

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

Dairy Deli #35,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0253657

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 Retailer Operations Division properly withdrew the authorization of Dairy Deli #35 (hereinafter “Dairy Deli #35” or “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 Title 7 Code of Regulations (CFR) Part 278 in its administration of the SNAP, when it withdrew the authorization of Dairy Deli #35 as a SNAP retail store.

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

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 contractor is then conducted to determine the Appellant’s continued eligibility to participate as a SNAP retailer.

The record shows that the Appellant applied for reauthorization to participate in the SNAP in an application that was signed on January 27, 2022. In a letter dated March 24, 2022, the Retailer Operations Division informed the Appellant that its authorization to participate as an authorized retailer in the SNAP was being withdrawn. This withdrawal action was based on evidence

obtained during a store visit on March 11, 2022 by an FNS contractor in an effort to determine whether or not the firm met eligibility requirements to be reauthorized in the SNAP. During this visit, the contractor took photographs of the store and its inventory, spoke with store personnel, and completed a written report detailing its observations. The withdrawal action was also based on information provided on the firm's reauthorization application.

The Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations. The withdrawal letter states "In order for a firm to be eligible to participate in the 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 Section 278.1(b)(1) of the SNAP regulations. Under Criterion A, a firm must offer for sale, on a continuous basis, a minimum of three stocking units of three varieties of foods in each of four staple food categories, including three stocking units of one variety of perishable foods in at least two of those categories. The four staple food categories are: 1) bread or cereals; 2) dairy products; 3) vegetables or fruits; and 4) meat, poultry, or fish. Under Criterion B, a firm must have more than 50 percent of its total gross retail sales in staple foods." The 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 products and meat, poultry, or fish staple food categories. Also, the Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its total gross retail sales.

The withdrawal letter also states that the Retailer Operations Division considered the Appellant's eligibility under the Need for Access provision at Section 278.1(b)(6) of the SNAP regulations. However, the Appellant did not qualify for SNAP authorization under this provision.

In a letter postmarked March 29, 2022, the Appellant appealed the Retailer Operations Division's decision and requested an administrative review of this determination. FNS granted the Appellant's request for administrative review by letter dated April 7, 2022 and implementation of the withdrawal was held in abeyance pending completion of this review. In an email correspondence of April 28, 2022, the Appellant submitted additional information in support of the request for administrative review.

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, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 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 participation in the SNAP.

7 CFR § 278.1(l)(1)(iii) states, in part:

FNS shall withdraw the authorization of any firm authorized to participate... if ...The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...

7 CFR § 271.2 defines a retail food store, in part, as:

An establishment or house-to-house trade route 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 food 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 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 stock keeping units, or other inventory or accounting record keeping 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... 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. Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will be included in the staple food category of the main ingredient as determined by FNS. Accessory food items include foods that are generally considered snack foods or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar. Items shall not be classified as accessory foods exclusively based on packaging size but rather based on the aforementioned definition and as determined by FNS. A food product containing an accessory food item as its main ingredient shall be considered an accessory food item. Accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm.

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 percent 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 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.

Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of 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

(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 FNS.

7 CFR § 278.1(b)(1)(iii) states, in part:

In order to qualify 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(k)(2) states, in part:

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

In the request for administrative review and in subsequent correspondence, the Appellant stated the following summarized contentions, in relevant part:

- The Appellant requests reconsideration of the authorization withdrawal determination.
- The Appellant disagrees with the authorization withdrawal determination.
- The store offers for sale dairy products (milk, cheese, eggs, butter, and sour cream) and meats and chicken (lunch/deli meats, bacon, hot dogs, deli beef sticks, frozen sliced steaks, frozen chicken strips, and frozen fish fillets).
- The cooler for the non-frozen foods has not been working properly for almost two months. When the cooler malfunctioned, all perishable items were placed in the walk-in cooler with storage of other perishable goods.
- The Appellant had to replace the compressor on March 24, 2022.
- The submitted food stock photos show the varieties of perishable foods in the cooler after the final cooler repair was completed.

In support of these contentions, the Appellant submitted the following information for review:

- Seven (7) undated photos of current food stock;

- Four invoices from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) dated January 28, 2022, February 17, 2022, March 21, 2022, and March 24, 2022; and
- Copies of three canceled checks for cooler repairs dated January 28, 2022, February 17, 2022, and March 24, 2022.

The preceding may represent only a brief 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

Criterion A

With regard to the 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 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 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 on the basis of after-the-fact or intended corrective actions. 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.

As noted above, in order 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 March 11, 2022. According to the reviewer's written record and photos taken of the store's stock, the firm had insufficient inventory in the dairy products and meat, poultry, or fish staple food categories, making the business ineligible under Criterion A. 5 U.S.C. § 552 (b)(7)(E).

SNAP authorization is dependent solely upon whether the firm meets the eligibility requirements for participation at the time of the reauthorization application, and subsequently abides by the statute and implementing regulations. The store stock 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. The evidence supports that Dairy Deli #35 did not meet the regulatory requirements of Criterion A at the time that the withdrawal decision was rendered.

Therefore, the Retailer Operations Division correctly concluded that Dairy Deli #35 did not meet Criterion A because the store did not offer "qualifying staple foods on a continuous basis".

Criterion B

An evaluation of the percentages of staple food sales reported on the Appellant's SNAP Retailer Reauthorization Application as well as the photographs and store inventory information provided from the store visit indicate that Dairy Deli #35 did not receive more than 50 percent of its projected annual sales from the sale of staple foods. Accordingly, the Retailer Operations Division correctly determined that Dairy Deli #35 was not eligible for SNAP authorization under Criterion B.

Need for Access

The SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether or not 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. This Need for Access evaluation also considers other factors, such as distance to the nearest SNAP authorized firm, transportation options, the extent of the Appellant's stocking deficiencies, and whether or not the Appellant firm furthers the purposes of the program.

The record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the Appellant firm did not qualify for SNAP authorization under this provision. After a review of all available evidence in this case, this review agrees that authorization under the Need for Access provision is not appropriate in this case.

CONCLUSION

Based on a review of all of the evidence in this matter, the determination by the Retailer Operations Division to withdraw the authorization of Dairy Deli #35 to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation in the SNAP for a minimum period of six months from the effective date of the withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery of this letter.

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, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

May 24, 2022