

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

Right On Time Ice Cream, LLC,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0251210

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to deny the application of Right On Time Ice Cream, LLC (hereinafter Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

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

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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

The record shows that Appellant applied to participate as a SNAP retailer food store on October 18, 2021. According to the firm’s application, the store opened for business on August 23, 2017. The Appellant was asked in a letter dated December 7, 2021, to submit invoices/receipts for inventory purchases in each of the four required staple food categories. The letter also stated that the invoices or receipts had to be dated within a 21 day period prior to December 7, 2021, and could not be older than 21 days.

After reviewing Appellant's application and evaluating the invoices/receipts provided, the Office of Retailer Operations and Compliance determined that the firm did not carry a sufficient quantity or variety of staple foods to be eligible for SNAP participation under Criterion A or Criterion B. This determination was made in accordance with SNAP regulations at 7 CFR § 278.1(b)(1) and showed that the firm had insufficient inventory in the dairy; the bread or cereals; and the meat, poultry, or fish staple food categories making the firm ineligible under Criterion A. Additionally, both the application and the review of the invoices/receipts indicated that the firm was not eligible under Criterion B. Therefore, the firm was found to not meet the minimum stocking requirements for authorization as a SNAP retailer in the dairy; the bread or cereals; and the meat, poultry, or fish staple food categories.

In a letter dated December 13, 2021, the Office of Retailer Operations and Compliance informed Appellant that its application to participate as an authorized retailer in SNAP was being denied because it did not offer for sale a variety of foods in sufficient quantities on a continuous basis and was found to carry too few items in the four staple food categories. 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. Additionally, the letter stated that FNS considered the firm's eligibility under the Need for Access provision of the regulations found at 7 CFR § 278.1(b)(6), but determined that the Appellant does not qualify for SNAP under this provision.

As a result of being found ineligible for participation under both Criteria A and B, and being found ineligible under the Need for Access provision, Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a request sent via email on December 15, 2021, Appellant appealed the Office of Retailer Operations and Compliance's decision and requested an administrative review of this determination. The appeal was granted. Subsequent correspondence was 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 action 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 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). In particular, 7 CFR § 278.1(b)(1) establishes the authority upon which FNS shall deny the application of any firm which fails to meet established eligibility requirements.

7 CFR § 271.2 defines a Retail Food Store 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 seven 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 three 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 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. 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. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.

7 CFR § 271.2 defines staple food 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 food 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) 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) provides that for a retail store to qualify for authorization under Criterion A, a firm 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 seven 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 three 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. Failure to provide verifying information related to stock when requested may result in denial or withdrawal of authorization. Failure to cooperate with store visits shall result in the denial or withdrawal of authorization.

NOTE: Full implementation of the definition of variety and stocking requirements cited above was delayed by the Consolidated Appropriations Act of 2017. Therefore, the three paragraphs below reflect the definition and stocking requirements as currently implemented.

7 CFR § 278.1(b)(1)(ii)(A) as currently implemented defines continuous basis under Criterion A as offering 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 qualifying staple variety on any given day of operation.

7 CFR § 278.1(b)(1)(ii)(B) as currently implemented: 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.

7 CFR § 278.1(b)(1)(ii)(C) as currently implemented: 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) provides that 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) deals with the 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.”

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. 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.”

APPELLANT’S CONTENTIONS

The following 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:

- The owner requests the six month denial period be waived and the application process with store visit continue; and,
- The business only sells 20 percent staple foods because it is not SNAP authorized and does not sell a lot of staple foods. Most items are purchased in bulk and do not sell fast which is why there are not many receipts within the 21 day period requested. The owner assures FNS that the business does have all of the required foods on hand and purchases more of them as needed. An in person store visit would have shown that the business is stocked in all categories.

Appellant submitted receipts for inventory purchases and undated photos of store stock in support of these contentions.

ANALYSIS AND FINDINGS

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 determination of the Office of Retailer Operations and Compliance, 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, planning to do so once SNAP authorized, or increasing staple food stock in order to qualify under Criterion B. 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.

