

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

**Healthsmart Inc.,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0254102**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds there is insufficient evidence to support the determination by the Retailer Operations Division (hereinafter Retailer Operations) to withdraw the authorization of Healthsmart Inc. (hereinafter Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP). Accordingly, Retailer Operations' determination is **reversed**.

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it withdrew Appellant's authorization to participate as a SNAP retail food store.

**AUTHORITY**

7 U.S.C. § 2023 and implementing regulations at 7 CFR § 279.1 provide that a food retailer 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 was initially authorized to participate as a SNAP retail food store on June 16, 2017. 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.

The record shows that on October 28, 2021, Appellant submitted a reauthorization application online. As part of Appellant's reauthorization process, an onsite store visit was conducted by an FNS contractor on March 7, 2022.

After reviewing the store visit report and photographs, and re-evaluating Appellant's reauthorization application, Retailer Operations determined that Appellant was ineligible for SNAP participation under either Criterion A or Criterion B, as set forth in 7 CFR § 278.1(b)(1).

In a letter dated April 11, 2022, Retailer Operations informed Appellant that its SNAP authorization was being withdrawn for a period of 6 months pursuant to 7 CFR § 278.1(k)(2). The withdrawal letter stated that 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 two of the required staple food categories – 1) dairy products and 2) meat, poultry, or fish. Also, Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50% of its total gross retail sales. The letter also indicated that Retailer Operations considered Appellant's eligibility under the Need for Access Provision at § 278.1(b)(6) of the SNAP Regulations, but determined, Appellant did not qualify for SNAP authorization under this provision.

In an email sent on April 19, 2022, Appellant appealed Retailer Operations' decision and requested an administrative review of the withdrawal determination. FNS granted Appellant's request for administrative review by letter dated April 26, 2022, and implementation of the withdrawal has been held in abeyance pending completion of this review. On May 16, 2022, Appellant submitted additional evidence in support of its case. The evidence included receipts for dairy products and meat, poultry, or fish purchased within 21 days prior to the store visit.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. This means 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 contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under 7 CFR Part 278. In particular, § 278.1(k)(2) and § 278.1(l)(1) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

### **7 CFR § 271.2 Definitions**

*Retail food store*, in part, is 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**), or has more than 50% of its total gross retail sales in staple foods (**Criterion B**) 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.

***Staple food***, in part, is 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.

**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.**

**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.**

**7 CFR § 278.1(b)(1)** states, in part:

- (i) 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

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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>.

categories of staple foods including perishable foods in at least [two]\* of the categories (Criterion A); or have more than 50% of the total gross retail sales of the establishment in staple foods (Criterion B).

(ii) 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.]

(iii) In order to qualify under [Criterion B] firms must have more than 50% 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.

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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>.

**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 as described in paragraph (a) of this section.

**7 CFR § 278.1(k)(2)** states, in part:

FNS shall deny the application of any firm if it determines that 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 6 months from the effective date of the denial.

**7 CFR § 278.1(l)(1)(iii)** 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.

### **ANALYSIS AND FINDINGS**

A review of the evidence does not support Retailer Operations' determination in this case. Accordingly, it is unnecessary to address 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 Appellant and Retailer Operations. In addition, this administrative review decision does not establish policy or supersede Federal law or regulations.

### **CONCLUSION**

Based on the discussion above, the determination by Retailer Operations to withdraw Appellant's SNAP authorization as a retail food store is reversed. The reauthorization application must be approved if Appellant is otherwise eligible for Program authorization under all other applicable provisions and requirements for Program participation.

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.

KIM DAMERON  
ADMINISTRATIVE REVIEW OFFICER

November 10, 2022