

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

Tarrant Marathon,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0205976

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the Retailer Operations Division properly denied the application of Tarrant Marathon to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of denial.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it denied the retailer application of Tarrant Marathon.

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

The Appellant firm, Tarrant Marathon, originally applied to participate as a retailer in SNAP on August 4, 2017. According to the firm's application, the store was opened for business under the current ownership on November 1, 2016. Because of a prior SNAP disqualification at the same location where Tarrant Marathon is located, the firm was required to provide FNS with a significant amount of documentation to prove that the current owner was not affiliated with the disqualified firm in any way. The process of submitting this information was finally completed on December 20, 2017.

On December 22, 2017, the Appellant store was visited by an FNS contractor in an effort to determine whether or not the firm met eligibility requirements to be authorized in SNAP. During this visit, the contractor took photographs of the store and its inventory, spoke with store personnel, and completed a written report detailing its observations.

After reviewing the store visit report and photographs, the Retailer Operations Division determined that the firm did not carry a sufficient variety of staple foods in order to be eligible to participate in SNAP under Criterion A. In accordance with regulations at 7 CFR § 278.1(b)(1), a firm must offer for sale on a continuous basis a variety of foods in each of the four staple food categories. According to the contractor's written record, the firm had insufficient inventory in both the dairy and the meat/poultry/fish categories on the day of the visit.

In a letter dated January 11, 2018, the Retailer Operations Division informed the Appellant that its SNAP application was denied because it did not offer for sale on a continuous basis a variety of foods in all four staple food categories as required under Criterion A. The letter also informed the Appellant that it did not meet the eligibility requirements of Criterion B because the store did not have more than 50 percent of its gross retail sales in the sale of staple foods.

As a result of being found ineligible for participation under both Criteria A and B, the Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter dated January 25, 2018, the Appellant requested an administrative review of the Retailer Operations Division's decision. The request was granted. It should be noted that in a letter postmarked February 23, 2018, the Appellant provided additional information and documentation to support its request for review.

STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k) establishes the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility requirements.

7 CFR § 278.1(k)(2) reads, in relevant part:

FNS shall deny the application of any firm if it determines that:

(2) 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

7 CFR § 271.2 defines a retail food store as:

(1) 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)** as set forth in § 278.1(b)(1) of this chapter, or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) as set forth in § 278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter... [Emphasis added.]

7 CFR § 271.2 defines staple food, in part, as:

... 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 [Criterion A] firms shall:

- (A) Offer for sale...qualifying staple food items **on a continuous basis...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.]
- (B) Offer for sale perishable staple food items in at least two staple food items. 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. 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...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) states, in part:

In order to qualify under [Criterion B] 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 CFR § 278.1(k)(2) states, in part:

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

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The store has a record of its invoices to prove that it carries the necessary items to be eligible for SNAP.
- Due to the holiday season, the firm was sold out of the necessary food items at the time of the store visit, or maybe were not in stock on time, or were misplaced.
- As a retailer, Appellant likes to provide satisfactory service to its customers, and so would like to start SNAP as soon as possible.
- In its follow-up letter, the Appellant stated that due to untimely circumstances, the firm was not fully prepared for the contractor's inspection of the store.
- There was a combination of unfortunate issues that took place. First was a maintenance issue that forced the store to be closed prior to December 22, 2017, which is the date of the store visit. Next was severe winter weather that caused "unusual store volume" prior to December 22, which all but depleted the firm's food supplies. Due to that snow storm, the firm was unable to have its normal delivery as it was impassable in the city and state. Because of these circumstances, the Appellant resorted to obtaining inventory at a local Dollar Tree.
- Appellant would like FNS to reconsider its denial decision and take another look at the store. The firm's goal is to provide nutritional and accessible food products to the community, and in order to do this, it must be able to accommodate all of its customers.

In support of these contentions, Appellant submitted the following documents:

- Letter from 5 U.S.C. § 552 (b)(6) & (b)(7)(C), who works for Sysco Foods, Inc. The letter states that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was scheduled to make a delivery to Tarrant Marathon on December 20, 2017, but the delivery was cancelled by the store owner "due to the store being closed for maintenance problems." The letter further states that the delivery was rescheduled for December 27, 2017. The letter also states that the owner requested re-delivery on December 22 or 23, but Sysco Foods was unable to accommodate the request "due to the holidays."
- A maintenance invoice from Ready to Roll Plumbing, showing a "reconfiguration of interior pipes, plumbing parts and labor." The invoice is dated December 18, 2017, but there is no indication of when the maintenance service was performed.

- One receipt from Dollar Tree Stores, showing the purchase of a variety of food and nonfood items. The receipt is torn off at the bottom, where the date of purchase would have been located. “12/17/17” is written by hand at the top of the receipt.

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

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the contractor’s store visit and at the time the Retailer Operations Division rendered its decision.

On August 4, 2017, the Appellant submitted an online form FNS-252, *Supplemental Nutrition Assistance Program Application for Stores*, in which it indicated that the firm carried at least three varieties of staple foods in each of the four staple food categories. The Appellant’s application also estimated that 25 percent of the firm’s gross retail sales were from the sale of staple foods, while 25 percent of its sales were in other foods, such as snack foods, soft drinks, and condiments. The Appellant estimated that 50 percent of its sales were from items not eligible for purchase with SNAP benefits, such as gasoline, alcoholic beverages, tobacco products, and other nonfood merchandise.

