

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

Fruit on Deck,)
)
Appellant,)
)
v.)
)
Retailer Operations Division,)
)
Respondent.)
_____)

Case Number: C0193653

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to deny the application of Fruit on Deck (hereinafter Appellant or Fruit on Deck), to participate in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1) in its administration of the SNAP when it denied the application of Fruit on Deck to participate as an authorized SNAP retailer.

AUTHORITY

7 USC § 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 August 30, 2016, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not meet the definition and eligibility requirements of a retail food store established by federal regulations at Sections 271.2 and 278.1(b)(1). Specifically, the letter stated the following:

Your firm is primarily a delivery service. Your firm does not offer for sale a variety of foods in sufficient quantities on a continuous basis. This type of business is considered a shopping service.

This determination was made as a result of a review of the electronic form FNS-252E *Supplemental Nutrition Assistance Program Application for Stores* received by the Retailer Operations Division on June 15, 2016, and a store visit conducted by FNS contracted personnel on July 26, 2016. The determination letter also informed Appellant that the firm could not submit a new application to participate in SNAP for a period of six months as provided in § 278.1(k)(2).

In a letter postmarked September 7, 2016, Appellant appealed the Retailer Operations Division's determination and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions 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 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 (the Act), 7 USC § 2021 and 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 USC 2018**

(b)(7)(e)

7 CFR § 271.2 defines a house-to-house trade route as “any retail food business operated from a truck, bus, pushcart, or other mobile vehicle.”

7 CFR § 278.1(a) states, inter alia, “Any firm desiring to participate or continue to be authorized in the program shall file an application as prescribed by FNS. Such an application will permit a determination to be made as to whether such an applicant qualifies, or continues to qualify, for authorization under the provisions of the program. FNS may require that a retail food store or wholesale food concern be visited to confirm eligibility for program participation prior to such store or concern being authorized or reauthorized in the program.”

7 CFR § 278.1(b) states, inter alia, “In determining whether a firm qualifies for authorization, FNS shall consider all of the following: (1) 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 . . . 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). (B) A retail food store must meet eligibility determination factors which may be based on, . . . visual inspection, sales records, purchase records, counting of stock keeping units,

or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry.”

7 CFR § 278.1(b)(1)(ii) states, in relevant part, that in order for a retail store to qualify for authorization under Criterion A, firms shall, “(A) 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. (B) Offer for sale perishable staple food items in at least two staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks; and (C) Offer a variety of staple foods which means 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.”

7 CFR § 278.1(b)(1)(vi) (A) provides guidance pertaining to the criteria applicable to all retail firms and states, in relevant part, “(A) It is a legitimate retail food outlet. Indicators which may establish to FNS that a firm is a legitimate retail food outlet include, but are not limited to, the following: (1) The firm’s marketing structure; as may be determined by factors such as, but not limited to: (i) A retail business license; (ii) The existence of sales tax records documenting retail food sales; and/or separate bookkeeping records; and (2) The way the firm holds itself out to the public as evidenced by factors such as, but not limited to: (i) The layout of the retail sales space; (ii) The use of retail advertisements; (iii) The posting of retail prices; (iv) Offering specials to attract retail customers; (v) Hours of operation for retail business; (vi) Parking area for retail customers; and (B) It has total annual retail food sales of at least \$250,000; or (C) It is a legitimate retail outlet but fails to meet the requirements in paragraph (b)(1)(iv)(B) of this section, and not authorizing such a firm would cause hardship to food stamp households. Hardship would occur in any one of the following circumstances: (1) Program recipients would have difficulty in finding authorized firms to accept their coupons for eligible food; (2) Special ethnic foods would not otherwise be available to recipients; or (3) Recipients would be deprived of an opportunity to take advantage of unusually low prices offered by the firm if no other authorized firm in the area offers the same types of food items at comparable prices.”

Non-traditional stores, such as house-to-house trade routes, that do not maintain a stock of eligible food items are considered to not meet the definition of a retail food store.

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, “[a] retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store or concern does not meet criteria for approval . . . may not for at least 6 months, submit a new application to participate in the program.”

APPELLANT’S CONTENTIONS

In its September 7, 2016, administrative review request, Appellant made the following summarized contentions, in relevant part:

- Appellant has two vans that are loaded with fruit and vegetables.

- Customers place orders and Appellant delivers to those who like the convenience of delivery.
- The majority of customers come to the van while it is parked and Appellant rides through the neighborhood and anyone can purchase

The preceding may represent only a brief summary of Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

Appellant contends that it carries a variety of fruit and vegetables and customers place orders and Appellant delivers to those who like the convenience of delivery. Based on the results of the onsite visit conducted on July 26, 2016, the Retailer Operations Division determined that this firm is primarily a shopping service with no retail outlet and that it did not meet eligibility requirements of a SNAP authorized delivery route. The vehicle photographs do not show signage supporting use as a commercial delivery vehicle and there is not a warehouse or physical space where the retail stock for the delivery route is maintained. The onsite visit report states that the contractor was told that "customers call him and he delivers." Moreover, on the application for authorization, Appellant indicated the following:

We are a produce delivery business. We take orders, we go purchase and separate the orders for delivery then we deliver to customers, who are physically unable, short on time or to those who just like the quality of produce we provide.

Based on internal agency guidance, the Appellant's operations fail to meet regulatory requirements for the authorization of a delivery route for the SNAP. Appellant does not maintain stock on hand from which to draw from, but rather, after collecting orders from customers, purchases food items through other companies and delivers them. Thus, the firm does not have stock on a continuous basis. On the day of the store visit, the van contained fruits and vegetables. However, there was no refrigeration or other mechanism to keep the product fresh. House-to-house trade routes that do not maintain a stock of eligible food items are considered to not meet the definition of a retail food store. This type of shopping service is not eligible to participate in SNAP.

The authorization of a store to participate in SNAP must be in accord with the Food and Nutrition Act and regulations, as amended. Those requirements of law cannot be waived. Thus, 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 denial action by the Retailer Operations Division. The evidence supported that the store is primarily a house-to-house trade route that does not maintain a stock of eligible food items and such shopping and delivery services are not eligible to participate in SNAP.

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, "[a] retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store

or concern does not meet criteria for approval . . . may not, for at least 6 months, submit a new application to participate in the program.” 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

The initial decision by the Retailer Operations Division to deny the application of Appellant to participate in SNAP for a period of six months, effective August 30, 2016, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 (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/

MARY KATE KARAGIORGOS
ADMINISTRATIVE REVIEW OFFICER

November 23, 2016
DATE