

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

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| Academy Deli Grocery, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | Case Number: C0193209 |
| |) | |
| Retailer Operations Division, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support a finding that the initial decision by the Food and Nutrition Service Retailer Operations Division to deny the application of Academy Deli Grocery (hereinafter, "Appellant" and/or "Academy Deli Grocery") to participate in the Supplemental Nutrition Assistance Program (SNAP) as an authorized retailer was properly imposed.

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 the application of Academy Deli Grocery to participate in the SNAP as an authorized retailer via letter dated August 9, 2016.

CASE CHRONOLOGY

In a letter dated August 9, 2016, the Retailer Operations Division informed Appellant that the application of Academy Deli Grocery to participate as an authorized retailer in SNAP was being denied because it did not meet the eligibility criteria for stores as enunciated in the Federal regulations at 7 CFR § 278.1(b)(1).

This determination was made as a result of a review of the electronic form FNS-252E *Supplemental Nutrition Assistance Program Application for Stores* initially submitted on March 12, 2016. Via letter received in the office of the Chief of the Administrative Review Branch on August 29, 2016, an administrative review of this action was requested, appealing the Retailer Operations Division' decision. 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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

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.”

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)¹, 7 USC 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR).² 7 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(b)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 278.1(b)(1) reads, in relevant part, *“The nature and extent of the food business conducted by the applicant – (i) Retail food store. (A) An establishment or house-to-house trade route shall normally be considered to have food business of a nature and extent that will 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 as defined in §271.2 of this chapter 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).”* [Emphasis Added]

7 CFR § 278.1(b)(1)(ii) of the SNAP regulations and internal agency directives define *“Continuous Basis”* as *“An eligible store must offer for sale the required variety of food items on any given day of operation.”* [Emphasis Added]

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.”*

¹ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment enacted February 7, 2014 through P. L. 113-79

² Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title07/7tab_02.tpl

APPLICATION SUMMARY

The administrative record includes form FNS-252E *Supplemental Nutrition Assistance Program Application for Stores* dated March 12, 2016 which indicates that Academy Deli Grocery is selling a variety of staple food products in each of the four (4) staple food groups; stocking fresh, frozen or refrigerated foods in at least two (2) of those categories. The material also indicates that Academy Deli Grocery sells other foods such as snack foods, soft drinks, or condiments, and non-foods such as tobacco products, lottery tickets, hot food and “other”. The material indicates that Academy Deli Grocery had actual retail sales in 2015 totaling \$21,000.00 attributing 40 percent of those sales to staple foods; 40 percent to other foods; and 20 percent to non-foods.

APPELLANT’S CONTENTIONS

In the request for administrative review letter dated August 23, 2016, Appellant through one (1) of its owners, [7 U.S.C. 2018 (b)(6) & (b)(7)(c)], requests a review of the determination indicating that Academy Deli Grocery was without SNAP authorization for five (5) months which reduced customer flow and resulted in Academy Deli Grocery carrying reduced inventory. Additionally, [7 U.S.C. 2018 (b)(6) & (b)(7)(c)], indicates that the contracted store visit conducted on August 4, 2016 occurred one week prior to vacation which resulted in moving of required inventory to their second location, [7 U.S.C. 2018 (b)(6) & (b)(7)(c)], which continued to be SNAP authorized. [7 U.S.C. 2018 (b)(6) & (b)(7)(c)], indicates that Academy Deli Grocery has participated in SNAP since 2001 and requests a second inspection to affirm that Academy Deli Grocery now has the required staple food products.

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

The record includes materials from a contracted store visit, conducted on August 4, 2016 under the authority of [7 U.S.C. 2018 (b)(6) & (b)(7)(c)], self-identified as an “owner”.

