

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

Food Pantry #1001,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0202506

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of Food Pantry #1001 (hereafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2, § 278.1(a), § 278.1(b), § 278.1(m) and (n), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew the application of Appellant to participate in SNAP via email notification dated June 8, 2017.

AUTHORITY

7 U.S.C. § 2023 and the 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

The FNS requires that stores be reauthorized on a set schedule. Appellant submitted a reauthorization application dated April 25, 2017. In an email correspondence dated March 27, 2017, Appellant’s corporate office contacted Retailer Operations Division and inquired about the store visit process. Corporate was informed that the store visits are unannounced and that the

FNS contractor will have all proper identification and paperwork required to conduct the store visit. Corporate was also informed that store personnel will not have any issues identifying the contractor as an authorized USDA contractor.

On May 21, 2017, the FNS contractor attempted to conduct the store visit. The store visit report states that store personnel verbally refused consent to the visit. The contractor presented the introduction letter but was informed that since no manager was on duty he could not conduct the visit. The contractor informed the clerk that having a manager present was not necessary to complete the survey. The visit was again refused. In email correspondence dated May 30, 2017, Appellant's corporate office was informed that the store visit was refused.

On June 3, 2017, the FNS contractor attempted a second store visit. The store visit report states that store personnel signed the refusal portion of the consent form. The contractor presented the introduction letter. Store personnel stated that an email from corporate indicates that proper identification was required to which the contractor complied but was then told that a copy of the ID and the introduction letter were already in the store's possession. The contractor was then told that corporate indicated that he was supposed to call before arriving to make an appointment. The contractor stated that store visits are not set by appointment and are unannounced per FNS guidelines. The store clerk then stated that due to improper identification she was refusing the store visit. The contractor indicated that they were given proper identification and refusing the visit may negatively affect their eligibility. The visit was refused.

In an email correspondence dated June 8, 2017, Appellant's corporate office was notified that the contracted store visit was refused a second time and that the store was withdrawn for failure to cooperate. The corporate office responded and stated that the store visit was refused because the contractor was unable to provide identification. On June 13, 2017, the store was reinstated into the SNAP and Retailer Operations Division was assured that a store visit would not be refused again. Appellant was notified, by the corporate office, that a third visit would be performed. Appellant submitted an FOIA request dated June 14, 2017.

On June 22, 2017, the FNS contractor attempted a third store visit which was verbally refused by store personnel. On June 27, 2017, Appellant was withdrawn from SNAP due to failure to cooperate. In a telephone conversation dated July 3, 2017, Retailer Operations Division discussed the store's withdrawal with ownership. In an email correspondence dated July 5, 2017, Appellant was informed that it was able to submit a new SNAP application for authorization.

In correspondence dated July 17, 2017, Appellant received a response to its FOIA request. In email correspondence dated August 2, 2017, Appellant questioned its withdrawal, loss of sales, and inquired about an appeal process. In email correspondence dated August 29, 2017, Appellant was informed that it was granted 10 days from the date of receipt of the email to seek administrative review.

In a letter dated August 31, 2017, Appellant appealed Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted. Due to the seriousness of the infraction and Appellant's refusal to cooperate on three different occasions,

implementation of the withdrawal has not been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence that the administrative actions 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 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).

7 CFR § 271.2 states “ 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) 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 by visual inspection...”

7 CFR § 278.1(a) states in relevant part: “Any firm desiring to participate or continue to be authorized in the program shall file an application as prescribed by FNS. Such an application shall contain information which will permit a determination to be made as to whether such an application qualifies, or continues to qualify, for authorization, under the provisions of the program. FNS may require that a retail food store or wholesale food concern be visited to confirm eligibility for program participation prior to such store or concern being authorized or reauthorized I the program. Required visits shall be conducted by an authorized employee of the Department...”

7 CFR § 278.1(b) states in relevant part: “An applicant shall provide sufficient data and information on the nature and scope of the firm’s business for FNS to determine whether the applicant’s participation will further the purposes of the program. ...Failure to comply with any request for information or failure to sign a written release form shall result in denial of the application for authorization or withdrawal of a firm or concern from the program.”

