

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

**Jays Wholesale Bulk Food &  
Delivery Service,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0203018**

**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 a finding that the decision by the Retailer Operations Division (Retailer Operations) to deny the application of Jays Wholesale Bulk Food & Delivery Service (Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed.

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it denied the application of Appellant to participate in the SNAP as an authorized retailer.

**AUTHORITY**

7 USC § 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**

FNS received an electronic SNAP application from Appellant on September 5, 2017. FNS-contracted staff conducted an onsite visit to the business on September 18, 2017. By letter dated September 20, 2017, Retailer Operations informed the owner that the application of Appellant to participate as a SNAP authorized retailer was denied. Appellant did not meet the eligibility

requirements as set forth in Sections 278.1(b)(1) and 271.2 of the SNAP regulations. In accordance with Section 278.1(k)(2) of the regulations, the owner was also informed that the firm could not submit a new application to participate in the SNAP for a period of six months from the effective date of the denial.

By letter dated September 25, 2017, the owner requested review of the denial determination. The request for review was acknowledged by letter dated October 2, 2017. The owner provided an additional letter dated October 11, 2017, and six photographs.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action 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 argument asserted is more likely to be true than not true.

## **CONTROLLING LAW AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021, and Section 278 of Title 7 of the Code of Federal Regulations (CFR). Parts 278.1(b), 278.1(h), 278.1(k)(1), 278.1(k)(2) and 278.1(k)(5) establish the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2(1) defines a retail food store as “An establishment...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 for 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 SNAP participation as retail food stores under § 278.1(b)(1) of this chapter.”

7 CFR § 271.2 defines a house-to-house trade route as “any retail food business operated from a truck, bus, pushcart, or other mobile vehicle.”

7 CFR § 278.1(b) reads, in 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.”

7 CFR § 278.1(b)(1)(i) states, in part: “An establishment or house-to-house trade route shall normally be considered to have food business of a nature and extent that it 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).”

7 CFR § 278.1(b)(1)(ii)(A) provides that in order for a retail store to qualify for authorization under Criterion A, it must “Offer for sale and normally display in a public area, qualifying 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.”

7 CFR § 278.1(b)(1)(iii) provides that in order for a retail store to qualify for authorization under Criterion B, it must “... have more than 50 percent of ... total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services ...”

7 CFR § 278.1(b)(1)(iv) reads “Ineligible firms: Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization and authorized firms will be withdrawn from program participation.”

7 CFR § 278.1(b)(1)(vi) states: 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 SNAP benefits unless it meets the criteria 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: (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 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 5 U.S.C. § 552 (b)(6) & (b)(7)(C); or (C) It is a legitimate retail outlet but fails to meet the requirements in paragraph (b)(1)(vi)(B) of this section, and not authorizing such a firm would cause hardship to food stamp households.

7 CFR § 278.1(k) reads, “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(k)(2), reads, “FNS shall deny the application of any firm if it determines that the firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion 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. 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 denial;...”

7 CFR § 278.1(k)(5) reads, “FNS shall deny the application of any firm if it determines that the firm’s participation in the program will not further the purposes of the program.”

### **APPELLANT’S CONTENTIONS**

All contentions were considered whether recapitulated here or not.

- Prepared food was a concern that caught your attention. We think the fully cooked chicken wings sections was the issue. The chicken was a heat and eat product; not an item that we prepared by ourselves. We decided to remove the item.
- The other concern was maintaining stock. We didn’t have much inventory. The business model is to pick up merchandise upon customer request then deliver it to the customers’ home. We will make sure to maintain the necessary stock at all times to meet customer demands.
- We provide our services to the community and senior living housing. It helps the homebound and those who can’t afford to pay a taxi to go to the grocery store.
- Food can be purchased in bulk through our service.
- All our food is for home preparation only, non-cooked.
- You can see that I have fully stocked my establishment to meet the demand of my customers.

The owner provided a one page petition “for accessible EBT machine for seniors & community” with 30 signatures. A list of “wholesale bulk food” and prices was also provided. Photographs were sent with a letter dated October 11, 2017.

### **ANALYSIS AND FINDINGS**

It is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of Retailer Operations, and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. 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. As noted, the firm was denied because it was determined the business did not meet the definition and requirements of a retail food store as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations. This decision was based on information on the application submitted by the owner, and an onsite visit by FNS-contracted staff.

The evidence under review supports that when it was denied, the firm did not meet SNAP eligibility criteria to be an authorized retail food store. It is not within the scope of this review to consider actions the owner may take to qualify for participation in the SNAP subsequent to that decision, such as stocking on display in a public area the variety of staples in each of the four staple food categories on a continuous basis, and to carry perishable food in at least two of the four staple food categories. That the owner has now reportedly changed his food offerings and his stock of inventory is not under consideration under this review. As noted, the review is limited to the facts and evidence at the time that Retailer Operations made its determination.

## **CONCLUSION**

After review of all the documentation in the record, the decision by Retailer Operations to deny the application of Appellant to participate in the SNAP for a period of six months from the effective date of denial is sustained. Per 7 CFR § 278.1(k)(2), Appellant may not reapply for SNAP authorization as a retail food store for a minimum period of six months from the effective date of the denial.

## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 USC § 2023) and to Section § 279.7 of the regulations (7 CFR § 279.7) with respect to applicable rights 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 the Appellant's owner resides or is 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, 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.

M. Viens  
Administrative Review Officer

November 14, 2017