

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

3240 Deli And Grocery Corporation,)
)
 Appellant,)
)
 v.)
)
 Retailer Operations Division,)
)
 Respondent.)
 _____)

Case Number: C0189371

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the decision to deny the application of 3240 Deli And Grocery Corporation (hereinafter “3240 Deli”) to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division (hereinafter “ROD”) of FNS.

ISSUE

The issue accepted for review is whether ROD took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it denied the application of 3240 Deli to participate in the SNAP on March 28, 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 March 28, 2016, ROD informed the Appellant that the application of 3240 Deli to participate as an authorized retailer in the SNAP was being denied because it did not offer for sale on a continuous basis a variety of staple foods in the “Dairy” and the “Meats, Poultry, Fish” staple food categories as required under Criterion ‘A’ of 7 CFR § 278.1(b)(1)(ii) of the SNAP regulations. Criterion ‘A’ requires, in part, that there be at least three different types of foods in each of the four staple food categories. During a store visit on March 19, 2016, it was observed that the store offered for sale only two

types of foods in the “Dairy” staple food category (milk and infant formula) and only two types of foods in the “Meats, Poultry, Fish” staple food category (finned fish and infant meats).

In addition, FNS determined that 3240 Deli did not have more than 50 percent of its total gross retail sales in staple food sales as required under Criterion ‘B’ of § 278.1(b)(1)(iii).

As the firm failed to meet either eligibility criterion for approval, the Appellant was informed that the firm could not submit a new application to participate in the SNAP for a period of six months as provided in § 278.1(k)(2). This denial action was based on observations made during the March 19, 2016 store visit as well as information provided on the firm’s retailer application.

In a letter postmarked April 4, 2016, the Appellant appealed ROD’s decision and requested an administrative review of this action. 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

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(k)(2) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

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.”

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).”

APPELLANT'S CONTENTIONS

In the written request for review, the Appellant provided information in which it was argued that:

- At the time of the store visit, 3240 Deli did not have all of the staple foods in stock required to meet the requirements for SNAP authorization eligibility under Criterion A as the store was in the middle of being renovated and the Appellant had to remove all of the staple foods normally stocked in the basement due to a flood;
- The Appellant has since increased the selection of staple foods offered for sale at the store to include adding a deli case which stocks a variety of meats, cheeses, eggs, etc. and he has added other foods such as canned, packaged, and boxed staple foods; and
- 3240 Deli now meets the requirements for SNAP authorization eligibility under Criterion A and Criterion B.

With regard to the Appellant's contentions regarding 3240 Deli now meeting the requirements for SNAP authorization eligibility under Criterion A, it is important at this point 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. It is not the authority of this review to afford additional time during which a store may begin to comply with program requirements for becoming authorized to participate in the SNAP. At the time of the denial action, the contracted Reviewer indicated that 3240 Deli did not offer for sale on a continuous basis a variety of staple foods in the "Dairy" (the store stocked milk and infant formula only) and the "Meats, Poultry, Fish" (the store stocked finned fish and infant meats only) staple food categories. 7 CFR § 278.1(b)(1)(ii) of the SNAP regulations states that ... "In order to qualify for SNAP authorization under Criterion A, 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". This means that retail stores must have qualifying staple food items displayed in a public area on a continuous basis at the time of the store visit in order to qualify for SNAP authorization under Criterion A. The Appellant did not provide FNS with any vendor invoices/receipts, dated prior to the store visit date, that validate that 3240 Deli normally stocks at least three different varieties of food items from the "Dairy" and the "Meats/Poultry/Fish" staple food categories and, therefore, the store met the SNAP eligibility requirements under Criterion A at the time of the store visit. 7 CFR § 278.1(k)(2) of the SNAP regulations is specific 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, as specified in paragraph (b)(1)(i) of this section ... for a minimum period of six months from the effective date of the denial." Therefore, the Appellant's contention that 3240 Deli now meets the requirements for SNAP authorization eligibility under Criterion A does not provide any valid basis for dismissing or mitigating the adverse action imposed.

The Appellant contends that 3240 Deli now meets the requirements for SNAP authorization eligibility under Criterion B. In the event of a firm's failure to meet the requirements of eligibility under Criterion A, FNS policy requires that the firm's eligibility be also evaluated under Criterion B. In order to qualify for authorization under Criterion B, more than 50 percent of a retail store's total annual retail sales must come from sales of staple foods. The Appellant's SNAP application reflects that 30 percent of its annual retail sales come from the sale of staple foods. The Appellant did not provide FNS with any documentation that verifies that more than 50 percent of 3240 Deli's total annual retail sales come from staple foods. Therefore, by the Appellant's own admission on the firm's SNAP application, 3240 Deli does not meet the eligibility requirements under Criterion B.

CONCLUSION

Based on a review of the case documentation and the discussion above, the initial decision by the Retailer Operations Division to deny the application of 3240 Deli And Grocery Corporation to participate in the SNAP for a period of six months, effective March 28, 2016, is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you reside or are 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 we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

/S/
LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

October 4, 2016
DATE