

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

Rite Stop Food Mart,

Appellant,

v.

Case Number: C0202303

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the decision by the Retailer Operations Division to withdraw the authorization of Rite Stop Food Mart (hereinafter “Appellant”) to participate in the Supplemental Nutrition Assistance Program (hereinafter 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(l)(1)(iii), when it made the decision to withdraw the Appellant’s authorization to participate as a retailer in SNAP by letter dated August 4, 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

The FNS requires that SNAP authorized retailers be reauthorized on a set schedule. Appellant submitted an electronic reauthorization application on March 1, 2017. In a letter dated August 4, 2017, the Retailer Operations Division withdrew Appellant’s

authorization to participate as a retailer in SNAP. This involuntary withdrawal action was based on information collected during an onsite store visit on April 7, 2017, as well as information provided on the firm's reauthorization application. The Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations. The withdrawal letter stated the firm does not have a sufficient variety of SNAP eligible foods in the dairy products and meat, poultry, or fish categories. 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 § 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 at 7 CFR § 278.1(k)(2).

By letter dated August 4, 2017, Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action. The appeal was granted and implementation of the withdrawal has been held in abeyance pending completion of this review. 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(l)(1) establishes the authority upon which the authorization of any firm to participate in SNAP may be withdrawn if it fails to meet established eligibility requirements.

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)(i) states in part: “An establishment . . . shall . . . 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)(ii) states in 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(l)(1) Withdrawing authorization reads, in part, “FNS may withdraw the authorization of any firm authorized to participate in the program for any of the following reasons: (i) The firm’s continued participation in the program will not further the purposes of the program; (ii) The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section; (iii) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section . . . for the time period specified in paragraph (k)(2) of this section.”

7 CFR § 278.1(k)(2) requires that firms withdrawn for failure to meet program eligibility criteria “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 withdrawal.

APPELLANT’S CONTENTIONS

In the request for administrative review, Appellant has stated that the business needs to have the SNAP program and the owner is willing to carry any required items to continue having SNAP.

Appellant submitted no evidence or documentation in support of these contentions.

The preceding may represent only a brief 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 listed above, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the 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 continued participation in the SNAP subsequent to that decision, such as stocking all the variety of staples in each of the four staple food categories in the store on a continuous basis or promising to do so if approved. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact or intended corrective actions. 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 it will stock the store sufficiently with necessary items does not provide any valid basis for dismissing or mitigating the adverse action imposed.

A store visit was conducted by an FNS contracted reviewer on April 7, 2017. The store visit report showed only two of the required three dairy products (ice cream and milk) in stock and only two of the required three meat, poultry, or fish products (jerky and Vienna sausages).

Additionally, the store was very minimally stocked in the remaining two categories. 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 (emphasis added)." The store was deficient in two of the four staple food categories on the day of the FNS contractor visit, specifically dairy products and meat, poultry, or fish 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".

Ownership's SNAP retailer reauthorization application dated March 1, 2017, stated that the firm does not stock at least three varieties of staple foods in the meat, poultry, or fish category; the vegetables or fruit category; or in the bread or cereals category. The application also stated that staple foods amounted to only one percent

of gross annual sales. Appellant's estimate of one percent of sales coming from staple food sales shows that the Appellant business did not derive more than 50 percent of its projected annual sales from the sale of staple foods on 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 Retailer Operations that Appellant did not meet the requirements for participation in the SNAP at the time such determination was made is correct.

The authorization of a store to participate in the SNAP must be in accord with the Act, as amended, and regulations. A full review of the store visit materials from the April 7, 2017, store visit does not indicate any material departure from the documentation as presented. A review of the store visit documentation indicates that Appellant was deficient in dairy products and in meat, poultry, or fish products. Therefore, Appellant does not meet Criterion A. Appellant also does not meet Criterion B because information provided on the revised reauthorization application and information obtained from the store visit confirm that staple food sales comprise 50 percent or less of annual gross retail sales.

7 CFR § 278.1(l)(1) states, in part, "FNS shall withdraw the authorization of any firm if the firm fails to meet the requirements for eligibility under Criterion A or Criterion B. . . for the time period specified in paragraph (k)(2)" and 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.

CONCLUSION

After a review of the pertinent documentation, and based on the discussion above, the initial decision by the Retailer Operations Division to withdraw the authorization of Appellant to participate as a SNAP retailer is sustained. Appellant shall not be eligible to submit a new application for a minimum period of six months from the effective date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery of this letter.

When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS web site at www.fns.usda.gov/snap/retailer-apply.

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 1, 2017