

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

Kota Korner,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0254494

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 Kota Korner (“Appellant”) to participate as a retailer in the Supplemental Nutrition Assistance Program (SNAP).

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 Kota Korner 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, Kota Korner, was initially authorized to participate as a retailer in SNAP on July 20, 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.

On January 22, 2022, Appellant submitted the required reauthorization application, FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*. On this document, Appellant reported that around 25 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 each of the 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 March 23, 2022, to verify the firm's reported staple food stock.

On April 4, 2022, the Retailer Operations Division sent Appellant a request that the store submit any purchase invoices or receipts documenting that the store normally carried sufficient stocking units of three varieties of dairy products. 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. Appellant submitted one inventory purchase receipt intended to show that it normally carries the minimum number of varieties and stocking units of foods required for program eligibility. That receipt was dated outside of the requested timeframe. Based on the store visit and the inventory purchase receipt, the store did not demonstrate having three stocking units of a third variety of dairy products and therefore was short of meeting eligibility requirements.

After reviewing the store visit report and photographs, and re-evaluating Appellant's reauthorization application and the inventory purchase receipt submitted, the Retailer Operations Division determined that the firm was deficient in the dairy products staple food category and therefore 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 April 14, 2022, 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.

In an April 22, 2022, email, Appellant requested an administrative review of the withdrawal determination. Although the request was granted, Appellant's SNAP authorization was inadvertently withdrawn. Appellant's authorization was subsequently reinstated and withdrawal is being held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of an 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 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

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

* 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>.

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:

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

* 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>.

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*

* 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>.

*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 made the following summarized contentions for administrative review, and in subsequent correspondence submitted on April 28, 2022, and June 14, 2022, in relevant part:

- Appellant requests reconsideration of the SNAP authorization withdrawal determination.
- Appellant submitted additional inventory purchase receipts dated within the correct timeframe, including one from its cheese supplier, Farner-Bocken.
- Appellant had inadvertently missed the requested timeframe on its earlier receipt submission.

* 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>.

- After receiving their monthly SNAP allotment, customers tend to seek out bigger grocery stores for their larger purchases. Customers visit Appellant for forgotten items or last-minute, bad weather, or short trips.
- Appellant keeps smaller quantities in stock and does not purchase items in bulk to avoid short expiration dates on items such as bread, buns, and eggs.
- The community around the store is underprivileged and low-income. Withdrawal of Appellant's SNAP authorization creates a hardship for the community. Customers are forced to travel further to obtain food items.

In support of these contentions, Appellant submitted eight inventory purchase receipts and invoices.

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 Appellant's firm, it found that the firm had adequate stocking units of only two dairy product varieties: milk and cheese. The store did not offer a third variety of dairy products. Appellant was three stocking units short of meeting Criterion A eligibility requirements. To show it had a sufficient inventory of dairy products at the time of the store visit, Appellant submitted one inventory purchase receipt to the Retailer Operations Division and eight additional inventory purchase receipts with the administrative review request.

To demonstrate inventory at the time of the store visit, inventory purchase receipts and invoices 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 nine inventory purchase receipts and invoices submitted by Appellant, four were dated outside this timeframe and cannot be considered. The remaining five inventory purchase receipts and invoices dated within the 21-day timeframe showed the purchase of milk and cheese but no other varieties of dairy. Accordingly, Appellant remains three stocking units short of meeting inventory requirements in the dairy products staple food category.

Appellant contends customers use the store for last-minute trips or forgotten items rather than as a primary grocery store, and its business model is to maintain smaller quantities of stocking items to avoid expired products. This review finds that none of these contentions provide a valid basis to reverse the agency's withdrawal determination. Available evidence shows Appellant was deficient in staple foods at the time of the store visit. 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.

This review agrees with the Retailer Operations Division's assessment of Appellant's inventory at the time of the store visit. Based on the record, it appears the store has failed to meet Criterion A eligibility requirements continuously. Accordingly, the Retailer Operations Division correctly determined that Appellant is ineligible 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 25 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, this review finds that the Retailer Operations Division properly determined that Appellant was ineligible under Criterion B.

Hardship to SNAP Households/Need for Access

Appellant argues a SNAP authorization withdrawal would impose a hardship on the surrounding community, forcing customers to travel further to obtain food items.

With regard to this contention, it is recognized that some degree of inconvenience to SNAP recipients is possible whenever a retail food store's SNAP application is withdrawn, and households are forced to spend their benefits elsewhere. To address such situations, 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 Kota Korner, 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 Kota Korner, 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.

In accordance with the Food and Nutrition Act of 2008 and SNAP regulations, the withdrawal of Kota Korner shall become effective 30 days after receipt of this decision. However, because Appellant has not conducted SNAP transactions since April 2022, the six-month withdrawal period has been served. A new retailer application for SNAP authorization may be submitted at any time.

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.

AMIE CHURCHILL
ADMINISTRATIVE REVIEW OFFICER

January 23, 2023