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

Pell City Valero #501,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0198529

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that Pell City Valero #501 (hereinafter "Appellant") was properly denied authorization to participate in the Supplemental Nutrition Assistance Program (SNAP) by the Retailer Operations Division, Retailer Operations Branch, hereinafter "ROD Office."

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k)(2) when it made the decision to deny the application by Appellant for authorization to participate in the SNAP.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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 record reflects that on January 17, 2017, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) signed as owner of Pell City Valero #501 an application for authorization to participate in the SNAP. A store visit was conducted on February 7, 2017. The ROD Office requested further documentation of Appellant's staple food inventory in a letter dated, February 14, 2017, to which Appellant replied and provided additional information. Appellant was subsequently advised in a letter dated February 28, 2017 of the Department's decision to deny the application. The regulatory bases given for that denial were 7 C.F.R. § 278.1(b)(1) and § 278.1(k)(2). On March 7, 2017, Appellant requested an administrative review of this action. The request 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 & Nutrition Act of 2008, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k)(2) establish the authority upon which a retail food store or wholesale food concern may be denied authorization to participate in the SNAP. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary for stores to qualify for participation in the SNAP.

7 C.F.R. § 271.2 states, *inter alia*:

> *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…

And

> 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 the eligibility of any firm.

7 C.F.R. § 278.1(a) states:

> FNS shall approve or deny the application within 45 days of receipt of a completed application. A completed application means that all information (other than an on-site visit) that FNS deems necessary in order to make a determination on the firm's application has been received.

7 C.F.R. § 278.1(b)(1) states, *inter alia*, that in order to meet Criterion A a firm must:

> Offer for sale, on a continuous basis, a variety of qualifying foods in each of the four categories of staple foods, including perishables in at least two of the categories.

7 C.F.R. § 278.1(b)(1) states, *inter alia*, that in order to meet Criterion A a firm must:

> Offer for sale, on a continuous basis, a variety of qualifying foods in each of the four categories of staple foods, including perishables in at least two of the categories.

7 C.F.R. § 278.1(b)(1)(ii) further stipulates, *inter alia*:

> Application of Criterion A: In order to qualify under this criterion, 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….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….Multiple ingredient food items intended for home preparation and consumption, such as, but not limited to, cold pizza, macaroni and cheese, soup or frozen dinners, shall only be counted as one staple food variety each and will normally be included in the staple food category of the main ingredient as determined by FNS.

7 C.F.R. § 278.1(b)(1)(iii) states, *inter alia*:

> Application of Criterion B: In order to qualify under this criterion, firms must have more than 50 percent of their 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, such as rental fees, professional fees and entertainment/sports/games income.

7 C.F.R. § 278.1(b)(1)(ii)(C) states, *inter alia*:

> …Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes.

7 C.F.R. § 278.1(b)(1)(iv) states, *inter alia*:

> 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...
>
> And
>
> …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.

7 C.F.R. § 278.1(k)(1) and (2) state, *inter alia*:

> FNS shall deny the application of any firm if it determines that:
> 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 The firm has failed to meet the eligibility requirements…under Criterion A or Criterion B….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

APPELLANT'S CONTENTIONS

In its written request for review dated March 7, 2017, Appellant provided information in which it was argued that:

The store was closed for the majority of January due to the construction of a new facility; at the time of inspection the store had been open for less than one week and all required staple food items required under Criterion A had not been received from the supplier. Since the inspection all required items have been added to the inventory. Appellant provides photographs of inventory in support thereof.

ANALYSIS AND FINDINGS

The record reflects that a contracted store visit of Appellant's firm was conducted on February 7, 2017. Documentation generated as a result of that visit includes photographs of the firm's interior and exterior, a store layout diagram and a store inventory survey reflecting that the firm had ample varieties of staple food stock in the breads and cereals category, in the dairy category and in the fruits and vegetables category but had an inadequate stock of staple food in the in the meats/poultry/fish category, thus failing to qualify under Criterion A. The SNAP Office duly requested additional information in order to determine if the firm normally maintained an adequate variety of staple foods in the meat/poultry/fish category; information provided in response by Appellant failed to demonstrate same. Appellant's application to participate in the SNAP indicated that the firm's staple food sales did not exceed 50 percent of gross retail sales (Appellant had indicated staple foods comprised 20% of total gross sales). As staple food sales must comprise more than 50 percent of a firm's gross retail sales, the store was ineligible for authorization under Criterion B. It was additionally noted that the Appellant firm maintained a considerable stock of prepared, ready-to-eat foods and accessory food items (such as carbonated/uncarbonated beverages, candy, coffee, tea, condiments, etc.), which are not considered staple food for the purposes of the SNAP. In addition, the firm maintained a substantial inventory of alcohol, tobacco and tobacco-related products, automotive supplies, paper products, pet supplies and other non-food items. Moreover, the firm operated as a gas station; thus the store visit further corroborated that staple food sales could not have reasonably exceeded 50% of gross sales.

In regard to Appellant's contentions above, it is acknowledged that extenuating circumstances may have contributed to the level and composition of staple food inventory observed at the firm on the day of the store visit; however, there is no provision in the statute or regulations which allows such considerations to warrant a reversal of a denial decision correctly made. Additionally, as noted above, 7 C.F.R. § 278.1(k)(1) and (2) clearly provides that FNS shall deny the application of any firm if it determines that 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 the firm has failed to meet the eligibility requirements…under Criterion A and B.

Appellant notes that it has added inventory since the store visit conducted on February 7, 2017 (and photographs in support thereof), and now qualifies under Criterion A and/or B. However, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the earlier decision of the SNAP Office and as such it is limited to consideration of the relevant facts and circumstances at the time of that decision. It is not within the scope of this review to consider actions Appellant may have taken to qualify for participation in the SNAP subsequent to the referenced store visit and the resulting decision by the SNAP Office. Therefore, Appellants' contention that it may now qualify under Criterion A and/or B of the eligibility requirements is not a valid basis upon which to reverse the decision. Moreover, 7 CFR §278.1(k)(2) of the SNAP regulations is quite specific and does not provide for agency discretion 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." (Emphasis added.)

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. The SNAP regulations at §278.1(b)(1)(ii) are clear (with emphasis added) 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." The store was deficient in one of the four staple food categories on the day of the visit, and, therefore, did not offer qualifying staple foods on a *continuous* basis. Likewise, the firm could not reasonably have qualified under Criterion B. Appellant has provided insufficient information and/or documentation demonstrating that the firm qualified to participate in the SNAP at the time of the store visit and the resulting SNAP Office decision to deny the firm's application.

CONCLUSION

In view of the above, it is my determination that the ROD Office's denial of Appellant's application for authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k). The denial, therefore, is sustained. However, it is noted that the six-month waiting period following denial stipulated by the Food and Nutrition Act of 2008 (Sec. 9(d)) and the regulations at § 278.1(k)(2) will elapse on September 1, 2017; accordingly, Appellant may reapply for participation in the SNAP up to 10 days prior to that date.

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 provisions of the Freedom of Information Act (FOIA), FNS is releasing this information in a redacted format as appropriate and will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

DANIEL S. LAY
Administrative Review Officer

April 19, 2018