

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

H & A's Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0232326

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 withdraw the authorization of H & A's Market ("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 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, when it withdrew the authorization of H & A's Market 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, H & A's Market, was initially authorized to participate as a retailer in SNAP on May 18, 2015. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization process to determine whether the firm still meets eligibility requirements.

On November 7, 2019, Appellant submitted the required reauthorization application, FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*. On this

document, Appellant reported that around 35 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 all four staple food categories, with a minimum depth of stock of three stocking units for each variety. As part of the firm's reauthorization process, an onsite store visit was conducted by an FNS contractor on December 23, 2019, to verify the firm's reported staple food stock.

On May 28, 2020, the Retailer Operations Division sent the Appellant a proof of inventory request letter which stated that the firm was lacking in the [product] staple foods category on the day of the store visit and gave the firm an opportunity to prove, through invoices and receipts, that it normally carries the minimum number of varieties and stocking units in the dairy category. The letter stated that the invoices and receipts must be dated no more than 21 calendar days prior to the date of the store visit, and may not be dated after the visit.

According to agency records, the Appellant submitted seventeen inventory purchase receipts in response to this request. Three of these were dated outside of the time period requested, while the date was cut off of one and could not be discerned. Of the thirteen remaining invoices, eleven invoices showed the purchase of dairy products, but not in the varieties and/or quantities needed to meet eligibility requirements.

After reviewing the store visit report and photographs, and re-evaluating Appellant's reauthorization application, the Retailer Operations Division determined that the firm was ineligible 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 June 29, 2020, the Retailer Operations Division informed Appellant that its SNAP authorization was being withdrawn for a period of six months pursuant to regulation, at 7 CFR § 278.1(k)(2). The withdrawal letter stated Appellant failed to meet the requirements of 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 the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its total 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 July 6, 2020, Appellant, through counsel, requested an administrative review of the withdrawal determination. The request was granted and the withdrawal has been held in abeyance pending completion of this review. On July 27, 2020, Appellant requested information under the Freedom of Information Act (FOIA). This administrative review has been held in abeyance pending the processing of the FOIA request. On November 9, 2022, the FOIA Office responded to the FOIA request. Appellant did not submit any information after receiving the FOIA response. However, Appellant had sent supplemental information on August 4, 2020, which is being considered in this administrative review.

STANDARD OF REVIEW

In an appeal of an adverse action, such as the withdrawal 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 shall 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 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:

* 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>.

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.]*

* 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>.

*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, through counsel, made the following summarized contentions for administrative review, in relevant part:

- This withdrawal is arbitrary and capricious as it did not account for the extenuating circumstances impacting the store at the time of the store visit. Specifically, the site visit occurred two days prior to Christmas and the store inventory was depleted due to high demand around the holidays. Thanksgiving had fallen on the latest possible date in 2019, and so staple foods were further diminished.

* As currently implemented. See SNAP Retailer Policy 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>.

- Appellant had at least partially replenished its inventory on December 1, 2019, but the Retailer Operations Division was unable to use the receipt showing this as it was dated one day before the time period of receipts requested. This receipt would have demonstrated eligibility. Given the timing of the store visit, this receipt should have been considered.
- Some degree of flexibility, rather than strict application of the regulation, is appropriate in this case.
- If the receipt is not considered, withdrawing Appellant would be arbitrary and capricious and forces Appellant to endure unfair punishment and a miscarriage of justice.
- Appellant's business partner was incarcerated and Appellant had to figure out how to run the business on his own. He has made some mistakes along the way but is committed to remaining SNAP-authorized and a valuable and contributing member of our community.
- Appellant is an immigrant in the process of obtaining U.S. citizenship and trying to survive in our capitalist economy.

Appellant did not submit any additional evidence in support of these contentions on administrative review.

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 withdrawn for a period of six months.

Criterion A Eligibility

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 dairy products staple food category on the day of the store visit to meet Criterion A eligibility requirements. When the Retailer Operations Division withdrew the Appellant firm, it found that

the firm had adequate stocking units of two dairy product varieties: milk and cheese. The firm did not have a third variety of dairy products. Appellant was three stocking units short of meeting Criterion A eligibility requirements.

On May 28, 2020, the Retailer Operations Division had requested inventory purchase invoices and receipts for a 21-day period in order to further assess store eligibility under Criterion A. The request letter explained that to demonstrate sufficient inventory at the time of the store visit, inventory purchase receipts must be dated no more than 21 calendar days prior to the date of the store visit, and may not be dated on, or after, the visit.

Of the 17 inventory purchase receipts submitted by Appellant, three were dated outside of the required timeframe, while one did not have a visible date. Accordingly, these four receipts are not considered in determining eligibility. Eleven of the remaining 13 receipts included the purchase of dairy products. All of these showed purchases of milk, which Appellant had already been credited for. One inventory purchase receipt also included **one unit** of sour cream and **one unit** of yogurt. Although it appears the Retailer Operations Division did not account for these two units, Appellant still fails to meet eligibility requirements even if they are counted as Appellant needed **three units** of one other variety of dairy products. Accordingly, none of the receipts submitted established that the store had the necessary inventory of dairy products on the date of the store visit. Appellant did not submit any additional evidence during administrative review that would demonstrate that Appellant had sufficient inventory to meet eligibility requirements on the date of the store visit.

Appellant contends that there were extenuating circumstances impacting the store at the time of the store visit due to the holidays and that under these circumstances, one of the submitted inventory purchase receipts, dated one day outside the specified 21-day time frame should be considered as it would make the store eligible under Criterion A. Appellant argues flexibility, rather than strict application of the regulations, to be appropriate in this case.

With regard to these contentions, extenuating circumstances may have contributed to the amount of staple food inventory available at the store on the day of the store visit. However, SNAP regulations require retailers to meet inventory requirements on a continuous basis and do not provide exceptions for extenuating circumstances.

The flexibility offered to stores that are close to meeting SNAP eligibility requirements is explicitly outlined in SNAP regulations, which provide that FNS may request receipts or invoices dated “up to 21 calendar days prior to the date of the store visit.” This review does not have discretion to expand upon this regulatory flexibility. Any invoices dated within the specified regulatory time period have been considered in this review and Appellant remains short of meeting inventory requirements. Therefore, Appellant’s contentions regarding extenuating circumstances do not provide a valid basis for reversing the Retailer Operations Division’s withdrawal determination.

This review agrees with the Retailer Operations Division's assessment that Appellant did not meet inventory requirements 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. This was based on the SNAP retailer application, in which Appellant reported that only about 35 percent of the store's gross retail sales were in staple food items. To note, the evidence submitted by Appellant did not provide any information that would demonstrate the percentage of staple foods contained in the store's gross retail sales.

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.

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 withdraw the SNAP authorization of H & A's Market, 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 withdrawal 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 withdrawal. In

accordance with the Food and Nutrition Act of 2008 and SNAP regulations, the withdrawal of H & A's Market shall become effective 30 days after receipt of this decision.

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

March 28, 2023