

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

Franklin Market,

Appellant,

V.

Retailer Operations Division,

Respondent.

Case Number: C0218756

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 Franklin Market (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 correspondence dated May 30, 2019.

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 October 11, 2018. The record reflects that FNS conducted a store visit on November 5, 2018. In correspondence dated May 15, 2019, FNS requested information needed to complete the reauthorization process in which the Appellant failed to respond.

In correspondence dated May 30, 2019, FNS notified Appellant that its authorization to participate as a retailer in the Supplemental Nutrition Assistance Program (SNAP) was being withdrawn. FNS informed Appellant that a retail food store will be required to undergo a periodic reauthorization determination by updating any and all of the information on the firm's application form and/or by allowing representatives of Food and Nutrition Service (FNS) to obtain this information during a store visit. In accordance with SNAP Regulations, 7 CFR 278.1(n), FNS may withdraw the authorization of any firm which fails to cooperate in the reauthorization process. Failure to cooperate may include non-response to a request for information, failure to submit information timely, or submission of unclear or incomplete information in response to a request.

In a letter dated June 7, 2019, Appellant appealed Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted and implementation of the withdrawal has 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 in 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:

1. Franklin Market has been authorized since 2000 and the store is using much of the same equipment it was using in 2000 which means it does not have cash register that read bar codes and can automatically produce copies of receipts or daily reports broken down into predetermined categories.
2. Franklin Market has not purchased and will soon install new cash registers that are capable of bar code scanning and report generation so that the information sought by FNS will be available for future sales.

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 store was withdrawn under 7 CFR § 278.1(n) for failure to cooperate. In correspondence dated April 30, 2019, Retailer Operations Division requested the firm's sales information which was deemed inadequate to demonstrate that the firm was eligible for authorization. In correspondence dated May 15, 2019, Retailer Operations Division requested specific documentation so that it could adequately determine Appellant's eligibility. 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.

CONCLUSION

Based on the discussion above, the initial decision by the Retailer Operations Division to withdraw the application of Franklin Market 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

September 5, 2019