Criteria A:

The store visit materials include a general report indicating that Academy Deli Grocery is located in an urban residential area in a mixed use building, occupying approximately 825 square feet of space. The materials include an inventory sheet reporting very limited staple food stock to include:

- One (1) unit of fresh milk and more than 20 units of cheese in the dairy products category;
- Three (3) varieties of fruits/vegetables staple foods including 100 percent fruit juices and between six (6) and 20 units of beans and soups/stews;

- Five (5) varieties of bread and cereal staple foods were identified consisting of limited loaf bread; snack cakes, breakfast cereals, pasta and snacks; and, One variety of meat, poultry and seafood staple foods consisting of deli/lunch meats/hot dogs.

The report also indicates that Academy Deli Grocery includes non-food stock consisting of tobacco products; lottery tickets; cleaning supplies, and paper products. Official photographs that accompany the report affirm the report materials.

Supplementing the August 23, 2016 request for review Appellant provided a package dated September 6, 2016 that included purchase orders and invoices (paid receipts) from a wholesale vendor, Jetro Cash & Carry, with various dates. A review of the materials identified relevant paid receipts between the date of application, March 12, 2016, and the August 4, 2016 contracted store visit. The materials found relevant include documents as follow:

- 3/22/16 – milk & yogurt pouches (dairy)
- 6/21/16 – Slim Jims (meat, poultry, fish)
- 6/25/16 – butter (dairy)

With the addition of the two (2) dairy varieties (milk was already counted), Appellant met the requirement for at least three (3) varieties in the dairy staple food category. However, the addition of only Slim Jims in the meat, poultry, seafood staple food category still left one (1) variety lacking.

Notably two (2) purchase orders, as follow, were identified as “suspended”, not paid, and therefore not considered.

- 4/4/16 – whole milk (dairy)
- 7/21/16 – ground beef (meat, poultry, seafood)

Included in the September 6, 2016 package from Appellant is a petition from customers including 22 signatures requesting reinstatement of SNAP at Appellant firm. However, the submission of customer request materials does not provide a basis for mitigating or reversing the Retailer Operations Division determination of ineligibility.

Because the paid receipt materials resulted in finding Appellant to lack only one (1) variety in one (1) staple food group the documents were made available to Retailer Operations Division for further consideration and follow up. Retailer Operations Division has provided evidence that a September 28, 2016 letter was sent to Appellant requesting proof of inventory, offering an additional opportunity to clarify regularly available staple food inventory. Retailer Operations Division reports that as of October 19, 2016 no materials were submitted by Appellant. Therefore on review it is determined that Appellant did not meet the eligibility requirements as established in 7 CFR § 278.1(b)(1) for Criteria A.

Criteria B:

The March 12, 2016 SNAP Retailer application provided for consideration under the reported signature of 7 U.S.C. 2018 (b)(6) & (b)(7)(c), indicates that Academy Deli Grocery derived 40

percent of its 2015 actual total retail sales of \$21,000.00 from the sale of staple foods.

The application further indicates that Academy Deli Grocery derived 40 percent of its total 2015 retail sales from the sale of "other" foods such as snack foods, soft drinks, or condiments and that 20 percent of the retail sales derives from non-food products or services.

The administrative record indicates that Retailer Operations Division accepted the information as provided by Academy Deli Grocery. On review, it is clear from the store visit materials that it would be highly improbable that Academy Deli Grocery would derive more than 50 percent of its total retail sales from the sale of staple food products. Therefore, the Retailer Operations Division decision that Academy Deli Grocery does not meet the eligibility conditions of criterion B is affirmed.

CONCLUSION

Based on the discussion above, the initial decision by the Retailer Operations Division to deny the application of Academy Deli Grocery to participate in the SNAP is sustained. Therefore, in accordance with 7 CFR § 278.1(k)(2) Academy Deli Grocery is ineligible to participate as a SNAP authorized retailer "for a minimum period of six months from the effective date of the denial", which is six (6) months from the date of the denial letter, August 9, 2016.

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 Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

October 26, 2016

/s/

NANCY BACA-STEPAN
ADMINISTRATIVE REVIEW OFFICER

DATE