

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

Universal 99 Cent,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0202085

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 a finding that the decision by the Retailer Operations Division (Retailer Operations) to deny the application of Universal 99 Cent (Appellant) to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed.

ISSUE

The issue accepted for review is whether Retailer Operations 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 the SNAP as an authorized retailer.

CASE CHRONOLOGY

FNS received a SNAP application from Appellant on June 26, 2017. FNS-contracted staff conducted an onsite store visit on July 13, 2017. By letter dated July 17, 2017, Retailer Operations requested that the owner provide additional information. By letter dated July 31, 2017 Retailer Operations informed the owner that the application of Appellant to participate as a SNAP authorized retailer was denied. Appellant did not meet the eligibility requirements as set forth in Section 278.1(b)(1) of the SNAP regulations. Based on the store visit and information provided by the owner, Retailer Operations determined that Appellant did not offer for sale a variety of foods in sufficient quantities on a continuous basis because it carried too few items in the dairy staple food category, thus not meeting Criterion A.

Retailer Operations also determined that the firm failed to meet Criterion B because its staple food sales comprise 50 percent or less of the total annual gross retail sales of the firm. This was

based on the application information and the store visit report. Appellant was informed that in accordance with Section 278.1(k)(2) of the SNAP regulations a new application to participate in the SNAP could not be submitted for six months from the effective date of the denial.

The owner, via counsel, requested administrative review of the denial determination by a letter dated August 14, 2017. The appeal was granted by letter dated August 21, 2017. Counsel filed a FOIA request. The agency replied October 3, 2017 to the information request. By email dated October 12, 2017, this office noticed counsel that the due date for information on this matter was October 25, 2017. Additional information was provided by email on October 26, 2017. A compact disk with attachments was received at a later date.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action 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 argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

7 USC § 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.”

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). Section 278.1(b)(1) 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 § 271.2 states that a retail food store means: “An establishment ... 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)...or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)...Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for The participation as retail food stores...”

The regulations at 7 CFR § 271.2 define a staple food as: “Food items intended for home preparation and consumption in each of the following staple food categories: . . . 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) imparts specific program requirements for retail food store participation, which reads: “An establishment ... shall ... effectuate the purposes of the program if it ... 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)(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 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 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.”

APPELLANT’S CONTENTIONS

- In support of the decision to permanently deny the Appellants’ application, the Department cited that the Appellants failed to meet Criterion A because the store does not offer for sale a variety of foods in sufficient quantities on a continuous basis due to carrying too few items in the dairy product category. The Department also cited that the store’s staple food sales comprise 50 percent or less of the store’s annual gross retail sales.
- There are perishable items in all three categories: dairy has milk, yogurt and cheese.
- Even if the store didn’t qualify under Criterion A, it would still qualify under Criterion B.
- The Appellant’s store qualifies for participation in SNAP under either Criterion A or B.

- The inventory has spoilable foods in three categories. Alternatively, the store's tax records show that they sell more than 70% of the gross revenue in foods – well in excess of the regulatory amount of 50%.

Evidence included: New Jersey Division of Taxation information for the months of May, June, and July 2017; vendor invoices for June, July and August 2017; and store photos.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of Retailer Operations, and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. 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. It is not within the scope of this review to consider actions the owner may take to qualify for participation in the SNAP subsequent to that decision, such as stocking on display in a public area the variety of staple foods in each of the four staple food categories on a continuous basis, or to carry perishable food in at least two of the four staple food categories.

As a point of clarification, the contention that this is a permanent denial is in error. Appellant was denied for a period of six months. The onsite store visit results indicated to Retailer Operations that there was a variety deficiency in the dairy staple food category. The photographs also supported that Appellant stocked “other” non-food items including: tobacco, auto products, health and beauty items, paper goods, party goods, and souvenirs. The owner failed to indicate non-food stock on his original application. Therefore, Retailer Operations requested an updated application to properly reflect the stock of these other items, along with invoices to support the stock of a variety of dairy staple foods.

The SNAP regulations at Section 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.” The record supports that the owner submitted invoices dated June 22, 2017 and July 10, 2017 for the purchase of milk. The owner also updated his application to show 45% of total retail sales from staple foods, 45% from accessory foods, and 10% from “other” wherein he marked tobacco products only. Based on the additional information, the application, and the store visit, Retailer Operations determined that Appellant did not meet Criteria A for eligibility.

The receipts provided on the compact disk dated: 6/3/17, 6/5/17, 6/7/17, 6/12/17, 6/21/17, 6/22/17, 7/3/17, 7/8/17, 7/10/17 and 7/12/17, were for milk and ice cream. These are the only receipts dated prior to the July 13, 2017 store visit. Receipts for additional dairy variety (margarine, yogurt and cheese) were dated in August 2017, after the store visit. Thus, the evidence does not support that Appellant carried a continuous variety of no fewer than three varieties of food items in the dairy staple food category when the denial decision was made.

Based on Appellant's application and the FNS contractor photographs, Retailer Operations determined that Appellant was ineligible for authorization under Criterion B per 7 CFR § 278.1(b)(1)(iii). Staple food sales could not reasonably comprise more than 50% of the store's total annual gross retail sales. Appellant features an abundance of ineligible items and accessory foods that do not count towards determining eligibility for authorization. Furthermore, Appellant's own revised application stated his staple food sales as 45% of total retail sales.

Counsel states: "In May of 2017, the store sold 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of merchandise, representing the store's total gross revenue. Of that, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was for food items (non-taxable, which show up as "Deductions" on the tax return), for a total of 77% of the store's monthly sales. In June of 2017, the store's gross sales were 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The store sold 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in non-taxable food items, for a total monthly amount of 71.8% of the store's total gross sales. In July, 2017, the store had total gross receipts in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of that, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (72.7%) of the sales were for food items."

Food items such as candy are presumably included in the non-taxable revenue amounts cited by counsel. In determining eligibility for SNAP authorization the regulations state that an establishment must sell 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), or has more than 50 percent of its total gross retail sales in staple foods (Criterion B). The denial of Appellant is based on the percentage of staple food sales, not the percentage of food sales which would include accessory foods. Per the regulations cited here, 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.

SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application, and subsequently abides by the statute and implementing regulations. The evidence supports that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the denial decision was rendered.

CONCLUSION

After review of all the documentation in the record, and the discussion herein, the decision by Retailer Operations to deny the application of Appellant to participate in the SNAP for a period of six months is sustained. Per 7 CFR § 278.1(k)(2), Appellant may not reapply for SNAP authorization as a retail food store 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 of 2008 (7 USC § 2023) and to Section § 279.7 of the Regulations (7 CFR § 279.7) with respect to applicable rights 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 the Appellant's owner resides or is 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.

M. Viens
Administrative Review Officer

November 7, 2017