

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

**Mobile1,**

**Appellant,**

**v.**

**Case Number: C0202247**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is insufficient evidence to support the determination by the Retailer Operations Division to deny the application of Mobile1 (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(b)(1), in its administration of the SNAP, when it denied the application of Appellant to participate in SNAP by letter dated August 7, 2017.

**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 7, 2017, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not meet the definition and eligibility requirements of a retail food store established by Federal regulations at 7 CFR § 271.2 and 278.1(b)(1). This denial action was based on observations during an onsite store visit on July 22, 2017, as well as information provided on and in support of the firm’s retailer

application. Specifically, the August 7, 2017, letter from the Retailer Operations Division to Appellant states the following, in relevant part:

“The Food and Nutrition Service has determined that your firm does 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 and therefore is ineligible to participate in SNAP as an authorized retailer.”

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). Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action in a request postmarked August 21, 2017. The appeal was granted. No subsequent correspondence has been received from Appellant.

### **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 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)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet the definition of an eligible firm.

7 CFR § 271.2 states, *inter alia* that *Retail Food Store* means: “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, 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) . . . or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) . . . Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate 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 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. 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 eligibility of any firm.”

7 CFR § 278.1(b)(1)(ii) states in relevant part: “In order to qualify under this criterion, firms shall: (A) 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. (B) Offer for sale perishable staple food items in at least two staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks; and (C) Offer a variety of staple foods which means different types of foods, such as apples, cabbage, tomatoes, and squash in the fruit or vegetable staple food category, or milk, cheese, butter and yogurt in the dairy category.”

7 CFR § 278.1 (b)(1)(iii) provides in relevant part 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) states, in part, that, “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 to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from program participation. 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 hot and/or cold prepared foods not intended for home preparation and consumption, 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. Such firms may qualify, however, under the special restaurant programs that serve the elderly, disabled, and homeless populations, as set forth in paragraph (d) of this section.” Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, “A retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store or concern does not meet criteria for approval . . . may not, for at least 6 months, submit a new application to participate in the program.”

### **APPELLANT’S CONTENTIONS**

In the request for administrative review, Appellant has stated as its position in the matter the following:

- Appellant states that the SNAP Retailer web site says a retailer selling food items with a dollar total that is more than 50% of the whole location should be eligible to accept SNAP. The business sells sodas, frozen sandwiches, chips, frozen pizzas, energy drinks, teas, coffee, candies, water bottles, condiments, cereal, ice cream, and a variety of food items that are accepted by the SNAP program;
- The owner does not understand why his application was denied when 90% of his store is SNAP approved. The few nonfood items are cleaning supplies and some basic needs that are approximately 10% of sale. The owner has pictures of store stock;
- There are approximately 50 customers asking about accepting EBT because the area is rural with no stores nearby and they are willing to sign a petition to assist with the application. The whole idea of a store in this location is to help the people in this small community; and,
- Mobile1 is a small business that is growing. Accepting EBT is very critical for this business to survive.

Appellant submitted a two-page screen print from the FNS Retailer web site showing the definitions for Criteria A and B in support of these contentions. The preceding may represent a summary of Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

### **ANALYSIS AND FINDINGS**

With regards to Appellant's contentions above, the authorization of a business to participate in SNAP must be in accord with the Act, as amended, and regulations. These requirements of law cannot be waived. Thus, it is important 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.

The Appellant business is located in Ford, Washington, an unincorporated, rural community located in eastern Washington State approximately 32 miles northwest of Spokane. The record reflects that Appellant submitted a SNAP 252E application electronically through the FNS web site on June 23, 2017, to participate as a retailer in the SNAP and later submitted a revised 252E directly to the Retailer Operations Division. Under question 9 asking if the business was a specialty food store or delivery route Appellant marked "no" on both applications. Both applications estimated that staple foods accounted for 20 percent of the firm's total retail sales while the revised application showed that accessory "other" food items accounted for 70 percent and nonfood items accounted for 10 percent of retail sales and that the business stocked at least three different items in the breads/grains, meat/poultry/fish, and fruits/vegetables categories. The revised application also reflected that the

business sold non- food items in the “other” category. The FNS store visit inventory report and photographs showed that the business was deficient in the Dairy Products category stocking only ice cream and cheese. Documentation was submitted by Appellant in response to a request for proof of dairy products inventory by the Retailer Operations Division showing regular purchases of milk thereby satisfying the dairy products requirement. Based on this, the firm meets the requirements under Criterion A for authorization.

A review of the record supports that, on the day of the FNS store visit, the Appellant business was a retail food store. In addition, 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 and Appellant’s response to the proof of inventory request, support that the Appellant business is eligible for authorization under Criterion A.

### **CONCLUSION**

A review of the evidence in this case supports that it is more likely true than not true that the Appellant business is a retail food store. The determination by the Retailer Operations Division to deny the application of Mobile1 to participate as an authorized SNAP retailer is reversed. **5 U.S.C. § 552 (b)(7)(E)**. This decision does not preclude the Retailer Operations Division from asking for additional documentation to properly assess the current eligibility of the business.

### **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 a judicial review is desired, 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.

ROBERT T. DEEGAN  
Administrative Review Officer

November 8, 2017