

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

R & R Liquor & Junior Market,

Appellant,

v.

Case Number: C0205973

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the decision by the Retailer Operations Division (Retailer Operations) to deny the application of R & R Liquor & Junior Market (Appellant) to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed.

ISSUE

The issue accepted for review is whether Retailer Operations 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 the SNAP as an authorized retail food store.

CASE CHRONOLOGY

FNS received a SNAP application from Appellant December 12, 2017. FNS contracted-staff conducted an onsite store visit on January 8, 2018. By letter dated January 11, 2018, Retailer Operations informed the owner that the application of Appellant to participate as a SNAP authorized retail food store was denied. Appellant did not meet the eligibility requirements as set forth in Section 278.1(b)(1) of the SNAP regulations. Retailer Operations determined that Appellant did not meet Criterion A. Appellant did not offer for sale a variety of foods in sufficient quantities on a continuous basis because it carried too few items in the dairy and the meat, poultry, fish staple food categories.

Retailer Operations also determined that the firm failed to meet Criterion B because its staple food sales comprise 50 percent or less of the total annual gross retail sales of the firm. This was based on the application information and the store visit report. Appellant was informed that in

accordance with Section 278.1(k)(2) of the regulations a new application to participate in the SNAP could not be submitted for a period of six months from the date of the denial. The owner requested administrative review of the denial by a letter dated January 22, 2018. The appeal was granted by letter dated January 31, 2018.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence which 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 not true.

CONTROLLING LAW AND REGULATIONS

7 USC § 2023 and its 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.”

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Section 278.1(b)(1) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 states that Retail Food Store means: “An establishment ... 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 The participation as retail food stores...”

The regulations at 7 CFR § 271.2 define a staple food, in relevant part, as “Food items intended for home preparation and consumption in each of the following staple food categories: . . . 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)(i) imparts 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 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)(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 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 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.”

APPELLANT’S CONTENTIONS

- We purchased the store October 25, 2017 and started remodeling December 2017. We completed the remodel January 2, 2018 and started to stock.
- In the middle of stocking we had your inspection.
- We have completed to stock.

The owner provided 27 photographs to support completion of stock. The photos are stated to have been taken two day before January 22, 2018.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of Retailer Operations, and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. 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. It is not within the scope of this review to consider actions the owner may take to qualify for participation in the SNAP subsequent to that decision, such as stocking on display in a public area the variety of staples in each of the four staple food categories on a continuous basis. It should be noted that this review applied the SNAP regulations in place at the time of the decision. Subsequent to the denial decision, the SNAP regulations have changed, and the owner is encouraged to become familiar with the current regulations which impact eligibility requirements.

The onsite review of Appellant's food inventory revealed insufficient stock in the dairy and the meat/poultry/fish staple food categories. The SNAP regulations at Section 278.1(b)(1)(ii) stated 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." On the date of the store visit, Appellant did not maintain sufficient variety of qualifying staple foods in two staple food categories to be eligible to accept SNAP benefits. The owner does not dispute this fact.

Based on Appellant's application and the FNS contractor photographs, Retailer Operations determined that Appellant was ineligible for authorization under Criterion B per 7 CFR § 278.1(b)(1)(iii). The record reflects that the owner's application estimated that staple foods accounted for 42% of the store's total gross retail sales. The accessory "other" food items showed an estimate of 15% of the firm's total gross retail sales, and 43% of total gross retail sales were stated to come from non-food items or food that is hot at the time the customer pays for it. The evidence supports that staple food sales could not reasonably comprise more than 50% of the store's total annual gross retail sales at the time the denial was rendered.

SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application, and subsequently abides by the statute and implementing regulations. The owner reported on his SNAP application that his firm was open January 1, 2018. To have been eligible, Appellant had to be fully stocked and meet the applicable regulations by the date of the store visit.

CONCLUSION

After review of all the documentation in the record, the decision 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. Per 7 CFR § 278.1(k)(2), Appellant may not reapply for SNAP authorization as a retail food store for a minimum period of six months from the effective date of the denial. The owner is reminded to review the regulations and the eligibility requirements before he reapplies.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 USC § 2023) and to Section § 279.7 of the Regulations (7 CFR § 279.7) with respect to applicable rights to a judicial review of this determination. 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's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it 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.

M. Viens
Administrative Review Officer

March 9, 2018