

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

Greatland Grocery & Supply, LLC,

Appellant,

v.

Case Number: C0207768

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny the application of Greatland Grocery & Supply, LLC (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1, when it denied the application of Appellant to participate as a SNAP retailer by letter dated March 16, 2018.

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 March 16, 2018, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not meet the definition and eligibility requirements of a retail

food store established by Federal regulations at 7 CFR § 271.2 and at § 278.1(b)(1). This action was taken because the Retailer Operations Division had determined the Appellant firm was a web-based business with no food inventory and as such failed to meet the definition of an eligible firm. This denial action was based on information provided on and in support of the firm's retailer application.

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 § 278.1(k)(2). Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action in a request dated March 23, 2018. The appeal was granted. No subsequent correspondence was received from Appellant.

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 un true.

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 Part 278.1(k)(1) and Part 278.1(l)(1) establish the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet the definition of an eligible firm.

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 qualifying staple food items on a continuous basis, evidenced by having no fewer than seven different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety, including at least one variety of perishable foods in at least three 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 accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter
....

7 CFR § 278.1 (b)(1)(i)(A) states, in part, An establishment . . . 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 as defined in § 271.2 . . . including perishable foods in at least two of the categories (Criterion A); or have more than 50 percent of the total gross retail sales . . . in staple foods (Criterion B.)

7 CFR § 278.1 (b)(1)(iv) defines ineligible firms, in part, as, Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from program participation. Ineligible firms under this paragraph **include, but are not limited to**, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. [Emphasis added]

7 CFR § 278.1(k) states: Denying Authorization. FNS shall deny the application of any firm if it determines that: (1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section; or (5) The firm's participation in the program will not further the purposes of the program.

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

The following may represent a summary of 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:

- The denial is not justified and reflects an incomplete review of the application. The denial letter notes two regulatory citations the first being 7 CFR 271.2 that defines a retail food store. As an online retailer, the firm's business model would fit the description of a house-to-house service as opposed to a physical retail building. The firm meets the 50 percent requirement as approximately 79 percent of earned revenues are for items covered under SNAP as staple foods as evidenced by attached invoices. The

- food items are accessible 24/7 through any internet enabled device;
- The denial letter also cites 7 CFR 278.1(b)(1)(iv) as justification. This covers stores selling only accessory foods, but the firm sells thousands of staple food items. The firm’s online store front offers a product mix similar to what would be found in any supermarket. We believe this regulation is not applicable to the firm and reflects an incomplete review and understanding of the business model; and
 - Early on we shared information with USDA that our business model is identical to another company that was approved by USDA even though we serve the same customer base and are located only a few miles apart.

Appellant submitted copies of the denial letter; the March 7, 2018, emails with ROD; and several customer invoices in support of these contentions.

ANALYSIS AND FINDINGS

With regards to Appellant’s contentions above, the authorization of a business to participate in SNAP must be in accord with the Act, as amended, and regulations. These requirements of law cannot be waived. Thus, 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 denial action by the Retailer Operations Division. On the day of the denial, the evidence supported that the business is not a retail food store and firms that are not retail food stores are not eligible to participate in SNAP.

Information provided on and in support of the firm’s application shows that the business is a web-based shopping service with orders being taken/paid for on-line and does not carry any food stock in inventory, but instead purchases food items as orders are received and therefore does not meet the definition of a retail food store as specified at 7 CFR §271.2(1) or 7 CFR §278.1(b)(1). SNAP regulations at 7 CFR § 278.1(k)(1) require the denial of applications for SNAP retailer authorization by firms that do not meet the definition of a retail food store.

While Appellant contends its business more closely fits the description of a house-to-house trade route; these types of retailers are also required to maintain inventory levels of eligible foods. Food stock carried by a third party that is ordered on a case-by-case basis does not satisfy this requirement. SNAP regulations at 7 CFR 278.1(b)(1)(iv) state that “Ineligible firms under this paragraph **include, but are not limited to.** . . . [Emphasis added]”. While this section does not specifically include web-based shopping services that do not carry any food stock in inventory, these businesses would fall under the “are not limited to” stipulation, therefore the Retailer Operations Division used the correct regulatory citation.

Contrary to Appellant's allegation, a review of the business cited as having an identical business model shows that it, in fact, does carry food stock in inventory. This review also shows that it has a Long Distance Food Purchasing Agreement with the State of Alaska, Department of Health and Social Services to service SNAP residents in rural communities.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny the Appellant's application to participate as an authorized SNAP retailer is sustained.

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 a judicial review is desired, 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.

ROBERT T. DEEGAN
Administrative Review Officer

June 21, 2018