

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

Sweets Factory,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0253247

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination by the Retailer Operations Division to deny the application of Sweets Factory (“Appellant”) to participate as a retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of denial.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it denied the application of Sweets Factory to participate as an authorized SNAP retailer.

AUTHORITY

7 U.S.C. § 2023 and 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 Appellant store, Sweets Factory, had previously been SNAP authorized from January 4, 2005 through March 20, 2016, but was required to reapply for SNAP authorization due to partial change of ownership. Appellant submitted an application to participate as a SNAP retailer on February 1, 2022. On the application, Appellant reported that the firm carried at least three different varieties of foods in each of three staple food categories; the firm reported to not have sufficient varieties of foods in the meat, poultry, or fish staple food category. Appellant also reported that around 90% of its gross retail sales were from the sale of staple foods. However,

during a February 1, 2022, telephone call with the Retailer Operations Division, Appellant described his store as a bakery that also sells eggs and a small amount of dairy and fruits.

On February 12, 2022, an FNS contractor conducted an onsite store visit to verify the firm's reported staple food stock. The store visit confirmed Appellant's description of the store as a bakery. The store visit report and photographs show that Appellant carried an extensive variety of accessory foods, such as cakes, cookies, and baklava, as well as other prepared desserts. Appellant also had several varieties of staple food items in three of the four staple food categories. However, in the meat, poultry, or fish staple food category, the store only carried eggs.

Because Appellant's description of the store and the store visit documentation conflicted with the information Appellant provided on the SNAP application, on February 24, 2022, the Retailer Operations Division sent Appellant a letter requesting information needed to verify the firm's staple food sales as a percentage of total gross retail sales, including sales receipts and an overview document showing sales for one representative week breaking actual retail sales down into the following categories: 1) staple foods, 2) accessory foods, 3) hot prepared and heated foods, 4) cold foods prepared on site, 5) charges for food heating services, and 6) nonfood items. In response, Appellant submitted daily cash register Z-tapes and a summary of sales broken down by the above categories that showed that only 41% of gross retail sales were in the sale of staple foods. The remaining 59% of gross retail sales were in the sale of accessory food items. Appellant reported no sales of hot foods, cold foods prepared on site, nonfood items, or charges for food heating services.

After reviewing the store visit documentation and the information submitted by Appellant, the Retailer Operations Division determined the firm did not maintain a sufficient variety, quantity, or percentage of staple foods to be eligible for SNAP participation under either Criterion A or Criterion B, as set forth in 7 CFR § 278.1(b)(1) of SNAP regulations.

In a letter dated March 10, 2022, the Retailer Operations Division informed Appellant that its SNAP application was denied for a period of six months pursuant to regulation, at 7 CFR § 278.1(k)(2). The letter stated Appellant failed to meet Criterion A because it did not offer for sale a variety of foods in required minimum quantities on a continuous basis in each of the four staple food categories and it failed to meet Criterion B because staple food sales did not comprise more than 50% of annual gross retail sales. The letter indicated 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 Appellant did not qualify for SNAP authorization under this provision.

On March 20, 2022, Appellant requested an administrative review of the denial determination. The request was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, the appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This 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 law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and is promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k) establishes the authority upon which FNS shall deny the application of any firm applying for SNAP authorization if it fails to meet established eligibility requirements.

7 CFR § 278.1(k)(2) states, in part:

FNS shall deny the application of any firm if it determines that:

(2) 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 § 271.2 defines a retail food store as:

(1) 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 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 stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter...

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2020-04 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 § 271.2 defines staple food as:

...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, 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

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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 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...

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2020-04 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(b)(6) states:

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 as described in paragraph (a) of this section.

APPELLANT'S CONTENTIONS

Appellant made the following summarized contentions for administrative review, in relevant part:

- I strongly disagree with the denial decision. After being in business over 15 years with SNAP eligibility, I know for a fact that my establishment meet Criterion B.
- A few weeks ago, I was asked to send copies of sales receipts and a chart that summarize one week of retail sales, so I gathered the most recent week and sent it in. The staple foods percentage for that week happened to be less than the required 50% for Criterion B, but this is a gross misrepresentation of actual staple food sales for my establishment.
- For example, I am sending in similar receipts and charts for the most recent week of March 13 to March 19 which shows that staple foods percentage for this week as 56%.

In support of its contentions, Appellant submitted daily cash register Z-tapes for March 13, 2022, through March 19, 2022 and a daily summary of sales broken into the categories such as staple foods, accessory foods, hot foods, etc.

