

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

Terminal Meats Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0215371

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 the decision of the Retailer Operations Division to deny the application of Terminal Meats Inc. (Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for six months from the effective date of the denial decision.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b) and 7 CFR § 278.1(k), when it denied the application of the Appellant to participate as an authorized SNAP retailer on November 19, 2018.

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 applied to participate in the SNAP as an authorized retailer in an application that was signed on October 30, 2018. In a letter dated November 19, 2018, the Retailer Operations Division denied the application of the Appellant to participate as an authorized retailer in the SNAP. The basis for the denial was that Terminal Meats Inc. does not meet the definition and requirements of a retail food store as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations and is, therefore, ineligible to participate in the SNAP as an authorized retailer. The denial action was based on information that was provided on the SNAP authorization application as well as the Appellant’s October 16, 2018 response to the Retailer Operations Division’s

October 11, 2018 request for additional information/documentation with regard to the submitted SNAP application.

In a letter postmarked December 8, 2018, the Appellant appealed the Retailer Operations Division's decision and requested an administrative review of this determination. FNS granted the Appellant's request for administrative review by letter dated February 13, 2019.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a 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 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) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in the SNAP if it fails to meet established eligibility criteria.

7 CFR § 271.2 defines a retail food store, in part, as:

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 qualifying staple food items on a continuous basis, evidenced by having no fewer than [three] different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple food variety, including at least one variety of 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 stock keeping units, or other inventory or accounting record keeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter

7 CFR § 278.1(b)(1)(ii) states, in part:

In order to qualify under [Criterion A] firms shall:

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 with a

minimum depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least [two] staple food categories.

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(b)(1)(v) states:

Wholesale food concerns. Wholesale food concerns, the primary business of which is the sale of eligible food at wholesale, and which meet the staple food requirements in paragraph (b) of this section, shall normally be considered to have adequate food business for the purposes of the program, provided such concerns meet the criteria specified in paragraph (c) of this section.

7 CFR § 278.1(c) states, in part:

Wholesalers. A wholesale food concern may be authorized to accept coupons only from a specified customer or customers if it meets the requirements and paragraphs (a) and (b) of this section, and FNS determined it is required as a redemption outlet:

7 CFR § 278.1(b)(1)(vi) states:

Co-located wholesale food concerns. No co-located wholesale/retail food concern with 50 percent or less of its total sales in retail food sales may be authorized to redeem SNAP benefits unless it meets the criteria applicable to all retail firms and:

(A) It is a legitimate retail food outlet. Indicators which may establish to FNS that a firm is a legitimate retail food outlet include, but are not limited to, the following:

(1) The firm's marketing structure; as may be determined by factors such as, but not limited to:

- (i) A retail business license;
- (ii) The existence of sales tax records documenting retail food sales; and/or separate bookkeeping records; and

(2) The way the firm holds itself out to the public as evidenced by factors such as, but not limited to:

- (i) The layout of the retail sales space;
- (ii) The use of retail advertisements;
- (iii) The posting of retail prices;
- (iv) Offering specials to attract retail customers;

- (v) Hours of operation for retail business;
- (vi) Parking area for retail customers; and
- (B) It has total annual retail food sales of at least \$250,000; or
- (C) It is a legitimate retail outlet but fails to meet the requirements in paragraph (b)(1)(iv)(B) of this section, and not authorizing such a firm would cause hardship to food stamp households. Hardship would occur in any one of the following circumstances:
 - (1) Program recipients would have difficulty in finding authorized firms to accept their coupons for eligible food;
 - (2) Special ethnic foods would not otherwise be available to recipients; or
 - (3) Recipients would be deprived of an opportunity to take advantage of unusually low prices offered by the firm if no other authorized firm in the area offers the same types of food items at comparable prices.

7 C.F.R. § 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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section. 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.

Additionally, in interpretation of the regulations, relevant policy provides, in part, that:

Co-located firms with retail sales accounting for less than 50 percent of their total sales may not be authorized unless: (1) it meets Criterion A or B; and (2) is a legitimate retail food outlet; and (3) it has total annual retail food sales of at least \$250,000; or (4) it is a legitimate retail outlet but does not have total annual retail food sales of at least \$250,000 and not authorizing the firm would cause hardship to recipient households.

