

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

Geo A Heimos Produce Company,)	
)	
Appellant,)	
)	
v.)	Case Number: C0192426
)	
Retailer Operations Division,)	
)	
Respondent.)	
_____)	

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to withdraw the authorization of Geo A Heimos Produce Company to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). The Appellant may not reapply for six months from the effective date of the withdrawal.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(k)(1), (2) and (5) in its administration of the SNAP when it withdrew the authorization of the Appellant to participate as an authorized SNAP retailer.

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 Appellant firm was authorized to participate in the SNAP as a delivery route on October 13, 2015. However, in a letter dated July 12, 2016, the Retailer Operations Division informed the Appellant that it was being withdrawn from the SNAP as it did not meet the definition of a retail food store under 7 CFR § 271.2 and 7 CFR § 278.1(b)(1) of the SNAP regulations. Specifically, the letter stated that the Appellant was a wholesale business with no retail outlet and could not be authorized under 7 CFR § 278.1(b)(1)(vi). The letter also informed the Appellant that it could not submit a new application to participate in SNAP for a period of six months from the effective date of the withdrawal as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter dated July 28, 2016, the Appellant requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request for administrative review was granted and implementation of the withdrawal was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an 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 AND REGULATIONS

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2018, and SNAP regulations at Title 7 Code of Federal Regulations (CFR) Parts 271 and 278. In particular, SNAP regulations at 7 CFR § 278.1(k) establishes the authority upon which FNS may withdraw an application from a retail food store or wholesale food concern.

7 CFR § 278.1(l) states in part, that:

(1) FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons.

(i) The firm's continued participation in the program will not further the purposes of the program;

(ii) The firm fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;

*(iii) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section; or, **for co-located wholesale/retail firms**, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section;*

7 CFR § 271.2, defines a retail food store as:

*(1) 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 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 inventory or 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 hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption, and require no additional preparation, are not eligible for FSP participation as retail food stores under § 278.1(b)(1) of this chapter.

(2) Public or private communal dining facilities and meal delivery services; private nonprofit drug addict or alcoholic treatment and rehabilitation programs; publicly operated community mental health centers which conduct residential programs for drug addicts and/or alcoholics; public or private nonprofit group living arrangements; public or private nonprofit shelters for battered women and children; public or private nonprofit establishments, approved by an appropriate State or local agency, that feed homeless persons; or a restaurant that contracts with an appropriate State agency to provide meals at concessional (low or reduced) prices to homeless SNAP households;

(3) Any stores selling equipment for procuring food by hunting and fishing to eligible households in Alaska, as specified in the definition of eligible foods;

(4) Any private nonprofit cooperative food purchasing venture, including those whose members pay for food prior to receipt of the food; and

(5) A farmers' market.

7 CFR § 278.1(b)(1)(vi) reads, in part,

No co-located wholesale/retail food concern with 50 percent or less of its total sales in retail food sales may be authorized to redeem food stamps unless it meets the criteria applicable to all retail firms and:

(A) It is a legitimate retail food outlet. Indicators which may establish to FNS that a firm is a legitimate retail food outlet include, but are not limited to, the following:

(1) The firm's marketing structure; as may be determined by factors such as, but not limited to:

(i) A retail business license;

(ii) The existence of sales tax records documenting retail food sales; and/or separate bookkeeping records; and

(2) The way the firm holds itself out to the public as evidenced by factors such as, but not limited to:

*(i) **The layout of the retail sales space;***

(ii) The use of retail advertisements;

(iii) The posting of retail prices;

(iv) Offering specials to attract retail customers;

(v) Hours of operation for retail business;

(vi) Parking area for retail customers; and

(B) It has total annual retail food sales of at least \$250,000 [Emphasis added.]

7 CFR § 278.1(k)(2) reads, in relevant part:

... 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 withdrawal.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- Geo A Heimos Produce Company is a wholesale produce company that is not involved with SNAP but it does have a subsidiary online retail business named Community Helpings that focuses on supplying the metro St. Louis area with access to fresh foods.
- Community Helpings delivers bi-weekly to community centers, churches, government buildings, schools, neighborhoods, libraries and businesses that receive fresh produce, dairy and breads and cereals. SNAP customers pay at time of delivery only.
- Community Helpings uses social media, newspapers and word of mouth to market its products.
- Geo A Heimos Produce Company currently has a retail business license.
- Customers may choose to pick up their orders at the warehouse which can accommodate 20 cars in front of the building.
- Geo A Heimos Produce Company d/b/a Community Helpings has a yearly revenue of \$250,000.