The preceding may represent only a summary of Appellant's contentions presented in this matter. However, in reaching a final decision, full attention was given to all contentions presented, including any not specifically summarized or referenced herein.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time the Retailer Operations Division rendered its decision.

After reviewing the record, as well as evaluating the contentions submitted by Appellant, this review finds that Appellant does not carry, on a continuous basis, sufficient staple food inventory to be eligible for SNAP authorization under Criterion A, nor do its staple foods sales meet eligibility requirements under Criterion B. Appellant is also ineligible for authorization under the Need for Access provision. Accordingly, Appellant's SNAP authorization was properly denied for a period of six months.

Criterion A Eligibility

For a firm to be eligible under Criterion A, 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. In addition, retailers must meet Criterion A eligibility requirements on a continuous basis, as demonstrated at the time of the store visit.

Regarding Appellant, the record shows that the firm did not have enough inventory in the meat, poultry, or fish staple food category on the day of the store visit to meet Criterion A eligibility requirements. The Retailer Operations Division found the Appellant firm had adequate stocking units of only one meat, poultry, or fish variety: eggs. Appellant does not claim to meet Criterion A eligibility requirements.

This review agrees with the Retailer Operations Division's assessment of Appellant's inventory at the time of the store visit and finds that Appellant's contentions do not demonstrate that it met Criterion A eligibility requirements continuously. Accordingly, the Retailer Operations Division correctly determined that Appellant is not eligible for SNAP authorization under Criterion A.

Criterion B Eligibility

Eligibility under Criterion B requires that more than 50% of the firm's total gross retail sales be from the sale of staple foods. The Retailer Operations Division determined that Appellant did not meet Criterion B because the store's staple food sales did not comprise more than 50% of its gross retail sales. Although Appellant initially claimed on the SNAP application that 90% of its gross retail sales were in the sale of staple foods, Appellant's description of the store and the store visit report and photographs revealed this estimated percentage to be inaccurate. When the Retailer Operations Division requested sales documentation of a representative week of sales, Appellant submitted cash register Z-tapes and summary charts showing that for the week submitted, 41% of gross retailer sales were in the sale of staple foods. This was the basis of the Retailer Operations Division's determination that Appellant was ineligible for SNAP authorization under Criterion B.

Appellant now claims that the week of information submitted was not representative of sales and has provided an additional week of cash register Z-tapes showing that staples foods being 57% of gross retailer sales for the week of March 13, 2022, through March 19, 2022. However, this information is insufficient to establish eligibility under Criterion B.

The Retailer Operations Division had requested a representative week of sales data, not the most recent week, and the information submitted in response to this request appears more likely reflective of Appellant's sales given its inventory. Appellant had stated, and the store visit report and photographs show, that Appellant primarily sells cakes, cookies, baklava, and other accessory dessert items. The vast majority of Appellant's inventory consists of these perishable accessory foods, while staple foods are a far smaller portion. Appellant has provided no evidence or rationale for why the Z-tapes and sales summary provided on administrative review are more representative of the store's sales than the Z-tapes and sales summary provided to the Retailer Operations Division. Adding the two weeks together may provide a more accurate assessment of Appellant's representative sales, though Appellant would remain ineligible for authorization under Criterion B as staple food sales are still under the 50% threshold when the two weeks are added together. Accordingly, based on the preponderance of the evidence, the Retailer Operations Division properly determined that the Appellant store was ineligible for SNAP authorization under Criterion B.

Need for Access

SNAP regulations, at 7 CFR § 278.1(b)(6), state that FNS will consider whether Appellant 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 Appellant's stocking deficiencies, and whether Appellant furthers the purposes of the program.

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

CONCLUSION

Based on the analysis above, the determination by the Retailer Operations Division to deny the SNAP application of Sweets Factory, is sustained. The firm does not meet eligibility requirements under Criterion A or B as outlined in regulations, at 7 CFR § 278.1(b)(1), and is not eligible for authorization under Need for Access, as provided under 7 CFR § 278.1(b)(6). Additionally, the contentions presented by Appellant are not sufficient to show that the denial decision made by the Retailer Operations Division should be reversed.

In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for authorization as a retailer in SNAP for a minimum period of six months from March 10, 2022, which is the effective date of the denial.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this determination are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in SNAP regulations, at 7 CFR § 279.7. If

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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a Complaint is filed, it must be filed within 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.

MICHELLE WATERS
ADMINISTRATIVE REVIEW OFFICER

June 9, 2022