

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

**Karnival Foods,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0247999**

**FINAL AGENCY DECISION**

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the Office of Retailer Operations and Compliance, (Retailer Operations) properly denied the application of Carnival Foods Mart (Appellant), to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether Retailer Operations took action consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it denied the authorization of Appellant to participate as a SNAP retail food store.

**AUTHORITY**

7 U.S.C. § 2023, and the 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**

The owner completed an application for SNAP authorization. FNS-contracted personnel conducted an onsite store visit on June 4, 2021, to ascertain Appellant's eligibility to participate in the SNAP. By letter dated June 15, 2021, the application of Appellant to participate as a retail food store in the SNAP was denied because the firm did not meet the eligibility criteria for stores as required by the regulations at 7 CFR § 278.1(b)(1). Retailer Operations' letter informed the owner that Appellant failed to meet Criterion A because it did not offer for sale a variety of

staple foods in sufficient stocking units on a continuous basis in the any of the staple food categories or perishable foods as required.

The letter also states that the firm failed to meet Criterion B. A business must have more than 50% of its total gross retail sales in staple foods to be eligible for authorization under Criterion B. Appellant's eligibility under the need for access provision was also reviewed by Retailer Operations. Appellant was found not to meet the established criteria.

An unsigned and undated letter requested administrative review and was postmarked June 24, 2021. The appeal was granted by letter dated August 11, 2021.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means the Appellant has the burden of providing credible, 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 not true.

### **CONTROLLING LAW AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Section 278.1(b)(1) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 states: "Staple food, means those 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."

7 CFR § 271.2 states: "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: “(A) An establishment or house-to-house trade route shall normally be considered to have food business of a nature and extent that 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 as defined in § 271.2 of this chapter, including perishable foods in at least three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).”

7 CFR § 278.1(b)(1)(ii) provides that for a retail store to qualify for authorization under Criterion A, a firm 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 seven 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 three 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.” 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.

7 CFR § 278.1(b)(1)(ii) states: “(B) Offer for sale perishable staple food items in at least three 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.”

7 CFR § 278.1(b)(1)(ii) requires that stores: (C) Offer a variety of staple foods which means different types of foods within each staple food category 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) provides that for firms to qualify for authorization 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. However, a fee directly connected to the processing of staple foods, such as raw meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B.”

7 CFR § 278.1 (b)(1)(iv) states: “Ineligible firms: Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization and authorized firms will be withdrawn from program participation. Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross sales in foods cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.”

7 CFR § 278.1(b)(6) deals with the 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.”

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 six months from the effective date of the denial.”

### **APPELLANT’S CONTENTIONS**

All contentions as presented have been considered in rendering this decision whether listed or not.

- I've been through a very rigorous and draining process trying to make our store ebt/snap compliant. I started our request back in march and still don't see any light at the end of this.
- The opening had to be pushed back multiple times due to covid restrictions. We are located in a urban community and our plan was to bring something new and vibrant that the community is lacking.
- We noticed certain foods items are not easily accessible. Since we had to adjust to face so many NEW norms after covid our plans were constantly pushed back and changed due to restrictions.
- We purchased ebt/snap pos systems, refrigeration equipment and shelving to stock items not easily accessible.
- Our merchant processor (go EBT) informed me there is over 77,000 snap/ebt recipients in my area. We understand each criterion A & B. Please try understand we are a new entity that barely survived covid. Covid has shown us all, how we all must adjust and adapt. The bulk of our patrons receive ebt/snap. They will be less likely to shop at Karnival Foods if we are unable to accept ebt/snap due to majority of households main income being ebt/snap.

