

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

Lincoln Liquor,

Appellant,

v.

Case Number: C0212857

Retailer Operations Division,

Respondent.

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 Lincoln Liquor (“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 September 5, 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 August 9, 2018, 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. Appellant provided an additional document in a

subsequent submission to the Retailer Operations Division, but did not provide invoices or receipts.

In a letter dated September 5, 2018, 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Retailer Operations Division informed Appellant that its authorization to participate as a retailer in SNAP would be withdrawn due to the firm's failure to meet minimum SNAP eligibility requirements.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 June 29, 2018 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 in the dairy products category. 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 September 14, 2018, 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 three 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, soft cheese, 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, beans, nuts, 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 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:

- Disqualification would pose an extreme hardship to Appellant.
- The delivery of dairy products was interrupted due to illness by the delivery driver. Appellant has changed delivery services.
- Appellant believes more than half the firm's sales are from staple food sales as the majority of the firm's sales are from SNAP transactions.
- Appellant requests another store visit.

In support of its contentions, Appellant provided the following documents:

- 27 pages of tax and financial documents;
- ~24 invoices and receipts; and
- 7 store pictures.

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 due to circumstances outside of its control, and that currently the store has a variety of food in sufficient quantities on a continuous basis. Appellant provided seven store pictures. 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 ROD'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. Although Appellant did not provide any receipts or invoices to the Retailer Operations Division, on review Appellant provided 23 invoices and receipts. No receipts were provided that were dated within three weeks

prior to the store visit of June 29, 2018 and contained stocking units in the dairy products category that were not present at the time of 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. Appellant carried milk and cheese, but carried only two stocking units in a third variety (sour cream) 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.”

Appellant stated that it believes more than half the firm’s sales are from staple food sales as the majority of the firm’s sales are from SNAP transactions. Appellant provided 27 pages of tax and financial documents. Not all purchases with SNAP benefits are for staple foods; participants may also purchase accessory foods. 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.

Hardship to Appellant

Appellant asserts that withdrawal of authorization would put the business in financial jeopardy. Economic hardship is a likely consequence whenever a store’s SNAP authorization is withdrawn. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship to the firm would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to economic hardship of the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been withdrawn from the program in the past for similar deficiencies. Therefore, Appellant’s contention that it will incur economic hardship based on deficiencies in meeting the eligibility requirements does not provide any valid basis for dismissing the withdrawal of Appellant’s authorization.

Appellant requests another store visit. 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 Lincoln Liquor 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. 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

February 19, 2019