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

Zerka Food Center,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0206799

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that Zerka Food Center (hereinafter "Appellant") was properly denied authorization to participate in the Supplemental Nutrition Assistance Program (SNAP) by the Retailer Operations Division, Retailer Operations Branch, hereinafter "ROD Office."

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1), (6) and § 278.1(k)(2) when it made the decision to deny the application by Appellant for authorization to participate in the SNAP.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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 record reflects that on September 15, 2017, and on January 24, 2018, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) signed as Owner of Zerka Food Center applications for authorization to participate in the SNAP. A series of information and document requests ensued following the first application, which was complicated by these communications crossing the

agency's transaction from prior to current SNAP eligibility rules, which went into effect January 17, 2018. Two store visits were conducted; one on January 12, 2018 and a second on February 1, 2018. Appellant was subsequently advised in a letter dated February 8, 2018 of the Department's decision to deny the firm's application. The regulatory bases given for that denial were 7 C.F.R. § 278.1(b)(1), (6) and § 278.1(k)(2). On February 16, 2018, Appellant requested an administrative review of this action. The request 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, might 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 & Nutrition Act of 2008**, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), (6) and § 278.1(k)(2) establish the authority upon which a retail food store or wholesale food concern may be denied authorization to participate in the SNAP. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary for stores to qualify for participation in the SNAP.

7 C.F.R. § 271.2 states, in part:

> **Retail Food Store** means: 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 four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety, including at least one variety of 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: food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods that are consumed on the premises or sold for carry-out, are not eligible for SNAP participation as retail food stores…

And

> Accessory food items include foods that are generally considered snack foods or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other foods that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt and sugar. Accessory food items shall not be considered staple foods for the purposes of determining the eligibility of any firm.

7 C.F.R. § 278.1(a) states:

> FNS shall approve or deny the application within 45 days of receipt of a completed application. A completed application means that all information (other than an on-site visit) that FNS deems necessary in order to make a determination on the firm's application has been received.

7 C.F.R. § 278.1(b)(1)(ii) further stipulates, in part:

> Application of Criterion A. In order to qualify under this criterion, 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 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 C.F.R. § 278.1(b)(1)(iii) states, in part:

> Application of Criterion B: In order to qualify under this criterion, 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 C.F.R. § 278.1(b)(1)(ii)(C) states, in part:

> …Variety of foods is not to be interpreted as different brands, nutrient values, flavorings, packaging types or styles or package sizes of the same or similar foods.
>
> …Accessory foods shall not be counted as staple foods for the purposes of determining eligibility to participate in the SNAP as a retail food store.

7 C.F.R. § 278.1(b)(1)(iv) states, in part, ineligible firms under this paragraph include:

> …specialty doughnut shops or bakeries not selling bread.
>
> …firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross sales in foods cooked or heated on-site by the retailer before or after

purchase; and hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that consumer on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B.

7 C.F.R. § 278.1(b)(6) states, in part,

> FNS will consider whether the applicant firm is located in an area with significantly limited access to food when the applicant firm fails to meet Criterion A or B, so long as the applicant firm meets all other SNAP authorization requirements.

7 C.F.R. § 278.1(k)(1) and (2) state, in part:

> FNS shall deny the application of any firm if it determines that:
> 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 The firm has failed to meet the eligibility requirements…under Criterion A or Criterion B….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.

7 C.F.R. § 278.1(l)(1)(ii) states, in part:

> FNS shall withdraw the authorization of any firm that fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section.

