

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

**4<sup>th</sup> Avenue Marathon,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0252614**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the Retailer Operations Division properly withdrew the authorization of 4<sup>th</sup> Avenue Marathon (Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it withdrew the authorization of Appellant to participate in SNAP.

**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**

Appellant submitted an online authorization form FNS-252, entitled *Supplemental Nutrition Assistance Program Application for Reauthorization for Stores* on November 2, 2021. The FNS-252 reported that 14 percent of the firm’s actual gross retail sales were in staple foods; 12 percent were in “accessory” food items such as snack foods, carbonated and non-carbonated beverages, condiments and spices; one percent was in hot foods; and 73 percent of its actual gross retail sales were in non-food items (gas, lottery, tobacco, alcohol, and other non-food items). An FNS contractor conducted a store visit on January 18, 2022, to document the firm’s food inventory for the purpose of determining the continued eligibility of 4<sup>th</sup> Avenue Marathon

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to participate in the SNAP. The store visit report showed that the store was deficient in the dairy staple food category.

After considering the available evidence, the Retailer Operations Division informed Appellant by letter dated February 2, 2022, that the authorization of Appellant to participate in the SNAP was withdrawn because the firm did not meet the eligibility criteria for stores as mandated by SNAP regulations at 7 CFR § 278.1(b)(1). The letter stated that the Appellant failed to meet Criterion A because the store did not have the required minimum variety of staple food. The store also failed to meet Criterion B because the store's staple food sales did not comprise more than 50 percent of its annual gross retail sales.

By letter dated February 8, 2022, ownership's representative appealed the Retailer Operations Division's decision 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 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, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). In particular, 7 CFR § 278.1(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 271.2 states 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, 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<sup>1</sup>] such categories, (Criterion A) as set forth in of this chapter, or has more than 50 percent 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

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\* 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>.

customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in: Food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter.

7 CFR § 271.2 states:

Staple food, means 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. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (i.e., nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility under § 278.1(b)(1) of this chapter.

7 CFR § 278.1(b)(1)(i)(A) imparts program requirements for retail food store participation, which states:

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 as defined in § 271.2 of this chapter, including perishable foods in at least three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).

7 CFR § 278.1(b)(1)(ii)(A) provides that in order for a retail store to qualify for 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<sup>2</sup>] 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 a sufficient amount of 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.”

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7 CFR § 278.1(b)(1)(iii) provides that in order for firms to qualify for authorization under Criterion B:

Firms must have more than 50 percent 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) regarding access states:

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 located 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 ....

7 CFR § 278.1(l)(1) reads, in part: FNS may 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 specification 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 time period specified in paragraph (k)(2) of this section; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section;"

7 CFR § 278.1(k)(2) reads, in relevant 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.... Any firm that has been denied authorization 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.

7 CFR § 278.1(b)(6) states in part:

Need for access. 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 located 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 ....

## **APPELLANT'S CONTENTIONS**

Appellant's representative made the following summarized contentions in its administrative review request dated February 8, 2022, in relevant part:

- Appellant is not familiar with the fact that it did not meet the inventory requirements.
- Appellant's average staple food inventory is equal to \$23,550.
- Appellant's food sales comprise 47.2% of total sales.
- The withdrawal would have a significant financial impact including eliminating a position.
- Appellant is in an inner-city that is the primary purchase point for food in the immediate area.
- Appellant attached maps showing the location of Appellant and the other purchasing option residents of the largely minority area.
- Appellant requests another store visit and requests that Appellant not be withdrawn.

The preceding may represent only a brief summary of the 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**

### **Criterion A**

Federal regulations at 7 CFR § 278.1(b)(1)(ii) state that to qualify for SNAP authorization under Criterion A, a firm it 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 variety. 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 to qualify for SNAP authorization under Criterion A. The invoices submitted by Appellant showed that Appellant was missing two qualifying varieties in the dairy staple food category. It had sufficient stocking units of milk.

Appellant requests reconsideration and another store visit. Second visits are not conducted as part of the administrative review process. The purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the withdrawal action. There are no provisions in the SNAP regulations for authorization based on possible after-the-fact corrective actions

implemented after a finding of ineligibility. The evidence supports that the Retail Operations Division correctly determined that Appellant was not eligible under Criterion A.

### **Criterion B**

In the event of a firm's failure to meet the requirements of eligibility under Criterion A, federal regulations require that the firm's eligibility also be evaluated under Criterion B. To qualify for authorization under Criterion B, more than 50 percent of a retail store's total annual gross retail sales must come from the sale of staple foods. Based on the application submitted by the store owner, the Retailer Operations Division determined that Appellant was also ineligible for authorization under Criterion B according to 7 CFR § 278.1(b)(1)(iii). Appellant's SNAP application estimates that 14 percent of its gross annual retail sales come from the sale of staple foods. The evidence supports that Retailer Operations Division correctly determined that Appellant was not eligible under Criterion B.

### **Need for Access**

Appellant explains it is the primary purchase point for food in the immediate area. SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether the Appellant firm is located in an area with significantly limited access to food when the firm fails to meet Criterion A or Criterion B as long as it meets all other eligibility requirements. The Retailer Operations Division determined that the Appellant firm did not qualify for SNAP authorization under this provision.

### **Appellant Hardship**

Appellant explains that the disqualification will be a hardship for its business. It is recognized that economic hardship is a likely consequence whenever a store is withdrawn or disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment based on possible economic hardship to the firm resulting from imposition of such penalty. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

## **CONCLUSION**

The Retailer Operations Division's decision to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2) Appellant will not be eligible to participate in the SNAP for a period of six months. The withdrawal shall become effective 30 days after receipt of this decision.

## **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, 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.

Mary Kate Karagiorgos  
ADMINISTRATIVE REVIEW OFFICER

June 14, 2022