After reviewing the contractor’s store visit photographs and report as well as evaluating the contentions and evidence submitted by the Appellant, it is the determination of this review that on the day of the store visit, the Appellant firm did not meet SNAP eligibility requirements under either Criterion A or B and thus, is not eligible for SNAP participation. As best as can be determined by this review, the only meat items in the store on the day of the contractor’s visit were canned fish and beef jerky, and the only dairy products were boxed milk and ice cream.

It must be emphasized that a firm must maintain a continuous and minimum inventory of staple food items in order to be eligible for participation in SNAP. If a firm does not purchase and maintain a sufficient inventory of staple foods then it does not further the purposes of the Program. As stated in regulations cited earlier, the firm must offer for sale no fewer than three different varieties of food in each of the four staple food categories on a continuous basis in order to be eligible for participation under Criterion A. “Continuous basis” includes the day of the contractor’s visit to the store.

In this case, the evidence clearly shows that the Appellant firm was lacking in variety in two of the four staple food categories on the day of the store visit. As a result of this deficiency, the firm is not eligible for SNAP participation under Criterion A.

The firm is also not eligible under Criterion B as the sale of staple foods almost certainly does not exceed 50 percent of the firm's total sales. As noted earlier, the Appellant indicated on its SNAP application that staple foods constitute just 25 percent of the firm's gross sales. But even this claim appears to be a significant overestimation. When gasoline, alcohol, tobacco, snack foods, soda, candy, and other nonfood sales are taken into consideration, it is likely that the store's staple food sales do not exceed 10 percent of the firm's total revenue. As such, Tarrant Marathon is not eligible for participation under Criterion B. It should be noted that Criterion B is generally reserved for stores such as butcher shops or bakeries, which normally do not carry food items in all four staple food categories, but which have most of their revenue in the sale of staple food items.

Appellant Documentation

As detailed earlier, the Appellant submitted the following documents to support its claim that extenuating circumstances prevented the firm from having a complete inventory in the store on the day of the contractor's visit:

- Letter from a Sysco Foods, Inc. representative detailing an inventory delivery delay;
- A maintenance invoice from Ready to Roll Plumbing; and
- One receipt from Dollar Tree, with the date of purchase torn off. "12/17/17" is written by hand at the top of the receipt.

The Appellant also claimed that a severe snowstorm in the Birmingham area prior to December 22 made the normal delivery of inventory to the store impossible because the roads were impassable. The Appellant further claimed that this storm resulted in greater- than-usual business, which all but depleted the firm's food supplies. Because of this storm and the simultaneous maintenance issues that forced the store to temporarily close, the Appellant claims that the firm had little option but to purchase inventory from a local Dollar Tree.

Unfortunately, none of these claims is sufficient for this review to conclude that the denial decision should be reversed.

For example, the snowstorm referenced by the Appellant took place on Friday, December 8, 2017, which is two weeks before the contractor showed up at the store, and lasted only one day. In the 14 days after the snowstorm, the temperatures in Birmingham reached as high as 71 degrees. On the Monday after

the store, the temperature reached 61 degrees. After just one or two days, the snow in the area had entirely melted away. There is no evidence whatsoever that this storm had any lasting impact on the firm's business or its inventory deliveries.

As for the store closure, this review has no evidence to counter the Appellant's claim that the store was temporarily closed due to a maintenance issue. And it's possible that a delivery From Sysco Foods was delayed as a result. But the Appellant offered no evidence of when the plumbing repair actually took place or any documentation to prove that the store was ever closed at all. Additionally, the bulk of the Appellant's evidence is not credible. The bottom of the Dollar Tree receipt was torn off, so there is no way to positively confirm when the purchase was actually made or who made it. The statement by the Sysco Foods representative was clearly written by the Appellant. It was also unsigned and the notary stamp at the bottom appears to be fabricated. It is extraordinarily unlikely that a legitimate notary public would have stamped and signed a document that was not also signed by the person making the statement.

Stated plainly, much of the Appellant's documentation appears to be falsified and the Appellant's explanations are wholly insufficient for this review to reverse the denial decision made by the Retailer Operations Division. Furthermore, the firm was well short of the required inventory on the day of the store visit and does not further the purposes of the Program.

CONCLUSION

Based on the analysis above, it is the determination of this review that the Appellant firm, Tarrant Marathon, does not meet eligibility requirements under Criterion A or B described in regulations at 7 CFR § 278.1(b)(1). The contentions and evidence presented by the Appellant are not sufficient to prove that the denial decision made by the Retailer Operations Division should be reversed. The store visit cited by the Retailer Operations Division was conducted by an FNS contractor and was thoroughly documented. A review of the report has yielded no indication of error or discrepancy. Rather the report and accompanying photographs are specific and accurate with regard to store conditions and food inventory on the day of the visit, and in all other critically pertinent details.

On the basis of the analysis above, the decision by the Retailer Operations Division to deny the application of Tarrant Marathon to participate as a retailer in SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from January 11, 2018, which is the effective date of the denial.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

March 8, 2018