

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

**Berkley's Gourmet Cupcakes  
And Party Cakes,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0268700**

**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 authorization of Berkley's Gourmet Cupcakes And Party Cakes ("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 permission of Appellant to participate as a 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 SUMMARY**

Appellant, Berkley's Gourmet Cupcakes And Party Cakes, submitted an application to participate as a SNAP retailer on February 15, 2023. On the application, Appellant reported that around 18 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 with a minimum depth of stock of three stocking units except for the meat, poultry and/or fish category. On March 1, 2023, an FNS contractor conducted an onsite store visit to verify the firm's reported staple food stock.

In a letter dated March 13, 2023, 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. Specifically, appellant failed to carry three stocking units of three different varieties in the meat, poultry and/or fish food category. Appellant also 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 also 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.

In an email dated March 15, 2023, Appellant requested an administrative review of the Retailer Operations Division's determination. The request was granted.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, such as the denial of a firm's SNAP authorization, 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(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) states, in part:

FNS may 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 § 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

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\* 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>.

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 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...

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(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...

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

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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 by correspondence submitted on March 15, 2023, and by a subsequent email dated April 13, 2023, in relevant part:

- Appellant owner was not present when the representative visited the bakery to take pictures.
- Appellant store did have canned and bagged tuna, sardines, Spam, corned beef, Vienna sausage, canned chicken breast and salmon; however, customer service lady did not have it displayed where everyone could see because she didn't think or know that the items should have been displayed.
- Other bakeries that we know who accept EBT do not have meat/poultry or fish products displayed. Being denied for not having this category displayed is very unfair and puts Appellant store at an unfair disadvantage because other bakeries do not have these items displayed.
- Appellant owner submitted a picture showing that meat, poultry and/or fish items have been moved and are now displayed for the public.
- As a small business, Appellant's customers are constantly asking if they accept EBT. Appellant asserts that most new customers actually leave and do not purchase anything when they find out that Appellant store does not accept EBT which is a loss to Appellant.
- Being approved will tremendously help our Appellant store because it will be providing the customers with what they want.
- Appellant states that it is located directly across the street from a low-income senior citizen apartment building, and for the past 5 years, the tenants have wanted to patronize and support Appellant store but cannot because it does not accept EBT.

Appellant further submitted five additional pictures of the store for consideration. 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.

In order 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.

Regarding Appellant, the record shows that the firm did not have enough inventory in the meat, poultry and/or fish category on the day of the store visit to meet Criterion A eligibility requirements. Appellant claims that at the time of inspection, the store stocked meat, poultry and/or fish products but the customer service representative that day did not have those items displayed because she was not aware that they should be displayed. As support, Appellant provided pictures which show sufficient varieties of meat, poultry and/or fish staple goods.

As stated above, Appellant bears the burden of proving that the administrative action should be reversed by providing relevant evidence which a reasonable mind, when 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. In its request for review and subsequent correspondence, Appellant has submitted a total of six pictures to prove that it now meets Criteria A. Regarding this contention, it must be restated that this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the contractor's store visit and at the time that the Retailer Operations Division rendered its denial decision. It is not the authority of this review to consider subsequent remedial actions. There are no provisions in the SNAP regulations for a reversal of a denial decision on the basis of any corrective actions.

As to Appellant's assertion that the items were stocked but not displayed, the review finds that Appellant again failed to meet its burden of proof. As noted above, when it is not clear whether a firm has made reasonable stocking efforts to establish that it carries a sufficient amount of required staple foods and offer them for sale on a continuous basis, retailers may provide verifying information such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of the required staple foods up to 21 calendar days prior to the date of the store visit. In this matter, Appellant provided no receipts and/or invoices to prove that the store maintained sufficient varieties of meat, poultry and/or fish staple goods. The pictures provide no proof as to when they were purchased.

Appellant further argues that other bakeries do not display this category and it would be unfair to apply a different standard to Appellant. While there is no evidence before this review that other retailers who accept EBT do not display meat, poultry and/or fish products, it must be stated that all retailers who participate in the SNAP program are required to comply with and follow each and every statute and SNAP regulation, and if they do not, they lose authorization to participate in the program. Nevertheless, it must be emphasized that this review did not sustain the decision

by the Retailer Operations Division because the items were not displayed. This review sustained the decision because the Appellant failed to satisfy its burden to prove that the firm had ordered and/or received a sufficient amount of the required staple foods up to 21 calendar days prior to the date of the store visit. Therefore, Appellant's contentions do not provide a valid basis for reversing the Retailer Operations Division's determination that Appellant failed to meet Criterion A eligibility requirements.

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. This was based on the SNAP retailer application, in which Appellant reported that 18 percent of the store's gross retail sales were in staple food items. There is nothing in the record that indicates this percentage of staple food sales to gross retail sales is inaccurate. Consequently, based on a preponderance of the evidence, the Retailer Operations Division properly determined that the Appellant store was ineligible under Criterion B.

Appellant also asserts that the SNAP authorization is financially important to them and that they lose business by not accepting EBT. Unfortunately, while economic hardship is a likely consequence whenever a store's SNAP authorization is denied, there is no provision in the SNAP regulations for reversing a denial determination based upon economic hardship to the firm.

### **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 authorization of Berkley's Gourmet Cupcakes And Party Cakes 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.

Pursuant to 7 CFR § 278.1(k)(2), Appellant is ineligible to reapply for authorization as a retailer in SNAP for a minimum period of six months from 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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

DAVID SHIVELY  
ADMINISTRATIVE REVIEW OFFICER

April 25, 2023