APPELLANT'S CONTENTIONS

In its written request for review dated February 16, 2018, Appellant provided information in which it was argued that:

The ROD Office's February 8, 2018 letter denying the firm's authorization to participate in the SNAP lacks accuracy and is challenged for the following reasons:

1. The location has been SNAP-authorized for over 20 years.
2. Appellant recently purchased the store and was in the process of stocking to meet new eligibility criteria established January 17, 2018.
3. The firm submitted an application around mid-October 2017 but due to clerical snafus within the ROD Office the application was misplaced or delayed. Appellant received a letter and responded on November 7, 2017. It was not until Appellant contacted the ROD Office via email on January 5, 2018 that the snafu was discovered and the firm was contacted by FNS and the required information sent back to the ROD Office.
4. At the time the firm applied in October 2017 it did meet the existing criteria. The firm should not be penalized for the agency's delay from October 26, 2017 through January 5, 2018 and should be allowed the opportunity to comply with new criteria.
5. Appellant has fully stocked the store to satisfy Criteria A and requests a new inspection by FNS.

6. As to Criteria B, the claims are inaccurately applied to this situation.
7. Appellant is a valuable and necessary food source for SNAP customers and, notwithstanding Criteria A or B it should be approved by the FNS.
8. The firm should be approved on the basis that it provides access to food for those having limited access.

ANALYSIS AND FINDINGS

As noted in the foregoing, the record reflects that two contracted store visits to Appellant's firm were conducted. Documentation generated as a result of these visits includes photographs of the firm's interior and exterior, a store layout diagram and a store inventory survey reflecting that the firm had ample varieties of staple food stock in the breads and cereals category, in the meats/poultry/fish category and in the fruits and vegetables category but had an inadequate stock of staple food in the dairy category, thus failing to qualify under Criterion A. Both of Appellant's applications to participate in the SNAP indicated that the firm's staple food sales did not exceed 50 percent of gross retail sales (Appellant had indicated staple foods comprised 10% of total gross sales). As staple food sales must comprise more than 50 percent of a firm's gross retail sales, the store was ineligible for authorization under Criterion B. It is additionally noted that the Appellant firm maintained a considerable stock of prepared, ready-to-eat foods and accessory food items, which are not considered staple food for the purposes of the SNAP. In addition, the firm maintained a substantial inventory of alcohol, tobacco and tobacco-related products, automotive supplies, paper products, cleaning supplies, housewares, clothing and other non-food items; thus the store visit further corroborated that staple food sales could not have reasonably exceeded 50% of gross sales.

In regard to contention 1, the historical duration during which a particular location has had businesses authorized in the SNAP has no bearing upon a new application or a reauthorization to participate in the SNAP. A firm must qualify based upon the relevant eligibility requirements in effect at the time of the determination.

Regarding contention 2 above, it is acknowledged that extenuating circumstances may have contributed to the level and composition of staple food inventory observed at the firm on the days of the store visits; however, there is no provision in the statute or regulations which allows such considerations to warrant a reversal of a denial decision correctly made. Additionally, as noted above, 7 C.F.R. § 278.1(k)(1) and (2) clearly provides that FNS shall deny the application of any firm if it determines that 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 the firm has failed to meet the eligibility requirements…under Criterion A and B.

With regard to contention 3 above, as noted in the foregoing, the record reflects that an application was submitted in mid-September 2017; additional information was requested by the ROD Office via a letter dated September 25, 2017. Additional information was provided by Appellant and received by the ROD Office on or about October 11, 2017. It was determined that, due to the information thus far provided, verification of ownership was warranted; accordingly, a letter dated October 26, 2017 requested additional information in connection with

the firm's ownership. Information related to this request was provided by Appellant and received by the ROD Office on or about November 11, 2017. It appears as though the receipt of this information was not logged into the agency's application tracking system, which, consequently, withdrew the firm's application on or about December 1, 2017 for non-response to the information request. This clerical error remained uncorrected until January 5, 2018, when it appears that Appellant inquired regarding the status of the application. At that point the ROD Office reinstated the application as "in process," and determined that additional information was still needed in order to make a proper eligibility determination. This information was requested, provided by Appellant and received by the ROD Office on the same day. The ROD Office then ordered a store visit, which is a routine step in the process of determining eligibility. The store visit was conducted on January 12, 2018 and, as noted above, reflected that the firm did not meet the eligibility requirements in effect at the time, being short in the dairy category. A decision was made by the ROD Office to request that the firm fill out a new application based on the new eligibility requirements, which were to take effect January 17, 2018. The firm complied with this request and another store visit was ordered – thus giving the firm another opportunity to qualify. A second store visit was conducted on February 1, 2018 and the firm was again unable to qualify due to a shortage of inventory in the dairy category. Thus the firm failed to qualify under Criterion A and B both under the old eligibility and the new eligibility requirements. The February 8, 2018 Denial Letter was issued, which Appellant received on 2/12/2018.

