

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch**

Dollar Saver Food Mart 12 #1,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0234456

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 FNS' Retailer Operations Division (hereinafter Retailer Operations) to withdraw Dollar Saver Food Mart 12 #1 (hereinafter Appellant) from authorization as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Appellant to participate as a SNAP retail food store.

AUTHORITY

7 U.S.C. § 2023 and implementing regulations at 7 CFR § 279.1, provide that a food retailer 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

FNS Regulations require that SNAP retail stores be reauthorized on a set schedule. As part of this process, store owners must complete a reauthorization application and an onsite visit by an FNS contracted reviewer to determine whether the store still meets SNAP eligibility requirements.

The record shows that Appellant's owner applied for reauthorization in an application that was signed on November 8, 2019. An onsite visit was conducted by an FNS contracted reviewer on August 10, 2020. During this visit, the reviewer took photographs of Appellant and its

inventory, spoke with Appellant personnel, and completed a written report detailing its observations.

By letter dated August 19, 2020, Retailer Operations informed Appellant that its authorization to participate as a SNAP retail food store was being withdrawn based on evidence obtained during the store visit on August 10, 2020, and/or information provided on Appellant's reauthorization application.

Retailer Operations determined that Appellant did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP Regulations. The withdrawal letter states 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 B, as set forth in 7 CFR § 278.1(b)(1). Under Criterion A, a firm must offer for sale a variety of foods in required minimum quantities on a continuous basis in each of four staple food categories, including perishable foods in at least two of those categories. The four staple food categories are: Meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products. Under Criterion B, a firm must have more than 50% of its total gross retail sales in staple foods. Appellant failed to meet the requirements of Criterion A because it did not offer for sale on a continuous basis a variety of foods in the dairy product's staple food category. Also, Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50% of its total gross retail sales.

The withdrawal letter also states that Retailer Operations considered Appellant's eligibility under the Need for Access Provision at 7 CFR § 278.1(b)(6) and determined that it does not qualify for SNAP authorization under this provision.

In a letter postmarked August 25, 2020, Appellant's owner appealed Retailer Operations' determination and requested an administrative review of this action. The appeal request was granted on September 2, 2020, and implementation of the withdrawal has been held in abeyance pending completion of this review. Appellant's owner provided subsequent information, in support of its case, by email on September 17, 2020.

STANDARD OF REVIEW

In an appeal of an adverse action, such as the withdrawal of a firm's SNAP authorization, Appellant bears the burden of proving by a preponderance of evidence, that the administrative action should be reversed. This means Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is contained in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018) and in 7 CFR § 278. 7 U.S.C. § 2018, 7 CFR § 271.2, § 278.1(b)(1), § 278.1(k)(2) and § 278.1(l)(1) establish the authority upon which a retail food store or wholesale food concern may be withdrawn from SNAP participation.

7 CFR § 271.2(1) defines a retail food store, in part, as: An establishment that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale, qualifying staple food items on a continuous basis, evidenced by having no fewer than [three]* different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety, including at least one variety of perishable foods in at least [two]* such categories, (Criterion A) as set forth in § 278.1(b)(1) of this chapter, or has more than 50% of its total gross retail sales in staple foods (Criterion B) as set forth in § 278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stockkeeping units, or other accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter.

7 CFR § 271.2 defines staple food, in part, as: Those food items intended for home preparation and consumption in each of the following four categories: Meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products.

7 CFR § 278.1(b)(1)(i)(A) reads, in part: An establishment 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% of the total gross retail sales of the establishment in staple foods (Criterion B).

7 CFR § 278.1(b)(1)(ii) states, in part: In order to qualify 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 with a minimum depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least [two] staple food categories. Documentation to determine if a firm stocks enough required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts to prove that the firm had ordered and/or received enough required staple foods up to 21 calendar days prior to the date of the store visit.
- (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

*As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

- (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. 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. Multiple ingredient food items such as cold pizza, macaroni and cheese, soup, or frozen dinners, shall only be counted as one staple food variety each and will normally be included in the staple food category of the main ingredient as determined by the FNS.]*

7 CFR § 278.1(b)(1)(iii) states, in part: In order to qualify under Criterion B, firms must have more than 50% of their 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, such as rental fees, professional fees, and entertainment/sports/games income.

7 CFR § 278.1(b)(6) deals with Need for Access and reads, in part: FNS will consider whether the applicant firm is located in an area with significantly limited access to food when the applicant firm fails to meet Criterion A per paragraph (b)(1)(ii) or Criterion B per paragraph (b)(1)(iii) of this section so long as the applicant firm meets all other SNAP authorization requirements. In determining whether an applicant is in such an area, FNS may consider access factors such as, but not limited to, the distance from the applicant firm to the nearest currently SNAP authorized firm and transportation options. In determining whether to authorize an applicant despite its failure to meet Criterion A and Criterion B, FNS will also consider factors such as, but not limited to, the extent of the applicant firm's stocking deficiencies in meeting Criterion A and Criterion B and whether the store furthers the purposes of the Program. Such considerations will be conducted during the application process.

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:

- (i) The firm's continued participation in the Program will not further the purposes of the Program.
- (ii) The firm fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section.
- (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 period specified in paragraph (k)(2) of this section.

*As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

7 CFR § 278.1(k)(2) reads, in part: Any firm that has been denied authorization on these bases shall not be eligible to submit a new application for SNAP authorization for a minimum period of 6 months from the effective date of the denial.

