

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

The Cake Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0254496

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 The Cake Store (“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 The Cake Store 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

Appellant, The Cake Store, submitted an application to participate as a SNAP retailer on February 25, 2022. On the application, Appellant reported that around 50 percent of its gross retail sales were from the sale of staple foods. The application also reported that the firm carried at least three different varieties of foods in three of the four staple food categories, with a minimum depth of stock of three stocking units for each variety. However, Appellant reported having no inventory in the meat, poultry, or fish staple food category. On March 19, 2022, an FNS contractor conducted an onsite store visit to verify the firm’s reported staple food stock.

After reviewing the store visit report and photographs, and re-evaluating Appellant's application, 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 April 1, 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 percent 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 April 22, 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...

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

* 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>.

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 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.]*

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*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(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, and in subsequent correspondence submitted on May 23, 2022, in relevant part:

* 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>.

- We were just getting the day started when the reviewer came in on a Saturday morning. The day before was pretty busy so we were in the process of replenishing all products including desserts and breads. Our bread racks were completely empty.
- We have since restocked many of the items that were not available the day of the visit as you will see in the pictures below. These are some pictures from over the weekend.
- We are on delivery platforms so often items sell out daily and it takes us a bit of time to replenish them.
- We bake 30 percent of our products. Small items such as cupcakes, cake slices, and small desserts.
- There are products that we purchase wholesale and stock on our displays such as large cakes, cupcakes, bread and rolls, etc.

In support of its contentions, Appellant submitted five undated photographs of store inventory and one sales receipt.

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 on the day of the store visit, the firm did not have any inventory in any of the four staple food categories required to meet Criterion A eligibility requirements. Appellant contends that when the store visit took place, the store was in the process of replenishing its products as the day before had been busy. Appellant claims to sell mostly accessory food items like cupcakes, cake slices, and desserts and to also sell bread and

rolls. To support these contentions, Appellant has submitted five undated photographs of store inventory and one sales receipt.

The photographs submitted by Appellant, as well as the one sales receipt, show that Appellant primarily sells accessory food items, such as cakes, cupcakes, and other desserts. Although the photographs show a few staple foods, such as bread, rolls, milk, and fruit, there is no evidence that Appellant has 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. Appellant did not submit any inventory purchases receipts that show that the necessary food items were purchased prior to the store visit.

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 percent 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 percent of its gross retail sales. On the SNAP authorization application, Appellant reported that 50 percent of the store's gross retail sales were in staple food items, which is insufficient to meet Criterion B which requires more than 50 percent in staple food sales. It is likely Appellant's self-reported sales figure is overestimated, however. The store visit report and photographs, as well as Appellant's own evidence of food sales, indicate that staple foods are a very small part of gross retail food sales.

There is nothing in the record that indicates that Appellant's staple food sales are more than 50 percent of its gross retail sales. Based on a 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 The Cake Store, 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 April 12, 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

July 25, 2022