

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

Get It To Go,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0253656

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that FNS's Retailer Operations Division properly withdrew the authorization of Get It To Go (hereinafter "Appellant") from participation 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 withdrawal.

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, in its administration of SNAP when it withdrew the authorization of Get It To Go.

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 SUMMARY

In a letter dated March 3, 2022, the Retailer Operations Division informed the Appellant that its authorization to participate as a retailer in SNAP would be withdrawn due to the firm's failure to meet basic program eligibility requirements. This withdrawal decision was based on observations made during a contractor's store inspection on February 9, 2022, as well as information provided on the firm's reauthorization application dated October 22, 2021. On March 24, 2022, twenty days after the withdrawal letter was sent, the system withdrew authorization.

The Retailer Operations Division determined that the firm did not meet eligibility requirements under Criterion A or Criterion B pursuant to SNAP regulations at 7 CFR § 278.1(b)(1). The withdrawal letter stated that the Appellant failed to meet the requirements of Criterion A because the firm failed to meet the inventory requirements of carrying three stocking units of at least three varieties of foods in the dairy product staple foods category. It also stated 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 retail sales. Additionally, 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 the Appellant did not qualify for authorization under this provision.

As a result of being found ineligible for participation under both Criteria A and B, and being found ineligible under the Need for Access provision, the Appellant's SNAP authorization was withdrawn for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

On March 29, 2022, Appellant, by phone and by email, informed the Retailer Operations Division that it never received the original withdrawal letter. Consequently, a second withdrawal letter was sent to Appellant that same day. Additionally, in that email of March 29, 2022, Appellant requested an administrative review of the Retailer Operations Division's determination. The request was granted, and on April 8, 2022, the store was reinstated pending an ARB review and implementation of the withdrawal has been held in abeyance pending the outcome of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as the withdrawal of a firm's SNAP authorization, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and 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) reads, 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) reads, in relevant 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...

* 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>.

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 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

* 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>.

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...

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

* 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>.

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

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

- The business does comply with Criterion A and Criterion B.
- The business is located where many of the consumers use EBT/SNAP and have limited access to other grocery stores.
- COVID has hit the community hard and the few days of EBT shutdown has already affected their customers.

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

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or invalidate the March 3, 2022, withdrawal determination made by the Retailer Operations Division. This review is limited to consideration of the facts as they existed at the time the determination was made. After reviewing Appellant's reauthorization submission and the contractor's store visit report and photographs, it is the finding of this review that Get It To Go does not carry sufficient staple food inventory required for continued SNAP authorization.

As described in regulations cited earlier, a firm must meet Criterion A or Criterion B to be eligible for ongoing SNAP participation. In order for a firm to be eligible under Criterion A, it must offer for sale on a continuous basis no fewer than three different varieties of staple foods in each of the four staple food categories with a minimum depth of stock of three stocking units for each variety. In this case, the firm is deficient in the dairy category. According to the contractor's report, the only dairy variety in sufficient quantities at the time of the inspection was milk. It should also be noted that this office, on April 7, 2022, sent a letter to Appellant store inviting it to submit additional evidence to support its contention that the withdrawal was incorrectly

decided. Appellant did not submit any additional evidence. Consequently, based upon a preponderance of evidence, the Retailer Operations Division properly determined that the Appellant was ineligible under Criterion A.

Additionally, 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 reapplication, in which Appellant reported that only about 5 percent of the store's gross retail sales were in staple food items. There is nothing in the record that indicates this low percentage of staple food sales to gross retail sales is inaccurate. Based on a preponderance of the evidence, the Retailer Operations Division properly determined that the Appellant store was ineligible under Criterion B.

Appellant further contends that COVID-19 has hit the community hard. While this review sympathizes with the impact COVID-19 has had in each and every community, Appellant failed to offer any explanation how the COVID-19 pandemic excused Appellant's duty to comply with the requirements of the SNAP program. SNAP regulations require that a firm continuously maintain sufficient staple food inventory in order to remain eligible for program participation (see 7 CFR § 278.1(b)(1)(i) and (ii)). A firm that does not maintain proper inventory at all times does not effectuate the purposes of the program and cannot remain authorized. Consequently, this review finds that the COVID-19 pandemic is not a valid reason to reverse the agency's withdrawal determination.

Appellant also refers to the possibility of a subsequent inspection in his letter for review. Such request cannot be granted. Not only is this review limited to consideration of facts that existed at the time of the withdrawal determination, but unannounced store visits are conducted with the intent of discovering inventory at the store on any given day of operation. A re-inspection after a determination of ineligibility could possibly result in artificially inflated inventory levels.

NEED FOR ACCESS

SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider authorizing a firm which fails to meet Criterion A or B as long as it is located in an area with significantly limited access to food and provided that it meets all other eligibility requirements. This Need for Access evaluation considers factors such as distance to the nearest SNAP-authorized retail store, transportation options, extent of the firm's stocking deficiencies, and whether the firm furthers the purposes of the program.

As for Get It To Go, the record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the firm is not located in an area with significantly limited access to food and thus, does not qualify for SNAP authorization under this provision. After reviewing the agency's record, this review agrees that authorization under this provision is not appropriate.

CONCLUSION

It is the finding of this review that the Appellant firm does not meet program eligibility requirements under Criterion A or B as outlined in regulations at 7 CFR § 278.1(b)(1). Additionally, the contentions presented by the Appellant are not sufficient to show that the withdrawal action should be reversed. Accordingly, the determination by the Retailer Operations Division to withdraw the SNAP authorization of Get It To Go is sustained.

Pursuant to 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from the date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the authorization withdrawal of Get It To Go shall become effective 30 days after receipt of this decision.

RIGHTS AND REMEDIES

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

JON YORGASON
Administrative Review Officer

January 3, 2023