

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

**Kalkaska S & K Marathon #11,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0222275**

**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 Retailer Operations Division to withdraw the authorization of Kalkaska S & K Marathon #11 (“Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

**ISSUE**

The purpose of this review is to determine whether the Retailer Operations Division 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 as a retailer in SNAP on August 18, 2019.

**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 July 12, 2019, the Retailer Operations Division informed Appellant that its inventory of staple foods was marginal, and requested invoices and receipts dated prior to the store visit to establish that Appellant normally carries at least three stocking units in three different varieties in the dairy products category.

Having not received a response from Appellant, in a letter dated August 18, 2019, the Retailer Operations Division informed Appellant that its authorization to participate as a retailer in SNAP

would be withdrawn due to the firm's failure to meet minimum SNAP eligibility requirements. This withdrawal decision was based on observations during a store visit on February 7, 2013 as well as information provided on the firm's reauthorization application.

The Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations. The withdrawal letter stated the Appellant failed to meet the requirements of Criterion A because it did not offer for sale on a continuous basis a variety of foods each of the four staple food categories. Also, Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its gross retail sales.

As the firm failed to meet either eligibility criterion 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 § 278.1(k)(2). This determination letter also stated that the Retailer Operations Division considered Appellant's eligibility under the need for access provision at Section 278.1(b)(6) of the SNAP regulations. However, the letter stated Appellant did not qualify for SNAP authorization under this provision.

On August 28, 2019, Appellant appealed the Retailer Operations Division determination and requested an administrative review of this action. The appeal request was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

### **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 authorization of any firm to participate in SNAP may be withdrawn if it fails to meet established eligibility requirements.

7 CFR § 278.1(b)(1)(i) relays specific program requirements for retail food store participation, which reads, in part:

An establishment . . . shall . . . effectuate the purposes of the program if it . . . 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<sup>1</sup>] 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 § 271.2 defines staple food, in part, as:

Those food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products.

7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis as offering for sale no fewer than three 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 on any given day of operation.

7 CFR § 278.1(b)(1)(ii)(C) of the SNAP regulations define “variety”, in part, as:

Different types of foods within each staple food category. For example: Apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk, soy yogurt . . . butter, sour cream, and cow milk yogurt in the dairy products category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken . . . beef, pork, eggs, and tuna in the meat, poultry, or fish category. Variety of foods is not to be interpreted as different brands, nutrient values (e.g., low sodium and lite), flavorings (e.g., vanilla and chocolate), packaging types or styles (e.g., canned and frozen) or package sizes of the same or similar foods. Similar food items such as, but not limited to, tomatoes and tomato juice, different types of rice, whole milk and skim milk, ground beef and beefsteak, or different types of apples (e.g., Empire, Jonagold, and McIntosh), shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any staple food category. Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.

7 CFR § 278.1(l)(1) reads, in part:

FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons . . . . [t]he firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section . . . for the time period specified in paragraph (k)(2) of this section.

7 CFR § 278.1(k) reads, in part:

FNS shall deny the application of any firm if it determines that . . . . [t]he firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B, as

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<sup>1</sup> Based on the current implementation of the regulations.

specified in paragraph (b)(1)(i) of this section . . . for a minimum period of six months from the effective date of the denial.

### **APPELLANT'S CONTENTIONS**

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

- The store now has a variety of food in sufficient quantities on a continuous basis. Appellant provided a photo of an invoice.
- Appellant requests to be reinstated.

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**

Appellant contends that the food in question was not available at the time of the store visit due to circumstances outside of its control, and that currently the store has a variety of food in sufficient quantities on a continuous basis. Extenuating circumstances certainly may have contributed to the amount and composition of staple food inventory observed at the firm on the day of the store visit. Nevertheless, no provision in SNAP regulations exists that allows these conditions to establish a valid basis for reversing a denial determination. This review is limited to consideration of the circumstances at the time the Retailer Operations Division's decision was made. It is not within this review's scope to consider actions Appellant may have taken subsequent to this decision to comply with requirements for SNAP authorization, including stocking the store sufficiently or increasing staple food sales to meet SNAP-authorization criteria.

In this case, Appellant was provided with an opportunity to provide receipts and invoices to demonstrate that it carried a sufficient variety of staple food items. The Retailer Operations Division requested receipts dated within three weeks prior to the store visit. Appellant contends that the invoice it provided demonstrates that it does offer a sufficient variety of foods in the dairy products category. For purpose of this review, it is assumed that this invoice was provided to the Retailer Operations Division in a timely manner.

The invoice provided was not from the three-week period prior to the store visit. A review of the store visit documentation illustrates that on the day of the visit the store was deficient in the dairy products category. Therefore, the Retailer Operations Division correctly concluded Appellant did not meet Criterion A because the store did not offer "qualifying staple foods on a continuous basis."

An evaluation of the percentages of staple food sales reported on Appellant's retailer application, as well as the photographs and store inventory provided from the store visit, indicate that Appellant did not receive more than 50 percent of its projected annual sales from the sale of

staple foods. Accordingly, the Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B.

Appellant has requested to be reinstated. The regulations at 7 CFR § 278.1(l)(1)(iii) state, in part, “FNS shall withdraw the authorization of any firm if the firm fails to meet the requirements for eligibility under Criterion A or B . . . for the time period specified in paragraph (k)(2)” and 7 CFR § 278.1(k)(2) states, in part, “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 . . . for a minimum period of six months from the effective date of the denial.” 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 Retailer Operations Division to withdraw the authorization of Kalkaska S & K Marathon #11 to participate as an authorized SNAP retailer is sustained.

According to 7 CFR § 278.1(l)(1)(iii) of the SNAP regulations, Appellant is ineligible to submit a new application for the subject store for a minimum period of six months from the effective date of withdrawal. Appellant was inappropriately withdrawn from the SNAP program for a month after its timely request for administrative review. Therefore, the six-month period of disqualification is reduced to five months. 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

November 12, 2019