

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

NA Chevron,

Appellant,

v.

Retailer Operations Division

Respondent.

Case Number: C0248867

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of NA Chevron (“Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(l)(1)(iii), in its administration of the SNAP when it withdrew Appellant’s authorization to participate as a retailer in SNAP in a letter dated July 28, 2021.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 CHRONOLOGY

In a letter dated July 28, 2021, the Retailer Operations Division informed Appellant that its authorization to participate as a retailer in SNAP would be withdrawn due to the firm’s failure to meet minimum SNAP eligibility requirements. This withdrawal decision was based on observations during a store visit on June 20, 2021, as well as information provided on the firm’s reauthorization application.

The Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations. The withdrawal letter stated

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 each of the four staple food categories. Also, Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its gross retail sales. The letter stated that the Retailer Operations Division considered Appellant's eligibility under the need for access provision at Section 278.1(b)(6) of the SNAP regulations, but Appellant did not qualify for SNAP authorization under this provision.

As the firm failed to meet either eligibility criterion for approval, Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in 7 CFR § 278.1(k)(2).

On August 9, 2021, Appellant appealed the Retailer Operations Division determination and requested an administrative review of this action. The appeal request was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

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 implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(l)(1) establishes the authority upon which the authorization of any firm to participate in SNAP may be withdrawn if it fails to meet established eligibility requirements.

7 CFR § 278.1(b)(1)(i) relays specific program requirements for retail food store participation, which reads, in part:

An establishment . . . shall . . . effectuate the purposes of the program if it . . . 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 [two¹] 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 § 271.2 defines staple food, in part, as:

¹ Based on the current implementation of the regulations.

Those food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products.

7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis as offering 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 qualifying staple variety on any given day of operation. It also provides that documentation, such as invoices and receipts, may establish eligibility if they 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.

7 CFR § 278.1(b)(1)(ii)(C) of the SNAP regulations states that in order to qualify under Criterion A, a firm shall:

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(l)(1) reads, in part:

FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons [t]he 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 part:

FNS shall deny the application of any firm if it determines that [t]he 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 . . . for a minimum period of six months from the effective date of the denial.

* 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>.

APPELLANT'S CONTENTIONS

Appellant's contentions regarding this matter are summarized as follows:

- At the time of the store visit, the store was short a few items because the foot traffic is lower on weekends and use the slow time to check inventory and discard expired items to await new products on Monday or Tuesday. The store now has all the required items needed to be authorized.
- The store is necessary to remain open due to the location and the high volume of SNAP participants in the area that need access to stock that is provided, such as milk and eggs.
- Appellant has requested a new store visit.

In support of its contentions, Appellant submitted eight inventory purchase receipts and ten undated photographs depicting store inventory.

In reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

After reviewing the record, as well as evaluating the contentions and evidence 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. The remainder of this review will address Appellant's contentions in this matter.

Appellant contends that the food necessary to meet Criterion A eligibility was not available at the time of the store visit. Appellant has indicated that they use weekends to check inventory and discard expired foods, and that currently the store has a variety of food in sufficient quantities on a continuous basis. Extenuating circumstances certainly may have contributed to the amount and composition of staple food inventory observed at the firm on the day of the store visit. Nevertheless, no provision in SNAP regulations exists that allows these conditions to establish a valid basis for reversing a withdrawal determination. This review is limited to consideration of the circumstances at the time the Retailer Operations Division decision was made. It is not within this review's scope to consider actions Appellant may have taken subsequent to the agency's determination to comply with requirements for SNAP authorization, including stocking the store sufficiently or increasing staple food sales to meet SNAP-authorization criteria.

As noted earlier, Appellant provided documentation as part of its request for review in an effort to show that the firm purchased sufficient food to meet eligibility criteria. Appellant provided eight invoices and ten photos to verify stock. However, to demonstrate 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 eight receipts, four

were dated after the date of the store visit, and thus, cannot be considered by this review. Three receipts were dated within the appropriate 21-day period. Furthermore the three receipts submitted within the 21-day period only two items of staple foods can be confirmed. Of the ten photos submitted by Appellant they were undated, and therefore cannot be considered a valid representation of store conditions at the time of the store visit.

As to the Appellant's request for a new store inspection, such a request cannot be granted. Unannounced store visits are conducted with the intent of discovering inventory conditions at the store on any given day of operation. A re-inspection after a determination of ineligibility could result in artificially-inflated inventory levels.

A review of the store visit documentation illustrates that on the day of the visit the store was deficient in the dairy products category and the meat, poultry or fish category. Therefore, the Retailer Operations Division correctly concluded Appellant did not meet Criterion A because the store did not offer "qualifying staple foods on a continuous basis."

After reviewing Appellant's documentation this review finds that the firm remains ineligible for SNAP participation under Criterion A. An evaluation of the percentages of staple food sales reported on Appellant's retailer application, as well as the photographs and store inventory provided from the store visit, indicate that more than 50 percent of the Appellant's total sales were not from the sale of staple foods. Accordingly, the Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B.

Need for Access / Hardship to SNAP Households

Appellant argues that NA Chevron is necessary to remain open due to the location and the high volume of SNAP participants in the area. This contention implies that a withdrawal of the firm's authorization will cause hardship to SNAP households.

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 NA Chevron, the record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the firm 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

Based on a preponderance of the evidence, it is the finding of this review that Appellant firm, NA Chevron, 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 and evidence presented by Appellant are not sufficient to show that the withdrawal decision should be reversed. Accordingly, the determination by the Retailer Operations Division to withdraw the authorization of NA Chevron to participate as a retailer in SNAP is sustained.

According to 7 CFR § 278.1(l)(1)(iii) and (k)(2) of the SNAP regulations, Appellant is ineligible to submit a new application for the subject store for a minimum period of six months from the effective date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery 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.

JODI GONZALEZ
ADMINISTRATIVE REVIEW OFFICER

November 10, 2022