

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

L K Mini Market,)	
)	
Appellant,)	
)	
v.)	Case Number: C0193953
)	
Retailer Operations Division,)	
)	
Respondent.)	
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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 to deny the application of L K Mini Market (hereinafter “Mini Market”) to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division (hereinafter “ROD”) of FNS.

ISSUE

The issue accepted for review is whether ROD took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it denied the application of Mini Market to participate in the SNAP on September 8, 2016.

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

In a letter dated September 8, 2016, ROD informed the Appellant that the application of Mini Market to participate as an authorized retailer in the SNAP was being denied because it did not offer for sale on a continuous basis a variety of staple foods in the “Dairy” and the “Meats, Poultry, Fish” staple food categories as required under Criterion ‘A’ of 7 CFR § 278.1(b)(1)(ii) of the SNAP regulations. Criterion ‘A’ requires, in part, that there be at least three different types of foods in each of the four staple food categories. During a store visit on September 5, 2016, it was observed that the store

offered for sale only two types of foods in the “Dairy” staple food category (ice cream and milk) and only two types of foods in the “Meats, Poultry, Fish” staple food category (eggs and meat jerky).

In addition, FNS determined that Mini Market did not have more than 50 percent of its total gross retail sales in staple food sales as required under Criterion ‘B’ of § 278.1(b)(1)(iii).

As the firm failed to meet either eligibility criterion for approval, the Appellant was informed that the firm could not submit a new application to participate in the SNAP for a period of six months as provided in § 278.1(k)(2). This denial action was based on observations made during the September 5, 2016 store visit as well as information provided on the firm’s retailer application.

In a letter postmarked September 12, 2016, the Appellant appealed ROD’s decision and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k)(2) establishes 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 § 278.1(k)(2) reads, 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.”

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 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).”

APPELLANT'S CONTENTIONS

In the written request for review, the Appellant provided information in which it was argued that:

- At the time of the store visit, Mini Market did not have all of the staple foods in stock required to meet the requirements for SNAP authorization eligibility under Criterion A;
- The Appellant believed that she was not required to stock the store with a variety of staple foods from the four staple food groups until after the store was authorized to participate in the SNAP;
- The Appellant has since stocked Mini Market with a variety of staple foods from each of the four staple food groups so that Mini Market now meets the requirements for SNAP authorization eligibility under Criterion A;
- The Appellant made a mistake when completing the SNAP Application in that staple foods comprise 65 percent of Mini Market's total gross retail sales; and
- Therefore, Mini Market meets the requirements for SNAP authorization eligibility under Criterion B.

The Appellant contends that at the time of the store visit, Mini Market did not have all of the staple foods in stock required to meet the requirements for SNAP authorization eligibility under Criterion A. The Appellant believed that she was not required to stock the store with a variety of staple foods from the four staple food groups until after the store was authorized to participate in the SNAP. The Appellant has since stocked Mini Market with a variety of staple foods from each of the four staple food groups so that Mini Market now meets the requirements for SNAP authorization eligibility under Criterion A. It is important at this point 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. It is not the authority of this review to afford additional time during which a store may begin to comply with program requirements for becoming authorized to participate in the SNAP. At the time of the denial action, the contracted Reviewer indicated that Mini Market did not offer for sale on a continuous basis a variety of staple foods in the "Dairy" (the store stocked ice cream and milk only) and the "Meats, Poultry, Fish" (the store stocked eggs and meat jerky only) staple food categories. 7 CFR § 278.1(b)(1)(ii) of the SNAP regulations states that ... "In order to qualify for SNAP authorization under Criterion A, firms shall ... 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". This means that retail stores must have qualifying staple food items displayed in a public area on a continuous basis at the time of the store visit in order to qualify for SNAP authorization under Criterion A.

The Appellants provided FNS with a total of four vendor invoices/receipts for purchases of various staple foods from various food vendors in order to validate that Mini Market met the requirements for SNAP authorization approval under Criterion A at the time of the store visit. One of the submitted invoices did not have a date listed on it; therefore, it

cannot be considered towards meeting the SNAP authorization requirements under Criterion A. In addition, the remaining three invoices were dated after the store visit date of September 5, 2016. As such, these invoices cannot be considered towards verifying that Mini Market met the SNAP eligibility requirements under Criterion A at the time of the store visit as they were not dated prior to the store visit date.