- Unfortunately for us we can't stock the shelves with products again because no will purchase anything if they can't use their benefits. Due to no prior notice of inspection to stock the shelves and have these items spoil will be very wasteful and not financially feasible for a business that did not receive any PPP loans.
- We purchased over \$6,000 worth of equipment [sic]out of pocket already and have not been able to properly utilize it due to ebt/snap approval. If we are approved or given a date on when the inspector will come out we have no problem fully stocking everything. Our main issue is our customers simply will not shop somewhere they cant use their benefits. We feel as though we also qualify under the need for access. Most of the stores in the community do not serve items, that we would like to carry. 100% juice, fruits, fresh vegetables, fresh bread, soy milk, oat milk there's a plethora of items we look forward to introducing to the community that's not being offered.
- We were informed 50% of our sales were not from snap items. I like to reiterate again over 77,000 people in our community receive snap benefits, they will not shop somewhere where there unable to use their benefits. People in this community simply dont have it . Unless we are approved we will never have 50% of snap benefit sales. It has been extemely disheartenting to spend so much time with this process to be denied and have to type out this appeal. I'm trying to give the community access to items not easliy accessible.
- Their primary sources of revenue is Gas, Tabacco, Alcohol and lottery tickets but they have a tiny spaces for your requirements and are approved. Theses gas stations don't reside in places where the bulk of receipents whom recevie ebt/snap reside. Yet a business like mines that's actually in the comminuty trying to sell something more than processed foods and high fruitose beverages is denied. We are able to stock the shelves, that's not an issue, we just need someone to come out and approve us right away so the Fresh proudcts we want serve our patrons don't persish and we end up losing more money on top of what covid has already cost us. Covid has forced us to adjust, I understand your criteria but every situation is unquie. I understood due to Covid processing our application was going take longer than usual.

## **ANALYSIS AND FINDINGS**

This review is to validate or to invalidate the determination by Retailer Operations; as such it is limited to consideration of the relevant facts at the time of the decision. The authorization of a store to participate in the SNAP must be in accord with the Act and the regulations, as amended; those requirements of law cannot be waived. The onsite review of Appellant's food inventory revealed insufficient varieties and stocking units in the meat, poultry or fish, bread or cereals, vegetables or fruits, dairy product staple foods categories, and did not meet the perishable foods requirement, for one staple food category.

The SNAP regulations at Section 278.1(b)(1)(ii)(A) under Criterion A, as currently implemented, require that a firm shall offer for sale and normally display in a public area, 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, and at least one variety of perishable foods in at least three staple food categories. The record supports that Appellant did not have sufficient varieties and/or stocking units of products in

multiple staple food categories in a public area, and the perishable foods requirement was not met. As such, Appellant did not meet Criterion A when the determination was rendered.

Based on Appellant's application, Retailer Operations determined that the store was also ineligible for authorization under Criterion B, per 7 CFR § 278.1 (b)(1)(iii). The owner estimated that Appellant's staple food sales were 75% of its total retail sales. This percentage is not supported by the firm photos. The photos indicate this is an ice cream store or restaurant. Ice cream stores selling solely ice cream per the regulations are not eligible for authorization. Ice cream is not a staple food. Also, restaurants as defined by the regulations, are not eligible for authorization. No evidence was provided by the owner that Appellant met Criterion B at the time of the denial.

Retailer Operations properly accessed the firm for need for access as per the regulations at 7 CFR § 278.1(b)(6), and found that it did not qualify. SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application. The preponderance of the evidence supports that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the denial determination was rendered. More importantly it appears Appellant may be an ineligible firm or a restaurant. Restaurants, firms that have more than 50% of their total gross sales in foods cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

## **CONCLUSION**

Based on a review of the evidence, the determination by Retailer Operations to deny the authorization of Appellant to participate as a SNAP retailer is sustained. The firm did not meet the requirements of a retail food store as set forth in Section 278.1(b)(1) of the SNAP regulations. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived.

In accordance with 7 CFR § 278.1(k)(2), the owner will not be eligible to reapply for participation as a retail food store in the SNAP for a minimum period of six months from the effective date of the denial. The effective date is thirty (30) days after the date of delivery of this decision. General questions regarding the application process can be handled by contacting 877-823-4369.

## **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008, and to the regulations at 7 CFR § 279.7, with respect to the applicable right to judicial review of this decision. Please note that 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 Appellant's owner resides or is engaged in business, or in any court of record of the State having competent

jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of delivery of this Final Agency 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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

September 3, 2021