

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

Mesa College M Stop Convenience Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0214924

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the Retailer Operations Division properly denied the application of Mesa College M Stop Convenience Store (hereinafter “Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of denial.

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it denied the retailer application of Mesa College M Stop Convenience Store.

AUTHORITY

7 U.S.C. § 2023 and 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 dated November 16, 2018. In a letter dated December 4, 2018, the Retailer Operations Division informed the Appellant that the firm was ineligible for a SNAP ineligible restaurant because

more than 50 percent of its total gross retail sales are from heated foods and/or prepared foods. Therefore, the firm's application was denied. The letter also 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 December 18, 2018, the Appellant requested an administrative review of the Retailer Operation Division's denial of its SNAP application. The request was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, such as the denial of a firm's SNAP application, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means the 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 matter asserted is more likely to be true than untrue.

CONTROLLING LAW AND REGULATIONS

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) establishes the authority upon which FNS shall deny the SNAP authorization of any firm which fails to meet established eligibility requirements.

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

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; or

(2) 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.... 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 § 271.2 defines a retail food store as:

- (1) An establishment or house-to-house trade route that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale qualifying staple food items on a continuous basis, evidenced by having 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, including at least one variety of 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 forth in § 278.1(b)(1) of this chapter. **Entities that have more than 50 percent of their total gross retail sales in: Food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under §278.1(b)(1) of this chapter.**

[Emphasis added.]

7 CFR § 278.1(b)(1)(i) states, in part:

An establishment...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)(iv) states, in part:

Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. **In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross retail sales in foods cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.**[Emphasis added.]

APPELLANT'S CONTENTIONS

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

The Appellant, made the following summarized contentions in its request for administrative review and in subsequent correspondence, postmarked February 20, 2019, in relevant part:

- The application was filled out in error, and sales from an adjacent area that sells coffee was inadvertently included;
- The store visit occurred on the day after Thanksgiving break and after being closed for nine and a half days, deliveries happened after the store visit;
- The store is part of a California community college, and without dorms or campus housing, students need to be able to purchase items on campus to support their needs; and
- There is no profit motive for the project, as the college is a public institution, and the 6th largest community college district in the United States.

The Appellant also submitted a copy of the SNAP Application with revised sales figures, a copy of the denial letter, and FNS's letter acknowledging the timely request for administrative review.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final agency decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the store visit and at the time the Retailer Operations Division rendered its decision.

It should be noted that on December 15, 2016, FNS published a final rule entitled "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)," at 81 Federal Register 90675, that impacted the eligibility of firms that sell heated or prepared foods. If more than 50 percent of a firm's sales come from the sale of heated or prepared foods, the firm is considered a restaurant under SNAP regulations, and therefore is ineligible for authorization. The final rule amended existing regulations by clarifying that any foods cooked or heated on-site by the retailer before or after purchase, and any hot or cold prepared food not intended for home preparation or consumption, including foods consumed on the premises or sold for carryout, count toward the 50 percent threshold. This portion of the rule was implemented by FNS on October 16, 2017.

On the SNAP reauthorization application, Appellant reported that over 50 percent of the firm's total retail sales were in the sale of hot foods or cold prepared foods, indicating the firm is ineligible as a restaurant under SNAP regulations at 7 CFR § 271.2 and 7 CFR § 278.1(b)(1)(iv). The contractor's store visit report, photos, and sketch confirm that some portion of the firm's business is in the sale of these foods. The store visit documentation shows that the firm has a significant number of hot food items for sale, such as burritos, sandwiches, soups, oatmeal, and coffee.

Appellant contends that the application was filled out in error and an adjacent area's coffee sales were inadvertently included in the application. While this is compelling given the Appellant is a public institution, the contention was not supported by any evidence, such as sales documentation or inventory purchase records that would confirm the revised sales numbers submitted for this review. Without such documentation, the Appellant has not proved by a preponderance of the evidence that the Retailer Operation's Division's denial decision should be reversed.

Hardship to SNAP Clients

The Appellant contends that students at the college need to purchase items on campus to support their needs. Unfortunately, this contention does not provide a valid basis for reversal of the Retailer Operations Division's denial determination. While stores that fail to meet Criterion A and B may sometimes be authorized if located in an area with significantly limited access to food, as provided under SNAP regulations at 7 CFR § 278.1(b)(6), firms determined to be restaurants are not eligible for authorization under this provision. There is no authority in SNAP regulations to authorize a firm determined to be a restaurant based upon SNAP recipient need.

CONCLUSION

On the basis of the analysis above, the decision by the Retailer Operations Division to deny the application of Mesa College M Stop Convenience Store to participate as a retailer in SNAP is sustained. Pursuant to the Food and Nutrition Act of 2008, as amended, 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for six months after the December 4, 2018, the effective date of the denial decision.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

MICHELLE WATERS
Administrative Review Officer

May 8, 2019