And:

If it is determined that the firm does not have a legitimate retail outlet, the firm shall be denied on this basis and no determination needs to be made on whether the firm does a substantial retail food business or regarding hardship on SNAP households.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the Appellant's request for administrative review, it was argued that:

- The Appellant believes it meets the definition of a retail food store within the meaning of Criterion B as more than 50% of the store’s total gross retail sales are in staple foods, mainly meat, poultry, and fish.
- Pursuant to the SNAP application and the supplemental information submitted to the Retailer Operations Division, the Appellant’s estimated retail food sales are approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) annually. Of that amount, approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are in staple foods. This represents 77% of the total retail sales in staple foods, which exceeds the 50% requirement of Criterion B.
- The Appellant does have a wholesale business. The wholesale business consists of selling meat to restaurants. The Appellant does not sell eligible foods to other retail food stores or to meal services for resale to households. Therefore, Terminal Meats Inc. is not a “wholesale food concern” within the definition of Section 271.2 of the SNAP regulations. Because it is not a wholesale food concern, Sections 278.1(b)(1)(v) and (vi) of the SNAP regulations are not applicable.
- Terminal Meats Inc. is a retail food store under the definitions provided in the SNAP regulations. The store has been in the same family for many years and has always participated in the SNAP. Therefore, the Appellant requests that FNS approve its application to participate in the SNAP.

ANALYSIS AND FINDINGS

The Appellant contends that it believes that it meets the definition of a retail food store under Criterion B as the store’s estimated retail food sales are approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) annually. Of that amount, approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are in staple foods indicating that 77% of the store’s total retail sales are in staple foods, which exceeds the 50% requirement of Criterion B.

The records reflects that the Appellant’s SNAP application as well as subsequent information provided to the Retailer Operations Division indicate that in 2018, the firm did 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in wholesale sales and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in retail sales. Thus, approximately 65% of its gross sales were wholesale sales and 35% were in retail sales.

Based on this sales information, Terminal Meats Inc. clearly can be considered to be predominantly a wholesaler rather than a retail food store. Given the fact that wholesalers are covered under the regulations at 7 CFR § 278.1(c), the regulations at 7 CFR § 278.1(b)(1)(i) cannot solely be used for determining the eligibility of the firm. Therefore, the firm’s contention that it is eligible under Criterion B because retail food sales are more than 50 percent of gross retail sales cannot be used to modify the original determination by the Retailer Operations Division.

However, the Appellant’s contention that 77% of retail sales are comprised of staple food sales is recognized by FNS. This being the case, Terminal Meats Inc. needs to be considered as a co-located wholesale food concern for eligibility determination rather than solely as a wholesaler. As stated above, the eligibility requirements for this type of firm are found under the regulations at 7 CFR § 278.1(b)(1)(vi) which states that co-located wholesale/retail food concerns whose

retail food sales are more than 50% of their total sales may be authorized to redeem SNAP benefits. Co-located firms with retail sales accounting for less than 50 percent of their total sales may not be authorized unless:

- It meets Criterion A or B; and
- Is a legitimate retail food outlet; and
- It has total annual retail food sales of at least \$250,000; or
- It is a legitimate retail outlet but does not have total annual retail food sales of at least \$250,000 and not authorizing the firm would cause hardship to recipient households.

While Terminal Meats Inc. may meet Criterion A or B and appears to be a legitimate retail food outlet, the store's total annual retail food sales are not at \$250,000.00. Total retail food sales for 2018 were reported by the Appellant as 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Even if the subject firm was considered to clearly be a legitimate retail food outlet, it would still need to be determined whether it would be a hardship to local SNAP residents if the firm was not authorized. 5 U.S.C. § 552 (b)(7)(E).

Based on the evidence, the disqualification of Terminal Meats Inc. would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience. Therefore, the Retailer Operations Division's decision to deny the application of the Appellant to participate as an authorized retailer in the SNAP is sustained as appropriate under 7 CFR § 278.1(b)(1)(vi).

Lastly, the Appellant contends that the store has been in the same family for many years and has always participated in the SNAP. However, this administrative review is limited solely to those circumstances concerning Terminal Meats Inc. and whether it met the definition and requirements of a retail food store at the time of the denial action as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations. Therefore, the Appellant's claim that stores owned by the family may have participated in the SNAP in the past cannot be used to reverse the decision rendered by the Retailer Operations Division.

CONCLUSION

Based on a review of all of the evidence in this matter, the determination by the Retailer Operations Division to deny the application of Terminal Meats Inc. to participate as a retailer in the SNAP is sustained. The business does not operate as a retail food business within the meaning of the SNAP regulations at Part 271.2 (definition of a retail food store). In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for SNAP authorization for a minimum period of six months from the effective date of the denial.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you 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, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

June 3, 2019