

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

Simlye's,)	
Appellant,)	
)	
v.)	Case Number: C0193010
)	
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 withdraw the authorization of Simlye'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 § 278.1(l)(1)(iii), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew Appellant's authorization to participate as a retailer in SNAP on August 3, 2016.

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 FNS requires that stores be reauthorized on a set schedule. Appellant submitted an electronic reauthorization application dated April 4, 2016. In a letter dated August 3, 2016, Retailer Operations Division withdrew Appellant's authorization to participate as a retailer in SNAP. This withdrawal was based on information obtained during a store visit on May 23, 2016, as well as information provided on the firm's reauthorization application. Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations. The withdrawal letter stated the in order for a firm to be eligible to participate in SNAP, it must offer for sale staple foods

intended for home preparation and consumption and meet either Criterion A or Criterion B, as set forth in 7 CFR § 278.1(b)(1) of the SNAP regulations. This determination of the nature and extent of your food business is based on information provided either on your reauthorization application and/or information obtained from a visit to your store on May 23, 2016.

As the firm failed to meet either 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 at 7 CFR § 278.1(k)(2).

In correspondence dated August 15, 2016, Appellant appealed Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

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(l)(1) establishes the authority upon which the authorization of any firm to participate in SNAP may be withdrawn if it fails to meet established eligibility requirements.

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 § 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)(ii)(A) of the SNAP regulations and internal agency directives define continuous basis as offering for sale no fewer than three different varieties of food items in each of the four staple food categories on any given day of operation.

7 CFR § 278.1(b)(1)(ii)(C) of the SNAP regulations and internal agency directives define "variety" as ". . . 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”

7 CFR § 278.1(l)(1) reads, in part, “FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons (iii). . . . The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section . . . for the time period specified in paragraph (k)(2) 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. Any firm that has been denied authorized 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.”

APPELLANT’S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- We are taking steps to ensure that we are compliant with the regulations, and ensuring that necessary additions to the services we offer are made to keep us in compliance with the SNAP regulations.

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

Regarding Appellant’s contentions, the record reflects that a contracted store visit of Appellant’s firm was conducted on May 23, 2016. A review of the store visit documentation and photographs indicates that the store was deficient in the dairy products category, fruits and vegetables category, breads and cereals category and the meats, poultry or fish category on the day of the visit. Therefore, Retailer Operations Division correctly concluded Appellant did not meet Criterion A because the store did not offer “qualifying staple foods on a continuous basis.”

An evaluation of the estimated percentages of staple food sales reported on Appellant’s retailer reauthorization application indicates that Appellant reported, staple foods comprised 30 percent of its estimated retail sales, other foods were estimated to comprise 35 percent of total sales and hot foods and non-foods were estimated to make up 35 percent of total retail sales. Appellant’s reauthorization application, the photographs and store inventory evidence in the record, indicate that Appellant did not derive more than 50 percent of its projected annual sales from the sale of

staple foods. Accordingly, Retailer Operations Division correctly determined Appellant was not eligible for reauthorization under Criterion B.

With regards to Appellant's contentions, through representation, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the withdrawal action by the Retailer Operations Division. It is not the authority of this review to afford additional time during which a firm may begin to comply with program requirements in order to remain authorized to participate in the SNAP.

CONCLUSION

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

Pursuant to 7 CFR § 278.1(k)(2) of the SNAP regulations, Appellant shall not be eligible to submit a new application for Simlye's, for a minimum period of six months from the effective date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery of this decision.

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.

/S/

MONIQUE BROOKS
ADMINISTRATIVE REVIEW OFFICER

October 25, 2016

DATE