

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

Yvonne's,

Appellant,

v.

Case Number: C0224072

Retailer Operations Division,

Respondent.

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 deny the authorization of Yvonne's (hereafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2 and § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied Appellant authorization to participate as a retailer in SNAP on October 9, 2019.

AUTHORITY

7 U.S.C. § 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 October 9, 2019, Retailer Operations Division denied Appellant's authorization to participate as a retailer in SNAP. This denial was based on evidence obtained during a firm visit conducted on September 24, 2019, as well as information provided on the firm's retailer application.

Retailer Operations Division determined that the firm did not meet the definition and requirements of a retail store as set forth in 7 CFR § 271.2 and § 278.1(b)(1) of the SNAP regulations. The denial letter stated it is the determination of FNS that your business does not

operate a retail food business within the meaning of the SNAP regulations at Part 271.2 (definition of Retail Food Store).

As the firm failed to meet SNAP 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).

In a letter dated October 19, 2019, Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means 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

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2018 and Section 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k)(2) establishes the authority upon which the authorization of any firm to participate in SNAP may be denied if it fails to meet established eligibility requirements.

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, as 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 and 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 recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. 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 FSP [SNAP] participation as retail food stores under § 278.1(b)(1) of this chapter.”

7 CFR §271.2 defines staple food, in 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.”

7 CFR §278.1(b)(1)(i) relays specific program requirements for retail food store participation, which reads, in part, “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)(iv) relays specific eligibility requirements for retail food store participation, which reads, in part, “Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the Food Stamp Program shall not be eligible for program participation... Ineligible firms under this paragraph include, but are not limited to, store selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. In addition, 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. Such firms may qualify, however, under the special restaurant programs that serve the elderly, disabled, and homeless population, as set forth in paragraph (d) of this section.”

7 CFR §278.1(k) reads, in part, “FNS shall deny the application of any firm if it determines that: (1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section; or (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 . . . 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 response to the denial letter and in the request for administrative review, in relevant part:

1. I have applied numerous times to the USDA in regards to the food stamp program. My previous denial was due to not all recommended eligible items under the food pyramid in ample supply.
2. This time I had every item needed to satisfy the recommendation for the program.
3. I was asked to provide proof that I purchased these items in the dairy section. I provided the receipts then got a letter stating I am denied because my store is in a residential area.
4. I had a discussion with one of the prior USDA workers about the store location and there was no problem. I am a community based convenience store. This community is in need of the food stamp program.

Appellant provided 5 color photographs of the homes driveway and the building across the street as well as a park area. The preceding may represent only a brief 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

In regards to Appellant's contentions it is important to clarify that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. It is not the purpose of this review to consider what subsequent actions may have been taken so that a store may begin to comply with program requirements. Section 278.1(b)(ii)(A) of the SNAP regulations state in part "...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."

A review of the firm visit documentation indicates that the firm was deficient in the dairy products category, missing one variety and three stocking units. The receipts provided to Retailer Operations Division do not show the additional items needed in the dairy products category for eligibility and therefore, Retailer Operations Division correctly concluded Appellant did not meet Criterion A because the firm did not offer "qualifying staple foods on a continuous basis in each of the four staple food categories."

Appellant reported on its retailer application that 50 percent of its projected total annual gross retail sales were from the sale of staple foods. Appellant's application, the photographs and firm inventory provided from the firm visit, confirm that Appellant did not derive more than 50 percent of its projected total annual gross retail sales from the sale of staple foods. Accordingly, Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B.

The regulations also provide a definition of "Ineligible firms" as "firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from Program participation. The store visit photographs indicate that the Appellant's firm does not meet the very definition of a retail food store as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations. The firm was the retailer's private home with no listed store hours, no signage for the firm and no separate entrance for customers.

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

Based on the discussion herein, the determination by the Retailer Operations Division to deny the authorization of Yvonne's to participate as a retailer in SNAP is sustained. Appellant shall

not be eligible to submit a new application for SNAP authorization for a period of six months, effective October 9, 2019.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

February 12, 2020