

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

Family And Kids Foundation,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0194338

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 to deny the application of Family And Kids Foundation to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it denied the application of Family And Kids Foundation to participate in the SNAP on September 21, 2016.

AUTHORITY

7 U.S.C. 2023 and its 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 21, 2016, the Retailer Operations Division informed the Appellants that the application of Family And Kids Foundation

to participate as an authorized retailer in the SNAP was being denied because it did not offer for sale on a continuous basis a variety of staple foods in the “Dairy” and the “Meats, Poultry, Fish” staple food categories as required under Criterion ‘A’ of 7 CFR § 278.1(b)(1)(ii) of the SNAP regulations. Criterion ‘A’ requires, in part, that there be at least three different types of foods in each of the four staple food categories. During a store visit on September 19, 2016, it was observed that the store offered for sale no foods in the “Dairy” staple food category and only two types of foods in the “Meats, Poultry, Fish” staple food category (hot dogs and ham).

In addition, FNS determined that Family And Kids Foundation did not have more than 50 percent of its total gross retail sales in staple food sales as required under Criterion ‘B’ of § 278.1(b)(1)(iii).

As the firm failed to meet either eligibility criterion for approval, the Appellants were informed that the firm could not submit a new application to participate in the SNAP for a period of six months as provided in § 278.1(k)(2). This denial action was based on observations made during the September 19, 2016 store visit as well as information provided on the firm’s retailer application.

In a letter postmarked September 28, 2016, the Appellants 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 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, might 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 U.S.C. 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k)(2) 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 § 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.”

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 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).”

APPELLANTS’ CONTENTIONS

In the written request for review and in a subsequent correspondence postmarked December 1, 2016, the Appellants provided information in which it was argued that:

- At the time of the store visit, Family And Kids Foundation did not have all of the staple foods in stock required to meet the requirements for SNAP authorization eligibility under Criterion A;
- The store has installed a commercial refrigerator and freezer; and
- As is indicated in the food donation slips submitted to FNS, Family And Kids Foundation has the required staple foods in stock to meet the requirements for SNAP authorization eligibility under Criterion A.

With regards to the Appellants’ contentions, it is important at this point to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision 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. It is not the authority of this review to afford additional time during which a store may begin to comply with program requirements for becoming authorized to participate in the SNAP. At the time of the denial action, the contracted Reviewer indicated that Family And Kids Foundation did not offer for sale on a continuous basis a variety of staple foods in the “Dairy” (the store stocked no foods) and the “Meats, Poultry, Fish” (the store stocked hot dogs and ham only) staple food categories. 7 CFR § 278.1(b)(1)(ii) of the SNAP regulations states that . . . “In order to qualify for SNAP authorization under Criterion A, 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”. 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.

With their letter postmarked December 1, 2016, the Appellants provided FNS with two food donation slips which indicated that certain staple foods had been donated to Family And Kids Foundation on September 2, 2016 and September 8, 2016. The Appellants provided these food donation slips in order to validate that Family And Kids Foundation met the requirements for SNAP authorization approval under Criterion A at the time of the store visit. While both food donation slips were dated prior to the store visit of September 19, 2016, the donation slips do not validate that Family And Kids Foundation had all of the required staple foods in stock from the “Dairy” and the “Meats, Poultry, Fish” staple food categories at the time of the store visit. Specifically, the food donation slips indicate that the following food items had been donated to Family And Kids Foundation: Cereal, breads, boxed goods, canned goods, and pastries. The food donation slips do not identify the individual staple food items that were donated as “boxed goods” and “canned goods”. As such, FNS could not validate whether additional staple foods from the “Dairy” and the “Meats, Poultry, Fish” staple food categories had been added to Family And Kids Foundation’s staple food stock prior to FNS’ store visit of September 19, 2016. As Family And Kids Foundation was still lacking some of the required staple food items at the time of the store visit, the Retailer Operations Division determined that the store did not offer for sale on a continuous basis a variety of staple foods in the “Dairy” and the “Meats, Poultry, Fish” staple food categories as required under Criterion A of 7 CFR § 278.1(b)(1)(ii) of the SNAP regulations. As such, the Appellants failed to verify that Family And Kids Foundation had all of the staple foods in stock on the store visit date to qualify it for participation in the SNAP under Criterion A. 7 CFR § 278.1(k)(2) of the SNAP regulations is specific in its requirement that “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.” Therefore, the Appellants’ contention that Family And Kids Foundation has the required staple foods in stock to meet the requirements for SNAP authorization eligibility under Criterion A does not provide any valid basis for dismissing or mitigating the adverse action imposed.

In the event of a firm’s failure to meet the requirements of eligibility under Criterion A, FNS policy requires that the firm’s eligibility be also evaluated under Criterion B. In order to qualify for authorization under Criterion B, **more than 50 percent** of a retail store’s total annual retail sales must come from sales of staple foods. The Appellants’ SNAP application reflects that 50 percent of its annual retail sales come from the sale of staple foods. Therefore, by the Appellants’ own admission, it does not meet the eligibility requirements under Criterion B.

CONCLUSION

Based on a review of the case documentation and the discussion above, the initial decision by the Retailer Operations Division to deny the application of Family And Kids Foundation to participate in the SNAP for a period of six months, effective September 21, 2016, is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (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 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.

LORIE L. CONNEEN
Administrative Review Officer

December 1, 2017