

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

BP Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0248999

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is insufficient evidence to support the decision by the Retailer Operations Division to withdraw the authorization of BP Mart (hereinafter “BP Mart” or “Appellant”) to participate in the Supplemental Nutrition Assistance Program (SNAP). Therefore, the determination is reversed.

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 BP Mart 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 in an application that was signed on February 12, 2021. In a letter of August 11, 2021, the Retailer Operations Division informed the Appellant that its inventory of staple foods was marginal and requested invoices/receipts to verify that the store carried at least three stocking units of three different varieties of foods in the dairy products staple food category.

The Appellant was informed that it had 10 days, from receipt of the letter, to provide the requested documentation. The record reflects that the Retailer Operations Division received a response from the Appellant on August 17, 2021 to the proof of inventory letter within the 10-day required timeframe.

In a letter dated August 26, 2021, 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Division informed the Appellant that its authorization to participate as an authorized retailer in the SNAP was being withdrawn.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 23, 2021 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 staple food category. 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 September 8, 2021, 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 September 28, 2021 and implementation of the withdrawal was held in abeyance pending completion of this review. In a letter of October 5, 2021, 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 SNAP authorization withdrawal determination.
- SNAP sales account for a large part of the retailer's sales.
- If stock was not available during the store visit, it was because the items sell fast. The retailer orders small numbers of units from a distributor and local warehouses like Restaurant Depot and Costco to make sure everything is fresh and new.

In support of these contentions, the Appellant submitted for review a Sales Summary for January 1, 2021 – April 24, 2021.

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

The Retailer Operations Division determined that based on evidence obtained during a store visit on March 23, 2021, as well as information provided on the firm's retailer reauthorization application that 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 staple food category. According to the store visit report and stock photos the Appellant stocked the following dairy staple foods: 20+ units of milk and 5 units of butter. The Retailer Operations Division also determined that 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.

A review of the evidence indicates the Retailer Operations Division's determination cannot be supported in this case. The determination is reversed as a March 23, 2021 store visit photo shows 4 units of a nacho cheese dip product where the first ingredient, after water, is whey or cheese whey, which is a milk derivative and should be counted as a dairy variety. As such, this review finds that the Appellant met the regulatory requirements of Criterion A at the time that the withdrawal decision was rendered.

Accordingly, it is unnecessary to address the Appellant's contentions in this matter.

This administrative review decision is based on the specific circumstances of this case as documented by materials provided by the Appellant and the Retailer Operations Division. In addition, this administrative review decision does not establish policy or supersede federal law or regulations.

CONCLUSION

A preponderance of the evidence supports that the Appellant normally carried a minimum of three varieties of dairy staple foods in sufficient stocking units at the time of the store visit. Based on the analysis above, the decision by the Retailer Operations Division to withdraw the authorization of BP Mart is **reversed**. The Retailer Operations Division should continue to process the Appellant's SNAP retailer application to determine eligibility. This decision does not preclude the Retailer Operations Division from asking for additional documentation to assess if the firm currently meets the regulatory criteria to participate in the SNAP.

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.

BRENDA THOMPSON
ADMINISTRATIVE REVIEW OFFICER

October 6, 2022