstrate that the items missing at the time of the inspection were ordered or stocked by the firm within 21

calendar days prior to the date of the store visit. Records dated on, or after, the date of the store visit are not considered acceptable. As such, none of the receipts change the determination. As noted, SNAP eligibility criteria cannot be waived.

CONCLUSION

After review of all the documentation in the record, the decision by Retailer Operations to deny the application of Appellant to participate in the SNAP for a period of six months is sustained. Per 7 CFR § 278.1(k)(2), Appellant may not reapply for SNAP authorization for a minimum period of six months from the effective date of the denial. Please call 877-823-4369 with general questions regarding the application process. Please consult the USDA website for resources that provide useful information regarding the SNAP requirements and regulations.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 USC § 2023) and to the regulations at 7 CFR § 279.7 with respect to the applicable rights to judicial review of this decision. 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.

M. Viens
Administrative Review Officer

December 7, 2018