

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

Scratch & Dent Grocery Store,

Appellant,

v.

Case Number: C0199090

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 decision by the Retailer Operations Division to deny the application of Scratch & Dent Grocery Store (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 March 23, 2017.

AUTHORITY

7 U.S.C. § 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.”

CASE CHRONOLOGY

In a letter dated March 23, 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 and the meat, poultry, or fish categories 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 March 4, 2017, as well as information provided on the firm's retailer application.

By letter dated March 28, 2017, store ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted. No subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means 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 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (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, Appellant has stated as its position in the matter the following:

- The owner received a letter dated March 15, 2017, requesting evidence that the business met Criterion A or B after the inspection on March 4, 2017. The owner responded and provided all information and pictures to provide proof that, immediately following the inspection, the business could now qualify under Criterion B. The letter stated the owner had ten calendar days from receipt to respond and he received the letter on March 16, 2017. The owner’s response was received [by FNS] on March 23, 2017, but when he checked his status that same day, he had already been denied;
- The owner provided proof that the business was denied prior to the 10 day deadline and requests his response be re-reviewed by a person with the expertise required to actually understand the information provided since he wasn’t afforded the actual deadline set forth in the March 15, 2017, letter; and,
- It is the owner’s belief that he does qualify for Criterion B.

Appellant submitted a copy of the owner’s March 22, 2017 response to the March 15, 2017, request and proof of delivery of the response as well as invoices, an undated manifest, Z reports,

and undated photographs of store inventory. No other documentation or evidence was submitted in support of these contentions.

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 the business opened on February 1, 2017, and that ownership submitted a SNAP retailer application electronically through the FNS web site on February 7, 2017. This application estimated that staple foods accounted for 100 percent of the firm's total retail sales. The accessory "other" food items showed an estimate of 00 percent of the firm's total retail sales. Ownership also estimated that 00 percent of retail sales came from non-food items. The application showed that the business stocked at least three different items in only the breads/grains staple food category and did not stock items in the remaining three categories. The application also showed that the business did not stock perishable foods in at least two of the four categories. The FNS retailer web site 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.

Based on the results of the FNS store visit report, inventory checklist, and photographs, Appellant's SNAP retailer application was revised to show that the business did stock at least three different items in the breads/grains category and in the fruits/vegetables category. The percentages were also revised to reflect that on the date of the store visit, 45 percent of sales were from staple foods, 40 percent were from accessory foods, and 15 percent were from non-food items that would be classified under "other".

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 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 it may now have stocked the store sufficiently or that its staple food sales are now sufficient to become eligible in SNAP does not provide any valid basis for dismissing or mitigating the adverse action imposed.

A review of the Appellant business's food inventory was conducted by an FNS contracted reviewer as a routine part of the authorization process on March 4, 2017, approximately one month after the store had opened as stated in the FNS SNAP retailer application. This store visit revealed the business was minimally stocked with staple food items and had insufficient stock available for purchase in two of the four staple food categories; thus, not meeting Criterion A per

7 CFR § 278.1(b)(1)(ii)(A). The store visit report showed only two of the required three dairy products in stock and only one of the required three meat, poultry, or fish products in stock. SNAP regulations at §278.1(b)(1)(ii) are clear that under Criterion A (emphasis added), 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.” Therefore, the Appellant business did not maintain a sufficient stock of qualifying staple foods on a continuous basis to be eligible to accept SNAP benefits (emphasis added).

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 Appellant’s SNAP retailer application and supported by the FNS contracted reviewer’s report and photographs, staple food sales accounted for only 45 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. That the Appellant business did not qualify under Criterion B is further corroborated by the owner’s March 28, 2017, letter that states “. . . to provide proof that, immediately following the inspection, I could now qualify for Criterion B” (emphasis added). 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.

The record reflects that the Retailer Operations Division sent Appellant a request for proof of inventory in the dairy products and meat, poultry, or fish products categories on March 15, 2017, and that this letter was received by Appellant on March 16, 2017. The proof of inventory letter specifically requested invoices or receipts dated prior to the March 4, 2017, FNS store visit that would show the Appellant business normally carried at least three different types of items in the dairy products and meat, poultry, or fish products staple food categories that would be required to qualify under Criterion A. Appellant submitted evidence with the administrative review request that store ownership had submitted a response to the proof of inventory letter that was received by FNS on March 23, 2017. The record also shows that the store owner telephoned the Retailer Operations Division Program Specialist on March 23, 2017, and during the ensuing conversation stated that the business did not carry the required products, that he did not have any receipts/invoices showing the required products, and that he would reapply in six months. The Retailer Operations Division denied Appellant’s application to participate as an authorized retailer in SNAP by letter dated March 23, 2017. A review of the documentation submitted by Appellant in response to the proof of inventory letter confirms the Retailer Operations Division’s determination that the documentation submitted was insufficient to show the business would qualify under either Criterion A or under Criterion B on the date of the FNS store visit and therefore Appellant did not meet the regulatory requirements to participate as an authorized SNAP retailer.

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 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

May 5, 2017