The preceding may represent only a brief summary of the 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.

ANALYSIS AND FINDINGS

The Food & Nutrition Service (FNS) authorized Geo A Heimos Produce Company for the SNAP on October 13, 2015 as a delivery route. However, the firm's application dated July 30, 2015 indicated that the Appellant was applying as a "produce market." The application also contained the following information:

Heimos Produce, dba Community Helpings, is a community-based group serving the St. Louis and Metro East areas. There is no membership fees or commitment to participate. Customers order off the internet and we deliver to certain locations where the customer picks up their order. The customer can either pay on the internet or COD. A lot of rural areas don't have the means to get fresh produce and we would like to "bring healthy" to them at affordable prices.

An onsite visit was not scheduled before authorization; however, several months later the Retailer Operations Division ordered an onsite visit to determine the firm's continued eligibility

for the SNAP. Based on the results of the onsite visit conducted on June 20, 2016, the Retailer Operations Division determined that this firm is primarily a wholesale business with no retail outlet and that it did not meet eligibility requirements for a co-located wholesale/retail food concern under 7 CFR § 278.1(b)(1)(vi). It also did not meet the requirements of a SNAP authorized delivery route. Therefore, the Retailer Operations Division withdrew the firm's authorization in a letter dated July 12, 2016.

The Appellant alleges that Community Helpings is a subsidiary online retail business of Geo A Heimos Produce Company with separate bookkeeping, a retail food license, special marketing strategies, and yearly retail revenue greater than \$250,000. Although the Appellant states it takes orders and makes deliveries at scheduled drop off sites, it also allegedly allows customers the option of picking up their orders and paying with SNAP benefits at the warehouse site with parking available for customers. Essentially what the Appellant is describing is a co-located wholesale/retail food concern.

Co-located wholesale/retail food concerns with less than 50 percent or less of its total sales in retail food sales are generally not eligible for the SNAP unless it meets a number of factors described in 7 CFR § 278.1(b)(1)(vi)(A) and (B). The Retailer Operations Division determined that the Appellant firm did not meet all of these factors. For example, there is no evidence of a "retail sales space" separate from the wholesale business and the store visit report stated that the contractor "was told that the warehouse sells **only to wholesale customers**, but ... was presented a brochure that customers can use EBT to order items to be delivered" [Emphasis added.]

Likewise, the Appellant does not meet all of the requirements of a delivery route as the administrative record indicates that there is not a warehouse or physical space where the retail stock for the delivery route is maintained. Again the onsite visit report states that the contractor was told that "the warehouse sells only to wholesale customers." In addition, many of the products offered on the website include items which were not in the warehouse stock and are likely purchased after an order is placed rather than kept in inventory. The Appellant also stated that it obtained fresh baked bread from "local bakeries." Based on internal agency guidance, the Appellant's operations fail to meet regulatory requirements for the authorization of a delivery route for the SNAP.

The purpose of this review is to either validate or to invalidate the withdrawal decision of the Retailer Operations Division. Therefore, this review is limited to whether the Retailer Operations Division properly followed agency regulations and policy guidance in making its determination. As documented in the case record, the Retailer Operations Division properly followed internal agency policy guidance in making its determination that Geo A Heimos Produce Company does not meet the definition of a retail food store under 7 CFR § 271.2.

Eligibility to Submit New Application

Section 9 of the Food and Nutrition Act of 2008, as amended, states, in part, "[a] retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store or concern does not meet criteria for approval . . . may not, for at least 6 months, submit a new application to participate in the program." In addition, 7 CFR § 278.1(k)(2) states, in part,

that “any firm that has been denied authorization ... 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 withdrawal.” Based on the law and SNAP regulations, there is no agency discretion to allow a firm to submit a new application less than six months from when a firm is denied for not meeting the eligibility requirements for SNAP authorization.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP application of the Appellant, Geo A Heimos Produce Company, is sustained. In accordance with 7 CFR § 278.1(k) (2), the Appellant shall not be eligible to submit a new application for SNAP authorization for six months from the effective date of the withdrawal.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute and unwarranted invasion of privacy.

/S/

RONALD C. GWINN
ADMINISTRATIVE REVIEW OFFICER

October 20, 2016
DATE