

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

Rush Enterprises Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0224889

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the application of Rush Enterprises Inc. (Appellant or Rush Enterprises Inc.) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The purpose of this review is to determine 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 Supplemental Nutrition Assistance Program (SNAP) when it withdrew the authorization of Appellant to participate in SNAP in a letter dated December 6, 2019.

AUTHORITY

7 USC § 2023 and the 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.”

CASE CHRONOLOGY

In a letter dated December 6, 2019, the Retailer Operations Division withdrew the authorization of Rush Enterprises Inc. to participate as an authorized retailer in SNAP because the firm is not a retail food store as defined by the SNAP regulations. The Retailer Operations Division determined that Appellant is primarily a restaurant because hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, either for carryout or on-premises consumption, and requiring no additional preparation, comprise more than 50% of the firm’s total sales. Restaurants are not eligible to participate in SNAP except in certain states that

operate special restaurant programs allowing the elderly, disabled, and homeless participants to use SNAP benefits in restaurants. Ownership was informed that the firm could not submit a new application to participate as a SNAP retailer for a period of six months as provided in § 278.1(k)(2).

In a letter dated December 10, 2019, ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions 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 matter asserted is more likely to be true than not true.

CONTROLLING LAW

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). Part 278.1(k) 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 § 278.1(k)(1) Denying authorization, references 7 CFR § 278.1(b)(1)(iv) Ineligible firms, which reads, in part:

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 CFR § 271.2 states, in part:

Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on premises consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores ...”

7 CFR § 278.1(l) states, inter alia:

FNS shall withdraw the authorization of any firm that fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), (h) or (i) 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

Appellant made the following summarized contentions in its December 10, 2019, administrative review request, and subsequent correspondence dated January 6, 2020, in relevant part:

- Appellant had SNAP for more than 30 years and many customers depend on SNAP.
- Appellant never abused the program.
- Only 1/3 of the business is hot and prepared foods.
- Appellant sells a lot of lunch meat, cheese, bread, rolls, cereal, milk, eggs, meat, canned goods, and fresh produce.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

Appellant indicated on the *FNS -252 Supplemental Nutrition Assistance Program Reauthorization Application for Stores* that 52% of its total gross sales come from the sale of hot and prepared food. According to 7 CFR § 271.2 and 278.1(b)(1)(iv), firms are considered restaurants if they have more than 50 percent of total gross sales from heated foods and/or prepared foods. Prepared foods are hot or cold foods not intended for home preparation and/or home consumption, including prepared foods that are consumed on the premises or sold for carryout. Restaurants are ineligible for SNAP authorization.

Appellant explains that it offers many groceries including dairy, cold cuts, bread and cereals, canned goods, and other food products. For the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has SNAP-eligible food available for sale. The issue is whether actual sales of prepared foods comprise more than 50 percent of the store's total gross retail sales. Appellant may sell a variety of staple food items; however, there is no evidence to suggest that the information provided on Appellant's application indicating that 52% of total gross sales is from the sale of hot and prepared food items was incorrect. According to 7 CFR § 278.1(b)(1) of the SNAP regulations, such a store is considered a restaurant and is not eligible for SNAP participation as a retail food store. Therefore, Appellant does not qualify as a retail food store for purposes of SNAP participation.

Previous Authorization

Appellant contends that it has been authorized for many years to accept SNAP. It is beyond the scope of this review to evaluate whether the previously authorized store was correctly authorized or not. Instead, this administrative review is limited to an evaluation of whether or not the Retailer Operations Division acted in accordance with the statute and regulations when it denied

the application of Appellant on December 6, 2019. Therefore, Appellant's contention concerning its previous authorization or the authorization of similar firms is irrelevant to this review.

Summary

The authorization of a store to participate in SNAP must be in accord with the Food and Nutrition Act and regulations, as amended. Those requirements of law cannot be waived. Although Appellant may sell a variety of staple food items, it is more likely true than not true that the majority of foods in the store are actually sold prepared and/or hot and ready-to-eat. According to 7 CFR § 278.1(b)(1) of the SNAP regulations, such a store is considered a restaurant and is not eligible for SNAP participation as a retail food store. Therefore, Appellant's store does not qualify as a retail food store for purposes of SNAP participation.

CONCLUSION

The initial decision by the Retailer Operations Division to withdraw the authorization of Rush Enterprises Inc. to participate as a retailer in SNAP for a period of six months from the effective date of withdrawal is sustained. The withdrawal shall become effective 30 days after receipt of this letter. In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from the date of withdrawal.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 owners reside or are 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.

Mary Kate Karagiorgos
ADMINISTRATIVE REVIEW OFFICER

March 5, 2020