7 CFR § 278.1(m) states in relevant part: “FNS may withdraw or deny the authorization of any firm which: (1) Refuses to accept correspondence from FNS; (2) Fails to respond to inquiries from FNS within a reasonable time: or (3) Cannot be located by FNS with reasonable effort.”

7 CFR § 278.1(n) states in relevant part: “At the request of FNS a retail food store or wholesale food concern will be required to undergo a periodic reauthorization determination by updating

any or all of the information on the firm's application form. Failure to cooperate in the reauthorization process will result in withdrawal of the firm's approval to participate in the program."

APPELLANT'S CONTENTIONS

In response to the Retailer Operations Division withdrawal action and in the request for administrative review, Appellant has stated as its position in the matter the following:

- It is our understanding we were supposed to receive an official written notice of involuntary withdrawal and be given 10 days from the date of such adverse action to seek an administrative review. We did not receive such notice and were not provided the right to an administrative review.
- We are disputing the claims made in the third inspection report whereby the inspector wrote, "Person in charge verbally refused consent". We interviewed all cashiers and managers on duty on the date of the reported inspection with 100% confirming no inspector had approached them.
- On August 1, 2017 we were informed by SNAP that we had passed the fourth inspection. As such we reactivated SNAP transaction processing effective August 2, 2017. Thus, we were unable to process SNAP transaction from June 28, 2017 to August 1, 2017 (35 days). We are requesting reimbursement **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** to make us whole for the improper and inconsistent handling of the inspections which led to the unwarranted shutdown of our services.

The preceding may represent only a brief summary of Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated or referenced herein.

ANALYSIS AND FINDINGS

With regards to Appellant's contentions, it is important 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 withdrawal action by the Retailer Operations Division. The SNAP regulations at §278.1(b) are clear that an applicant shall provide sufficient data and information on the nature and scope of the firm's business for FNS to determine whether the applicant's participation will further the purposes of the program. The SNAP regulations at §278.1(a) are clear that FNS may require a retail food store to be visited to confirm eligibility for program participation prior to such store being reauthorized. The SNAP regulations at §278.1(m) state that FNS may withdraw the authorization for refusal to accept correspondence or to respond to inquiries. Finally §278.1(n) makes it clear that failure to cooperate in the reauthorization process will result in withdrawal of the firm's approval to participate in the program.

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. The attempted store visit reports do not indicate that the store personnel had difficulty understanding the request to review the store. On May 21, 2017, the statement by the contractor, per the record under review, is that he was told he could not inspect the store because there was no manager on duty; on June 3, 2017, per the instructions from corporate, he was supposed to call before arriving and set an appointment, and that the visit to the store would be within two weeks; and on June 22, 2017, a store employee again verbally refused the store visit. This conflicts with Appellant's claim that it passed a fourth inspection when no further attempts were made after June 22, 2017.

Additionally, it is important to note that there is nothing in the Food and Nutrition Act of 2008, as amended or SNAP regulations that would allow for lost sales claims if the withdrawal action is appropriate. The store was withdrawn under 7 CFR § 278.1(n) for failure to cooperate when the USDA contractor visited the store to gather information necessary for Retailer Operations Division to make its determination. As a result of the store's failure to cooperate, Retailer Operations Division was unable to make a determination regarding Appellant's eligibility under the rules governing Criteria A and B.

Appellant contends that it did not receive official written notice of involuntary withdrawal and therefore was not provided the right to an administrative review. With regard to this contention, Appellant's corporate office was notified in an email communication dated June 8, 2017, of the store's withdrawal due to failure to cooperate. Appellant was also provided an opportunity to request an administrative review in email correspondence dated August 29, 2017. Appellant has been duly given, and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deems pertinent in support of its position.

CONCLUSION

Based on the discussion above, the initial decision by the Retailer Operations Division to withdraw the application of Food Pantry #1001 to participate in SNAP was proper and, therefore, is sustained. However, there is no waiting period for submitting a new application for authorization that is associated with the particular basis for which the store was withdrawn. Therefore, the Appellant may file a new application for participation in SNAP at any time subsequent to receipt of this correspondence.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

November 14, 2017