

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

Humble Foods,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0228506

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support the decision of the Retailer Operations Division to deny the application of Humble Foods (hereinafter “Humble Foods” or “Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for six months from the effective date of the denial decision. However, if the business model remains the same and you reapply, your application may be denied again for the same reason.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b) and 7 CFR § 278.1(k), when it denied the application of the Appellant to participate as an authorized SNAP retailer.

AUTHORITY

7 U.S.C. 2023 and its 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 applied to participate in the SNAP as an authorized retailer in an application that was signed on January 29, 2020. The SNAP application identified the firm as a delivery route that sold 100 percent staple foods consisting of meats, poultry and seafood. Through supporting documents provided by the Appellant, the Retailer Operations Division determined that the firm did not meet the definition of a retail food store under 7 CFR 271.2 and 278.1(b)(1) as it was an ineligible wholesale distributor. Therefore, the firm’s application was denied in a letter dated

March 9, 2020. The letter 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 denial as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter postmarked March 16, 2020, the Appellant appealed the Retailer Operations Division's decision and requested an administrative review of this determination. FNS granted the Appellant's request for administrative review by letter dated April 3, 2020. By email correspondence of April 19, 2020, the Appellant submitted additional information in support of its request for administrative review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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 law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k) provides the authority upon which FNS shall withdraw or deny the authorization of any firm if it fails to meet SNAP eligibility criteria.

7 CFR § 278.1(k)(1) reads, in relevant part:

(k) 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

7 CFR § 278.1(b)(1)(i)(A) states:

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 as defined in § 271.2 of this chapter, including perishable foods in at least three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).

7 CFR § 278.1(c) states:

Wholesalers. 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(k)(2) reads, in relevant part:

... Any firm that has been denied authorization on these bases shall not be eligible to submit a new authorization for authorization in the program for a minimum period of six months from the effective date of the denial.

In addition to the above regulatory guidance, the agency issued new guidelines regarding delivery routes to the Retailer Operations Division in November 2018. Under these guidelines, firms that hire contractors are operating as a wholesale distributor, not a retailer, and are not considered eligible for authorization.

APPELLANT'S CONTENTIONS

In the request for administrative review and in subsequent correspondence, the Appellant stated the following summarized contentions, in relevant part:

- The Retailer Operations Division determined that the Appellant firm does not meet the definition and requirements of a retail food store as set forth in Sections 271.2 and 278.1 of the SNAP regulations. It was determined that the business does not operate as a retail food business and is operating as a wholesale distributor because the owner hired two individuals as contractors and issued 1099 forms for last year's commissions, thereby making the Appellant ineligible.
- Beginning January 1st, the owner has not been utilizing any subcontractors for Humble Foods. In fact, the owner has been running the business without any help and will eventually hire actual employees by summer time. The owner plans on hiring individuals that pass drug and background checks.

- The owner used contractors in the past but the Retailer Operations Division did not know that the status had changed. The Appellant would have updated the SNAP application if he had known hiring contractors affected the firm's approval.
- The owner is willing to let USDA know when he hires an employee and let the agency approve the candidate and is willing to be fully responsible for their actions as well. The Appellant promises not to ever hire contractors again.
- The owner requests that the authorization denial be overturned as the Appellant is in compliance with SNAP vendor requirements.
- The Appellant has over 100 prospective customers who have been waiting since January and February 2020 for the business to accept SNAP benefits. The Appellant has convenient delivery to customers who have transportation problems and it offers quality meats at a great price. The Appellant is an essential business during the current crisis. Most companies cannot compete with the Appellant's ability to deliver foods to customers.

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

Independent Contractors as Drivers

The Retailer Operations Division reviewed documents received from the Appellant which included an IRS Form 1099 filed for four individual contract employees. This information was confirmed with the owner by email messages dated March 9, 2020. The record indicates that Appellant firm, a delivery route, had four contract drivers and that other than the owner, had no employees associated with the firm.

Under SNAP regulations, at 7 CFR § 278.1(c), a wholesale entity may only be authorized in SNAP under very limited circumstances in which the wholesale entity facilitates the redemption of SNAP benefits for specific types of entities otherwise eligible to participate in the program. In this case, the Appellant firm does not serve this function. A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that Humble Foods does operate as a wholesale distributor **as defined by FNS** in that it has contractors, not employees, who make the food deliveries.

Although the Appellant firm owner, local governments or other entities may consider the firm to be a retailer, under procedures established by FNS in November 2018, firms that use contractors as delivery drivers are considered by FNS to be operating as a wholesale distributor, not a retailer and are no longer considered eligible for SNAP authorization. Such firms shall be denied under 7 CFR. § 278.1(k)(1) or withdrawn under 7 CFR § 278.1(l)(1)(ii).

It should also be noted that as part of the documents submitted to the Retailer Operations Division, the Appellant also provided a State of Idaho Certificate of Assumed Business Name which notes that the general type of business conducted under Humble Foods is “wholesale trade”. This Certificate indicates that the state of Idaho considers the Appellant firm a “wholesale trade” business. Nevertheless, the use of independent contractors as drivers is conclusive that, for SNAP authorization purposes, the firm is considered to be a wholesale distributor and cannot be authorized as a retail delivery route.

Remedial Actions Taken

The Appellant contends that it no longer has, nor will have in the future, contracted employees and it will make changes in its business model to obtain SNAP authorization. The owner is willing to let USDA know when he hires an employee and let the agency approve the candidate and is willing to be fully responsible for their actions as well.

With regard to these contentions, it must be reiterated that this review is limited to the circumstances that formed the basis of the determination at the time of the Retailer Operations Division’s decision. It is not the authority of this review to consider any subsequent remedial actions that may have been taken place, or that will take place, to conform to program requirements. Therefore, Appellant’s contention that changes to operations have been made does not provide a valid basis for authorizing the firm at this time, given that the firm was ineligible when the denial determination was made.

Customer Hardship

The Appellant contends that it has over 100 prospective customers who have been waiting since January and February 2020 for the business to accept SNAP benefits. The Appellant has convenient delivery to customers who have transportation problems and it offers quality meats at a great price. The Appellant is an essential business during the current crisis. Most companies cannot compete with the Appellant’s ability to deliver foods to customers.

Unfortunately, these contentions do not provide a valid basis for reversal of the Retailer Operations Division’s denial determination. A store may only accept SNAP benefits if it currently meets the minimum eligibility criteria for authorization. As noted previously, the use of independent contractors as drivers is conclusive that, for SNAP authorization purposes, the firm is considered to be a wholesale distributor and cannot be authorized as a retail delivery route.

CONCLUSION

Based on a review of all of the evidence in this matter, the determination by the Retailer Operations Division to deny the application of Humble Foods to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for SNAP authorization for a minimum period of six months after March 9, 2020, the

effective date of the denial. However, if the business model remains the same and you reapply, your application may be denied again for the same reason.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (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, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

May 26, 2020