

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

**Summer Fuel LLC #1,
Appellant,**

v.

**Retailer Operations Division,
Respondent.**

Case Number: C0249134

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is insufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of Summer Fuel LLC #1 (hereafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program. Therefore, the Retailer Operations Division decision to withdraw Appellant's SNAP authorization is reversed.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 Code of Federal Regulations (CFR) Part 278, when it withdrew Appellant's authorization to participate as a retailer in SNAP on September 1, 2021.

AUTHORITY

7 U.S.C. § 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

The FNS requires that stores be reauthorized on a set schedule. As part of that routine reauthorization process, the Appellant submitted a reauthorization application dated January 24, 2021. In a letter dated August 25, 2021, Retailer Operations Division requested proof of inventory and requested invoices to show that Appellant normally carried the minimum required items in the Dairy staple foods category. The record reflects that Appellant responded to the proof of inventory request and in correspondence dated September 1, 2021, Retailer Operations Division withdrew the authorization of Appellant to participate as an authorized retailer in SNAP. This withdrawal action was based on observations during a store visit on July 5, 2021,

invoice information provided, as well as information provided on the firm's retailer application. 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 stated "Your firm fails to meet the inventory requirements under Criterion A because your Store does not carry three stocking units in at least three varieties of foods in the dairy product staple foods category(s). We received and reviewed the receipts provided. However, the receipts provided are dated August 26, 2021, and August 28, 2021, which after the store visit date. Your firm also fails to meet Criterion B because your firm's staple food sales comprise 50 percent or less of your annual gross retail sales."

As the firm failed to meet each eligibility criterion for approval, Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided at 7 CFR § 278.1(k)(2).

In correspondence postmarked September 16, 2021, Appellant appealed Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted, and implementation of the withdrawal has been held in abeyance pending completion of this review.

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, 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 U.S.C. § 2018 and Section 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(l)(1) establishes the authority upon which the authorization of any firm to participate in SNAP may be withdrawn if it fails to meet established eligibility requirements.

7 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 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."

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 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)(A) relays specific program requirements for retail food store participation, which reads, in part, “An establishment . . . shall . . . 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 three 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: “*Application of Criterion A*ⁱ. In order to qualify under this criterion, 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

ⁱ 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 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) reads, 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”

CONCLUSION

Based on a review of the record, the determination by Retailer Operations Division to withdraw the authorization of Summer Fuel LLC #1, to participate as a retailer in SNAP is reversed. The record reflects that Appellant provided additional purchase receipts during the review process dated June 19, 2021, containing three (3) units of butter, and a receipt dated July 3, 2021, containing 10 units of yogurt and six (6) units of butter. The receipts were dated within the required time period and provided sufficient evidence that Appellant carried at least three (3) varieties and three (3) stocking units in the Dairy staple foods category. Therefore, it is the decision of this review that Appellant met Criterion A eligibility and the six-month disqualification period of Appellant’s SNAP authorization be reversed.

RIGHTS AND REMEDIES

Under the Freedom of Information Act (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

September 27, 2022