While it is acknowledged that a delay/clerical error occurred, the error/delay did not cause the firm's denial of authorization. As noted, the firm was essentially provided two opportunities to qualify and failed in both instances.

In regard to contention 4 above, the record reflects that the firm applied in mid-September 2017; at that time the firm's application was incomplete and an eligibility determination could not be made; thus, as noted, more information was requested. Requests for any/all relevant information needed to determine a firm's eligibility are well within the ROD Office's statutory and regulatory purview. Information provided in November, though the agency failed to act upon it, did not confirm eligibility. The effect of this appears to be the delay the firm's **denial**, not its approval for authorization. There is no information in the record provided by Appellant or by the ROD Office indicating that the firm qualified to participate in the SNAP at any point in the application process. As noted, the firm did not comply with either the old or the new eligibility requirements, being short of staple food stock in the dairy category under both standards.

Regarding contention 5 above, Appellant notes that it has added inventory since the firm's denial of authorization, and now qualifies under Criterion A and/or B. However, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the earlier decision of the SNAP Office and as such it is limited to consideration of the relevant facts and circumstances at the time of that decision. It is not within the scope of this review to consider actions Appellant may have taken to qualify for participation in the SNAP subsequent to the referenced store visits and the resulting decision by the SNAP Office. Therefore, Appellant's contention that it may now qualify under Criterion A and/or B of the eligibility requirements is not a valid basis upon which to reverse the decision. Moreover, 7 CFR §278.1(k)(2) of the SNAP regulations is quite specific and does not provide for agency discretion in its requirement that "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." (Emphasis added.)

With regard to contention 6 above, as noted, the firm's own application information, provided and evaluated by the ROD Office twice, reflect that the firm clearly did not qualify under Criterion B under either the old or the new eligibility standards. The old standard included more kinds of food (primarily snack foods) as staple food items than does the new standard; however, even under that more lenient standard, there is no indication that the firm could have possibly met Criterion B. Appellant provides no information supporting its eligibility under Criterion B under either the old or the new standard.

In regard to contention 7 above, Appellant may imply that a failure to authorize the firm to participate in the SNAP would work a hardship upon SNAP households, would deprive a benefit to Appellant derived from a SNAP authorization, would deprive service to SNAP customers (other than the firm's failure to meet eligibility requirements) and/or to the community, or would work a hardship upon same implied by a lack of such benefit or service; however, such cannot constitute grounds for reversing the denial decision in the present case. There are no provisions in the Act or regulations allowing hardship to applicants and/or to SNAP customers as considerations in determining eligibility for participation in the SNAP, with the exception of co-located wholesale/retail firms, which must meet a variety of additional requirements. Appellant's store is not a co-located retail/wholesale firm and, accordingly, such provisions do not apply in this case.

Regarding contention 8 above, the record reflects that the ROD Office duly evaluated the firm's eligibility under limited access provisions and correctly found that the firm does not qualify.

CONCLUSION

In view of the above, it is my determination that the ROD Office's denial of Appellant's application for authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), (6) and § 278.1(k). The denial, therefore, is sustained. However, it is noted that the six-month waiting period following denial stipulated by the **Food and Nutrition Act of 2008** (Sec. 9(d)) and the regulations at § 278.1(k)(2) will elapse on August 9, 2018; accordingly, Appellant may reapply for participation in the SNAP up to 10 days prior to that date.

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 provisions of the Freedom of Information Act (FOIA), FNS is releasing this information in a redacted format as appropriate and will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

DANIEL S. LAY April 17, 2018
Administrative Review Officer