

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

Nivo, LLC,

Appellant,

v.

Case Number: C0204490

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

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

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 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 October 26, 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 October 26, 2017, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not offer for sale on a continuous basis a variety of staple foods in the dairy products category as required for authorization under Criterion A of 7 CFR § 278.1(b)(1)(ii) of the SNAP regulations. In addition, the letter also informed Appellant that it did not have more than 50 percent of its total

gross retail sales in staple food sales as required for authorization under Criterion B of Section 278.1(b)(1)(iii).

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 7 CFR § 278.1(k)(2). This denial action was based on observations during an onsite store visit on September 29, 2017, as well as information provided on the firm's retailer application.

By letter dated November 9, 2017, store ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted. Subsequent correspondence dated December 22, 2017, was 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 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 Part 278.1(b)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 defines staple food, in relevant 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) states, *inter alia*, "In determining whether a firm qualifies for authorization, FNS shall consider all of the following: (1) The nature and extent of the food business conducted by the applicant – (i) *Retail food store*. (A) An establishment or house-to-house trade route shall normally be considered to have food business of a nature and extent that 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). (B) A retail food store must meet eligibility

determination factors which may be based on, . . . visual inspection, sales records, purchase records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry.”

7 CFR § 278.1(b)(1)(ii)(A) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion A, it must “Offer for sale and normally display in a public area, qualifying food items *on a continuous basis* (emphasis added) 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.”

7 CFR § 278.1(b)(1)(ii)(C) clarifies “variety of staple foods” as meaning, in relevant part, “. . . 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. Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes. Similar processed food items with varying ingredients such as, but not limited to, sausages, breakfast cereals, milk, sliced breads and cheeses, and similar unprocessed food items, such as, but not limited to, different varieties of apples, cabbage, tomatoes or squash, shall not each be considered as more than one staple food variety for the purpose of determining variety . . .”

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(k)(2) 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

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

- The owner was not given a fair hearing as normal procedures, consistent with your policy, were not followed. He believes the decision reached was not only reckless, but was based on prejudice as presented and requests a fair hearing;
- The program specialist was aware through multiple conversations that the store opening date was an estimate and that the transfer of ownership was delayed as the landlord wanted certain conditions met. On September 27, 2017, the owner signed the transfer documents and immediately called the program specialist to inform her that he now owned the business. The program specialist indicated that she would send someone within two weeks for the inspection. While the program specialist has the right to send someone at any time after the store went operational, it was stunning that she decided to send someone on September 29,

2017, just two days after the property transfer. As a result, the inspector determined that the inventory level for some dairy products was marginal;

- In subsequent conversations, the program specialist admitted that she did not fully understand that September 27 was the opening date and stated that had she known, she would not have approved the inspection that early. After pushback, she requested receipts be provided for certain dairy products purchased before the inspection date of September 29. The owner told her that since he did not take over the store until September 27 that he had no receipts and was submitting the original receipts for items he had purchased after September 29 as well as receipts from the previous owner that he could find. The owner found it astonishing that the program specialist failed to allow him to present receipts made after the inspection date. Therefore, the only receipts provided were a few that the previous owner could find;
- Please note that the previous owner was granted approval to accept SNAP benefits even though the new owner's changes have only been positive including increased dairy products. The previous owner and other witnesses will be available for testimony as needed;
- The owner believes that the program specialist was not objective as an objective person in this position would have conducted the review of the owner's application differently and would have arrived at a completely different conclusion. As presented, the program specialist failed to exercise care in her review and acted in reckless disregard of FNS policy and procedures; and,
- As citizens, we count on people in key positions to serve objectively. The owner understands that the program specialist may point to estimates in the application as grounds for objection, but these numbers were just that (estimates) as the new owner had never owned a convenience store before. While these "gotcha" kinds of approach may be viewed as good tactics to continue pinning down certain groups in our society, it only sets us back to the dark pages of history and hurts the most vulnerable in our society that programs like this are intended to serve. Therefore we cannot sit back and allow the disguised tactics and decisions like this to stand.

Appellant submitted a copy of lease agreement dated September 27, 2017, which was signed by the tenant and notarized on September 16, 2017, in addition to eight receipts showing the purchase of milk products and 29 receipts that included no dairy products in support of these contentions. It is noted that although Appellant's December 22, 2017, correspondence referenced photographs, none were submitted.

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

The record reflects that store ownership submitted a SNAP retailer application electronically through the FNS retailer web site on September 2, 2017, that listed the store's opening date as being September 15, 2017. This application estimated that staple foods accounted for 20 percent of the firm's total retail sales. The accessory "other" food items showed an estimate of 20

percent of the firm's total retail sales. Ownership also estimated that 60 percent of retail sales came from nonfood items such as tobacco, alcohol, lottery, gasoline, hot food, and other nonfood item sales. The application further showed that the business stocked at least three different items in each of the four required staple food categories and also showed that the business did stock perishable foods in at least two of the four categories. A review of information submitted by store ownership based upon the results of the FNS store visit lead to the percentages being revised by the Retailer Operations Division staff to reflect staple foods at four percent, accessory foods at five percent, and nonfoods at 91 percent. This reduction in the percentage of staple food inventory from 20 percent to four percent by the assigned Retailer Operations Division program specialist had no bearing on the Appellant business's eligibility as a SNAP retailer since to qualify under Criterion B, staple foods must account for more than 50 percent of total gross retail sales. Lastly, it is noted that the same FNS web site utilized by store ownership to submit its SNAP retailer application also contains detailed information on the staple food requirements for businesses to become authorized as SNAP retailers and also states that an onsite inspection is part of the application process.