The Appellant also provided FNS with 30 photos of some of Mini Market's staple food stock as evidence that the store now meets the requirements for authorization under Criterion A. However, the photos were not dated. As such, they cannot be considered towards verifying that Mini Market had all of the required staple food items in stock at the time of the store visit. As Mini Market was still lacking some of the required staple food items, the Retailer Operations Division determined that the store did not offer for sale on a continuous basis a variety of staple foods in the "Dairy" and the "Meats, Poultry, Fish" staple food categories as required under Criterion A of 7 CFR § 278.1(b)(1)(ii) of the SNAP regulations. As such, the Appellant failed to verify that Mini Market had all of the staple foods in stock on the store visit date to qualify it for participation in the SNAP under Criterion A. 7 CFR § 278.1(k)(2) of the SNAP regulations is specific in its requirement that "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." Therefore, the Appellant's contention that since the store visit was conducted she has stocked Mini Market with a variety of staple foods from each of the four staple food groups so that Mini Market now meets the requirements for SNAP authorization eligibility under Criterion A does not provide any valid basis for dismissing or mitigating the adverse action imposed.

The Appellant contends that she made a mistake when completing the SNAP Application in that staple foods comprise 65 percent of Mini Market's total gross retail sales; therefore, Mini Market meets the requirements for SNAP authorization eligibility under Criterion B. In the event of a firm's failure to meet the requirements of eligibility under Criterion A, FNS policy requires that the firm's eligibility be also evaluated under Criterion B. In order to qualify for authorization under Criterion B, more than 50 percent of a retail store's total annual retail sales must come from sales of staple foods. The Appellant's original SNAP application reflects that 50 percent of its annual retail sales come from the sale of staple foods. However, when requesting an administrative review of the subject case, the Appellant stated that she made a mistake when completing the SNAP application in that staple foods comprise 65 percent of Mini Market's total gross retail sales. However, despite listing such a percentage, the report summarizing the FNS contractor's September 5, 2016 visit to Mini Market, along with accompanying photographs and sketch of the store's interior, reflects that the subject store does not carry sufficient items in two of the four staple food categories and that staple food sales represented less than 50 percent of the firm's total gross retail sales. The contracted Reviewer also noted that Mini Market stocks a large volume of items considered ineligible items under the SNAP regulations to include such items as tobacco products, lottery tickets, paper products, health and beauty aids, clothing (hats, t-shirts, etc.), over-the-counter medications, school/office supplies, sunglasses, hookah pipes, gift items, laundry detergent, flower arrangements, glassware, jewelry, candles, wall clocks, wall

pictures, pet supplies, lamps, vases, etc. In addition, the Appellant indicated on the firm's SNAP application that Mini Market does not stock at least three different items in two of the four staple food categories (i.e., the "Dairy" and the "Meats, Poultry, Fish" staple food categories). A thorough review of the pictures taken during the September 5, 2016 store visit also indicates that 20 to 25 percent of Mini Market's staple food stock consists of "accessory foods" such as candy and gum, carbonated drinks, bottled water, flavored drinks, ketchup, barbecue sauce, pickles, non-dairy creamer, energy drinks, salt, salad dressing, mustard, baking soda, brown sugar, white sugar, etc. Per 7 CFR § 271.2, accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining SNAP eligibility of any firm. The Appellant did not provide any evidence, such as copies of all purchase invoices and sales receipts or other accounting records, which would reveal that more than 50 percent of the store's total gross retail sales are in eligible staple foods. Therefore, the earlier determination that Mini Market does not meet the requirements for participation in the SNAP under Criterion B remains in effect.

CONCLUSION

Based on a review of the case documentation and the discussion above, the initial decision by the Retailer Operations Division to deny the application of L K Mini Market to participate in the SNAP for a period of six months, effective September 8, 2016, is sustained.

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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

/s/
LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

October 26, 2016
DATE