APPELLANT'S CONTENTIONS

In its request for administrative review and in subsequent correspondence, Appellant's owner provided the following summarized contentions, in relevant part:

- I disagree with the determination to cancel our store's eligibility to participate in SNAP. We do qualify under Criterion A.
- When the representative came to the store, our stock was down due to it being a Monday and the order hadn't come in or our supplier was out.
- We sell a variety of staple foods, and even more now because of COVID. We sell milk, butter, cheese, ice cream, bread, tortillas, cereal oatmeal, rice, orange juice, apple juice, apples, lemons, limes, canned vegetables, bologna, wieners, chopped ham, frozen fish filet, prepared foods, and a few perishable items.
- We just purchased a new cooler and will be adding more.
- Please reconsider as we feel it would be detrimental to this neighborhood if we were disqualified.

In support of these contentions, Appellant's owner submitted a total of 15 photos of current food stock.

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

ANALYSIS AND FINDINGS

Regarding Appellant's contentions with respect to Criterion A, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of Retailer Operations, 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 SNAP after that decision, such as stocking all the varieties of staples in each of the four staple food categories in the store on a continuous basis or promising to do so if approved. There is no provision in the SNAP Regulations for waiver or reduction of an administrative penalty assessment based on after-the-fact or intended corrective actions. The authorization of a store to participate in SNAP must be in accord with the Act and the regulations, as amended; those requirements of law cannot be waived.

As noted above, for a firm to be eligible for SNAP participation, it must qualify under either Criterion A or Criterion B, as described in 7 CFR § 278.1(b)(1). Under Criterion A, a firm must offer for sale no fewer than three different varieties of food items in each of the four staple food

categories with a minimum depth of stock of three stocking units for each food variety and at least one variety of perishable foods in at least two staple food categories. A store visit was conducted by an FNS contracted reviewer on August 10, 2020. According to the reviewer's written record and photos taken of Appellant's stock, Appellant had insufficient inventory in the dairy products staple food category, making it ineligible under Criterion A. Also, Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50% of its total gross retail sales.

SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of the reauthorization application, and subsequently abides by the statute and implementing regulations. The evidence supports that Appellant did not meet the regulatory requirements of Criterion A at the time the withdrawal decision was made.

In support of the request for administrative review, Appellant's owner submitted a total of 15 store stock photos. The photos provided for review are current and cannot be used to assess inventory of required items at the time that the withdrawal action was rendered.

Therefore, the evidence supports that Retailer Operations correctly concluded that Appellant did not meet Criterion A because it did not offer qualifying staple foods on a continuous basis.

As noted above, under Criterion B, a firm must have more than 50% of its total gross retail sales from staple foods per 7 CFR § 278.1 (b)(1)(iii). Appellant's owner self-reported its staple food sales at 5% on its SNAP Retailer Reauthorization Application which was signed on November 8, 2019. The photographs and inventory information provided from the store visit confirm Appellant did not receive more than 50% of its projected annual sales from the sale of staple foods. Accordingly, Retailer Operations correctly determined that Appellant was not eligible for SNAP authorization under Criterion B.

Regarding Appellant owner's contention that a SNAP authorization withdrawal will impose a hardship on SNAP customers, there are no provisions in the Food and Nutrition Act or SNAP Regulations allowing hardship to SNAP customers as a consideration in determining eligibility for SNAP participation, except for co-located wholesale/retail firms, which must meet a variety of additional requirements. Appellant is not a co-located wholesale/retail firm; therefore, such provisions do not apply in the present case.

SNAP Regulations at § 278.1(b)(6) state that FNS will consider whether a firm is in an area with significantly limited access to food when it fails to meet Criterion A or Criterion B if it meets all other eligibility requirements. This Need for Access evaluation also considers other factors, such as distance to the nearest SNAP authorized firm, transportation options, extent of Appellant's stocking deficiencies, and whether Appellant furthers the purposes of the Program.

The record indicates that Retailer Operations conducted a Need for Access evaluation and determined that Appellant did not qualify for SNAP authorization under this provision. After an

analysis of all available evidence in this case, this review finds that Need for Access was fully and properly considered and that authorization under this provision is not appropriate.

CONCLUSION

SNAP authorization is an administrative privilege granted upon evidence of eligibility and continued compliance with the governing laws and regulations. If a firm does not conform to the applicable statutes and regulations, the same provides for the firm's removal from SNAP.

Based on a review of all the evidence, the determination by Retailer Operations to withdraw the authorization of Appellant to participate as a SNAP retail food store is sustained.

Appellant did not meet the requirements of a retail food store as set forth in 7 CFR § 278.1(b)(1) when it was withdrawn. In accordance with 7 CFR § 278.1(k)(2), ownership will not be eligible to reapply for SNAP participation as a retail food store, for a minimum period of 6 months from the effective date of the withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP Regulations, the withdrawal of Appellant shall become effective 30 days after receipt of this Decision.

General questions regarding the SNAP application process can be handled by consulting the USDA website and contacting 877-823-4369. Questions regarding this withdrawal action should be directed to Jonalyn Johnson at jonalyn.johnson@usda.gov or (225) 313-7403.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this Decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (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 or 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 30 days of receipt of this Decision. The judicial filing timeframe is mandated by the Act, and this office is unable to grant an extension.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

KIM DAMERON
Administrative Review Officer

July 21, 2021