A store visit was conducted by an FNS contracted reviewer on September 29, 2017. The store visit report showed only two of the required three dairy products (milk and ice cream) in stock meaning that the store failed to meet the dairy requirement. Additionally, the store was minimally stocked in the remaining three categories. When only one staple food category is deficient, the firm is to be provided an opportunity to document that it normally meets the requirement for that category. The record documents that the Retailer Operations Division sent a letter to the Appellant dated October 10, 2017, requesting invoices/receipts dated prior to the store visit on September 29, 2017, that would show the Appellant business normally carried at least three different types of dairy products. Appellant responded to these requests by submitting documentation of inventory purchases made prior to as well as after the FNS store visit. A review of these purchases by the Retailer Operations Division staff showed that only milk products were listed. Since none of the inventory purchases submitted by Appellant provided evidence of additional of dairy products that could be added to what was evident at the time of the FNS store visit, the store was determined to be deficient in the dairy products staple food category and therefore could not qualify as a SNAP retailer under Criterion A.

It is important to clarify for the record that the purpose of this review is to validate or to invalidate the initial determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. It is not within the scope of this review to consider actions ownership may take to qualify for participation in the SNAP subsequent to that decision, such as stocking all the variety of staples in each of the four staple food categories on a continuous basis, planning to do so once SNAP authorized, or increasing staple food stock in order to qualify under Criterion B. The authorization of a store to participate in the SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived. Therefore, Appellant's contention that store ownership had insufficient time to stock the store sufficiently with necessary items does not provide any valid basis for dismissing or mitigating the adverse action imposed. No ruling will be issued on Appellant's contention that the previous store owner was granted approval to accept SNAP benefits even though the new owner's changes have only been positive and include increased dairy products as the scope of this review is limited solely to the

factors pertaining to the denial of SNAP authorization of the Appellant business. Appellant's contention regarding other firms cannot be used to reverse the decision of Retailer Operations Division.

The SNAP regulations at §278.1(b)(1)(ii) are clear that under Criterion A, a firm shall “offer for sale . . . 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 . . . including perishable foods in at least two of the categories” (emphasis added). The store was deficient in one of the four staple food categories on the day of the FNS contractor visit, specifically dairy products. 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”.

Staple food sales must exceed 50 percent of overall sales, as required by SNAP regulations at 278.1(b)(1)(iii), in order to qualify as a SNAP retailer under Criterion B. Based on the information from the store owner's SNAP retailer application and supported by the FNS contracted reviewer's report and photographs, staple food sales at most accounted for only 20 percent of overall sales so the business did not derive more than 50 percent of its projected annual sales from the sale of staple foods as of the date of the store visit. Accordingly, the Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B. Therefore, the earlier determination by the Retailer Operations Division that Appellant did not meet the requirements for participation in the SNAP at the time such determination was made is correct.

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 less than six months when a firm does not meet the aforementioned eligibility requirements for authorization.

A review of the official record shows no evidence to support the allegation that the Retailer Operations Division's denial action may have resulted from disparate treatment due to race, color, national origin, sex, age, disability, type of business or other factors. Appellant's SNAP retailer application was reviewed in accordance with applicable SNAP laws and regulations and was correctly denied because it did not offer for sale on a continuous basis a variety of staple foods in the dairy products category as required under Criterion A of 7 CFR § 278.1(b)(1)(ii) of the SNAP regulations. In addition, Appellant 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 Appellant business did not qualify under either Criterion A or Criterion B, there is no basis to support Appellant's claim that the program specialist failed to exercise care in her review and acted in reckless disregard of FNS policy and procedures and that there would have been a completely different conclusion had she been more objective. Retail store authorizations must be in accordance with SNAP regulations and there are no provisions to modify or waive these regulations by allowing receipts dated after the date of the FNS store visit to be submitted as proof of meeting Criterion A requirements. That the program specialist requested receipts for

dairy inventory purchases was not the result of pushback, but that of compliance with long established procedures.

However, store ownership has the right to pursue any such allegations of discrimination directly with the USDA office which handles such matters. If ownership wishes to file a Civil Rights program complaint of discrimination with USDA, the USDA Program Discrimination Complaint Form, found online at http://www.ascr.usda.gov/complaint_filing_cust.html, should be completed. The form may also be requested by calling (866) 632-9992. Ownership may also write a letter containing all of the information requested in the form. The completed complaint form or letter should be mailed to U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue, S.W., Washington, D.C. 20250-9410. Any such allegations of discrimination will be handled by that office independently of this administrative review.

CONCLUSION

After a review of the pertinent documentation, and based on the discussion above, the initial decision by Retailer Operations Division to deny the application of Appellant to participate in the SNAP for a period of six months from the effective date of denial is sustained.

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

February 20, 2018