American Discount and Surplus, )
Appellant, )
v. )
Retailer Operations Division, )
Respondent. )

Case Number: C0193225

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the decision by the Retailer Operations Division to deny the application of American Discount and Surplus (hereinafter Appellant) 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 Appellant to participate in SNAP by letter dated August 17, 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

In a letter dated August 17, 2016, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not offer for sale on a continuous basis a variety of staple foods in the dairy products and the meat, poultry, or fish categories as required for authorization under Criterion A of 7 CFR § 278.1(b)(1)(ii) of the SNAP regulations. The business also did not carry perishable foods in at
least two of the four food categories. In addition, the letter also informed Appellant that it did not have more than 50 percent of its total gross retail sales in staple food sales as required for authorization under Criterion B of Section 278.1(b)(1)(iii).

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 in 7 CFR § 278.1(k)(2). This denial action was based on observations during an onsite store visit on August 8, 2016, as well as information provided on the firm’s retailer application.

By letter dated August 29, 2016, store ownership appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal was granted. No subsequent correspondence has been received from Appellant.

**STANDARD OF REVIEW**

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means 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 § 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 § 271.2 states, *inter alia* that Retail Food Store means: “An establishment ... that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale, on a continuous basis, a 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)...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 hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores...”

7 CFR § 271.2 defines staple food, in relevant 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. Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm . . .”
7 CFR § 278.1(b)(1)(i) imparts 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)(ii)(A) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion A, it must “Offer for sale and normally display in a public area, qualifying food items on a continuous basis (emphasis added) 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.”

7 CFR § 278.1(b)(1)(ii)(C) clarifies “variety of staple foods” as meaning, in relevant part, “... 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. Similar processed food items with varying ingredients such as, but not limited to, sausages, breakfast cereals, milk, sliced breads and cheeses, and similar unprocessed food items, such as, but not limited to, different varieties of apples, cabbage, tomatoes or squash, shall not each be considered as more than one staple food variety for the purpose of determining variety ...”

7 CFR § 278.1(b)(1)(iii) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion B, it must “... have more than 50 percent of ... 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 ...”

7 CFR § 278.1(k)(2) reads, in part, “FNS shall deny the application of any firm if it determines that ... [t]he 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**

In the request for administrative review, Appellant has stated as its position in the matter the following:

- The business is a small family owned and operated variety store offering discount prices with an emphasis on food products. The business offers quality products and service at a fair price;
- The town of Lead has only two SNAP retailers with one of them being a full service grocery store [7 USC 2018 (b)(6) & (b)(7)(c)], with products and prices that the business can beat in most cases on a regular basis. The other SNAP retailer is a gas station convenience
store, 7 USC 2018 (b)(6)&(b)(7)(c), that has an emphasis on selling gas, alcohol, and cigarettes that the business does not and will not sell. It has a limited food variety that the business can beat on price on a regular basis;

- At the time of the inspection, the business was waiting for a service call to repair the cooler and had a freezer unit on order from 7 USC 2018 (b)(6) & (b)(7)(c) with an estimated delivery date of August 31. The business was carrying 7 USC 2018 (b)(6)&(b)(7)(c) Lunchables at the time of the inspection and they were in stock. These may have been overlooked during the inspection and a copy of the receipt for their purchase is enclosed as evidence of this. The business has also purchased additional perishables consisting of milk, cheese, butter, margarine, ground beef, turkey, chicken, fish, pork, fruit and vegetables, eggs, orange juice, and loaves of wheat and white bread with receipts enclosed to prove these purchases. The business advertises in the 7 USC 2018 (b)(6) & (b)(7)(c) and is updating its ad to show that it is carrying these products; and,

- Ownership sincerely thought he had what was required and then some to get started and regrets that this was not the case. He will be adding more food products so the store can be a one stop for people in the community. As someone who is partially disabled, the owner knows how important SNAP benefits go as far as possible. The owner requests reconsideration of his application since the business will be an asset to an economically challenged community.

Appellant submitted three receipts: a 7 USC 2018 (b)(6) & (b)(7)(c) receipt dated August 28, 2016; a 7 USC 2018 (b)(6) & (b)(7)(c) receipt dated August 3, 2016, for lunchables; and another 7 USC 2018 (b)(6) & (b)(7)(c) receipt dated August 20, 2016. No other evidence was submitted in support of these contentions.

The preceding may represent a 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 reflects that the business opened on May 20, 2016, and that ownership submitted a SNAP retailer application electronically through the FNS web site on June 7, 2016. This application estimated that staple foods accounted for 40 percent of the firm’s total retail sales. The accessory “other” food items showed an estimate of 20 percent of the firm’s total retail sales. Ownership also estimated that 40 percent of retail sales came from non-food items including other products. The FNS retailer web site, in addition to containing the retailer application, contains detailed information on the staple food requirements for businesses to become authorized as SNAP retailers and also states that an onsite inspection is part of the application process.
With regards to Appellant’s contentions listed above, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the initial determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. It is not within the scope of this review to consider actions ownership may take to qualify for participation in the SNAP subsequent to that decision, such as stocking all the variety of staples in each of the four staple food categories on a continuous basis or planning to do so once SNAP authorized. The authorization of a store to participate in the SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived. Therefore, Appellant’s contention that it may now have stocked the store sufficiently or that its staple food sales are now sufficient to become eligible in SNAP does not provide any valid basis for dismissing or mitigating the adverse action imposed.

A review of the Appellant business’s food inventory was conducted by an FNS contracted reviewer as a routine part of the authorization process on August 8, 2016. This store visit revealed the business was minimally stocked with staple food items and had insufficient stock available for purchase in two of the four staple food categories as well as having no perishable items; thus, not meeting Criterion A per 7 CFR § 278.1(b)(1)(ii)(A). The store visit report showed only two of the required three dairy products in stock, only two of the required three meats, poultry, or fish products in stock, and no perishable items in stock. SNAP regulations at §278.1(b)(1)(ii) are clear that under Criterion A (emphasis added), a firm shall “offer for sale ...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... including perishable foods in at least two of the categories.” Therefore, the Appellant business did not maintain a sufficient stock of qualifying staple foods on a continuous basis to be eligible to accept SNAP benefits.

Staple food sales must exceed 50 percent of overall sales, as required by SNAP regulations at 278.1(b)(1)(iii), in order to qualify as a SNAP retailer under Criterion B. Based on the information from Appellant’s SNAP retailer application and supported by the FNS contracted reviewer’s report and photographs, staple food sales accounted for only 40 percent of overall sales so the business did not derive more than 50 percent of its projected annual sales from the sale of staple foods as of the date of the store visit. Accordingly, the Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B. Therefore, the earlier determination by Retailer Operations that Appellant did not meet the requirements for participation in the SNAP at the time such determination was made is correct.

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

After a review of the pertinent documentation, and based on the discussion above, the initial decision by Retailer Operations Division to deny the application of Appellant to participate in the SNAP for a period of six months from the effective date of denial is sustained.

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, 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/                                      October 3, 2016

ROBERT T. DEEGAN                          DATE
ADMINISTRATIVE REVIEW OFFICER

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