Therefore, any contentions that the store is now or will be sufficiently stocked with necessary items do not provide any valid basis for dismissing or mitigating the adverse action imposed.

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, on a continuous basis, 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. Under Criterion B, a firm must have more than 50 percent of its total gross retail sales in the sale of staple foods. Stores that do not meet required stocking standards are not eligible to be SNAP retailers. That a store may have been SNAP authorized under a previous owner provides no guarantee that store inventory meets required stocking standards.

According to the review of the invoices/receipts submitted by Appellant, the firm had insufficient inventory in the dairy staple food category with no varieties, only one variety (beef) in the meat, poultry, or fish staple food category, and only two varieties (rice and grits) in the bread or cereals category thus making the firm ineligible under Criterion A. Therefore, the Office of Retailer Operations and Compliance correctly concluded Appellant did not meet Criterion A because the store did not offer “qualifying staple foods on a continuous basis”.

Appellant’s SNAP retailer authorization application dated October 18, 2021, and subsequent information provided shows that staple foods amounted to 20 percent of gross annual sales showing that the Appellant firm did not derive more than 50 percent of its annual sales from the sale of staple foods. Accordingly, the Office of Retailer Operations and Compliance correctly determined Appellant was not eligible for authorization under Criterion B.

The authorization of a store to participate in the SNAP must be in accord with the Act, as amended, and regulations. A review of the invoices/receipts provided indicates that Appellant was deficient in the dairy; the bread or cereals; and the meat, poultry, or fish staple food categories. Therefore, Appellant does not meet Criterion A. Appellant also does not meet Criterion B because information obtained from the invoice/receipt analysis confirms that staple food sales comprise 50 percent or less of annual gross retail sales. Accordingly, the Appellant firm was deficient in the dairy; the bread or cereals; and the meat, poultry, or fish staple food categories.

Appellant submitted additional pages of receipts as well as photos of store stock during the administrative review period. All of the receipts were dated more than the specified 21 day period from the December 7, 2021 request for proof of inventory and therefore do not provide evidence that the store regularly stocks a minimum of three varieties in sufficient stocking units in each of the four staple food categories. Since a minimum of three varieties is needed for each staple food category, the Appellant firm did not meet the minimum SNAP stocking requirements. Photos of store stock do not provide evidence that the firm met minimum SNAP stocking requirements.

Regarding Appellant’s contentions, SNAP regulations and statute do not provide for waivers of eligibility requirements that are integral to SNAP retail food stores.

When store ownership signed the certification page of the SNAP retailer application to begin operating as a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. SNAP rules and regulations require SNAP retailers to meet required stocking requirements for staple foods on a continuous basis; however, the invoice/receipt analysis determined that the store was deficient in three of the four staple food categories and therefore did not meet the stocking requirements. Stores that do not meet stocking requirements are not eligible to be SNAP retailers. Adding staple food stock after the analysis does not change the fact that the business was deficient at the time of the analysis and has no impact on the Office of Retailer Operations and Compliance determination to deny Appellant's SNAP retailer application.

Information on staple food stocking requirements may be found on the FNS SNAP retailer web site, the same site that contains the online SNAP retailer application. It should be noted that common mistakes are counting different sizes, flavors, and fat contents of milk as different varieties when all milk products only count as one variety. Eggs and even bread are also often erroneously thought to be classified in the dairy staple food category when they actually fall under the meat, poultry, or fish and the bread or cereals staple food categories, respectively.

Need for Access

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 the extent of Appellant's stocking deficiencies, distance to the nearest SNAP authorized firm, transportation options, and whether or not the Appellant firm furthers the purposes of the program.

The record indicates that the Office of Retailer Operations and Compliance 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

After a review of the pertinent documentation, and based on the discussion above, the initial decision by Office of Retailer Operations and Compliance to deny the application of Appellant to participate as a retailer in SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from the effective date of the denial. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

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, 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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

April 19, 2022