

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

Gourmet Express Marketing, Inc,

Appellant,

v.

**Office of Retailer Operations and
Compliance,,**

Respondent.

Case Number: C0232178

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 Office of Retailer Operations and Compliance to withdraw the authorization of Gourmet Express Marketing, Inc. (“Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(l)(1)(iii), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew Appellant’s authorization to participate in SNAP in a letter dated June 21, 2020.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 June 21, 2020, the Office of Retailer Operations and Compliance withdrew Appellant’s authorization to participate as an authorized retailer in SNAP because it is not a retail food store as defined by the SNAP regulations. Specifically, the withdrawal letter states the firm does not operate as a retail food store. The letter states the firm is not a retail food store

based on information provided in Appellant's reauthorization application. As the firm failed to meet the eligibility criteria for approval, Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in Section 9 of the Food and Nutrition Act of 2008, as amended.

In a letter dated July 2, 2020, Appellant appealed the Office of Retailer Operations and Compliance decision and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(l)(1) establishes the authority upon which the application of any firm to participate in SNAP may be withdrawn if it meets the definition of an ineligible firm.

The definition of house-to-house trade route at 7 CFR § 271.2 states:

Any retail food business operated from a truck, bus, pushcart, or other mobile vehicle. 7 CFR § 278.1(a) states, in 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 will permit a determination to be made as to whether such an applicant 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.

7 CFR § 278.1(b) states, in part:

In determining whether a firm qualifies for authorization, FNS shall consider all of the following: (1) The nature and extent of the food business conducted by the applicant – (i) Retail food store. (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 ... 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). (B) A retail food store must meet eligibility determination factors which may be based on,...visual inspection, sales records, purchase records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry.

7 CFR § 278.1(b)(1)(ii) states in relevant part, that in order for a retail store to qualify for authorization under Criterion A, firms 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 three different varieties of food items in each of the four staple food categories. (B) Offer for sale perishable staple food items in at least two 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; and (C) Offer a variety of staple foods which means different types of foods, such as apples, cabbage, tomatoes, and squash in the fruit or vegetable staple food category, or milk, cheese, butter and yogurt in the dairy category.

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv) which reads, in part:

- (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; or (C) It is a legitimate retail outlet but fails to meet the requirements in paragraph (b)(1)(iv)(B) of this section, and not authorizing such a firm would cause hardship to food stamp households. Hardship would occur in any one of the following circumstances: (1) Program recipients would have difficulty in finding authorized firms to accept their coupons for eligible food; (2) Special ethnic foods would not otherwise be available to recipients; or (3) Recipients would be deprived of an opportunity to take advantage of unusually low prices offered by the firm if no other authorized firm in the area offers the same types of food items at comparable prices.

7 CFR § 278.1 (c) regarding wholesalers reads, in part:

A wholesale food concern may be authorized to accept coupons only from a specified customer or customers if it meets the requirements of paragraphs (a) and (b) of this section, and FNS determines it is required as a redemption outlet: (1) For one or more specified authorized drug addict or alcoholic treatment programs, (2) For one or more specified authorized group living arrangements, (3) For one or more specified authorized shelters for battered women and children,

(4) For one or more specified authorized nonprofit cooperative food-purchasing ventures, (5) For one or more specified authorized public or private nonprofit homeless meal providers, or (6) For one or more specified authorized retail food stores which are without access to an insured financial institution which will redeem their coupons. No firm may be authorized to accept and redeem coupons concurrently as both a retail food store and a wholesale food concern. Authorizations of wholesale food concerns granted prior to January 28, 1982 shall expire on May 31, 1982. Wholesale food concerns desiring to participate in the program after that date must reapply for authorization in accordance with the provisions of this paragraph.

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

Wholesale food concerns. Wholesale food concerns, the primary business of which is the sale of eligible food at wholesale, and which meet the staple food requirements in paragraph (b) of this section, shall normally be considered to have adequate food business for the purposes of the program provided such concerns meet the criteria specified in paragraph (c) of this section.

7 CFR § 278.1 (h) stipulates that FNS may limit the authorization of house-to-house trade routes to those trade routes whose services are required by participating households in order to obtain food. In deciding whether such routes are required in certain areas, the regulations call for FNS to consider the volume of food business the trade route does and the availability of alternate sources of comparable food.

7 CFR § 278.1(l)(1) states:

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." (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 . . .

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.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- Appellant is a wholesale business with employees who drive company-owned trucks and are issued W2s.

- Appellant also uses independent contractors who are issued 1099s.
- Appellant operates similarly to another firm.
- Appellant has been operating for 24 years and would like to continue to service its long- term customers.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

With regards to Appellant's contentions, Appellant admits that it uses independent contractors. Consequently, Appellant is considered a wholesale distributor, not a retailer. That Appellant also has employees does not change the fact that the firm is operating in some capacity as a wholesale distributor. As Appellant is not a retail food store, it is not eligible for authorization.

Appellant stated that a nearby competitor with a similar business model has been approved as an authorized SNAP retailer. This administrative review is limited solely to those circumstances concerning Appellant's eligibility. Therefore, the firm's contention regarding the other firm cannot be used to reverse the decision of the Office of Retailer Operations and Compliance.

Summary

The authorization of a store to participate in SNAP must be in accord with the Food and Nutrition Act and regulations, as amended. Those requirements of law cannot be waived. This review is limited to consideration of the circumstances at the time of the withdrawal action by the Office of Retailer Operations and Compliance. The evidence supported that the store is not a retail food store and therefore is not eligible to participate in SNAP.

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.

There is no agency discretion to impose a sanction of less than six months when a firm does not meet the eligibility requirements for authorization.

CONCLUSION

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to withdraw the authorization of Gourmet Express Marketing, Inc. to participate as an authorized SNAP retailer is sustained. In accordance with the Food and Nutrition Act of 2008,

as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery of this letter.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

August 24, 2020