

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

N & A Fuel Space Age,

Appellant,

v.

**Office of Retailer Operations
and Compliance,**

Respondent.

Case Number: C0249177

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 withdrew the authorization of N & A Fuel Space Age (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 withdrew 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

FNS regulations require that stores be reauthorized on a set schedule. A SNAP reauthorization application was submitted. FNS-contracted personnel conducted an onsite store visit on August 17, 2021, to ascertain Appellant's continued eligibility to participate in the SNAP. Additional information was requested. The owner responded but the information was not adequate to support that Appellant met Criterion A.

By letter dated September 13, 2021, the authorization of Appellant to participate as a retail food store in the SNAP was withdrawn because the firm did not meet the eligibility criteria for stores

as enunciated in the regulations at 7 CFR § 278.1(b)(1). Retailer Operations' letter informed the owner that Appellant failed to meet Criterion A and Criterion B. Appellant's eligibility under the need for access provision was also reviewed. Retailer Operations found that Appellant did not to meet the established criteria.

By undated letter with an unreadable postmark, the owner requested administrative review. The review was granted by letter dated October 6, 2021. The owner sent three emails, one was a duplicate, each with photos, dated October 8, 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 Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended, and 7 U.S.C. § 2018. The SNAP regulations at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008.

7 CFR § 271.2 states that Retail Food Store means: "An establishment 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 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, including at least one variety of perishable foods in at least three 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 accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in: Food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under 278.1(b)(1) of this chapter. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores." 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)(i) imparts program requirements for retail food store participation, which 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 § 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.”

7 CFR § 278.1(b)(1)(ii) provides that in order for a retail store to qualify for authorization 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 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)(iii) provides that in order 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)(6) regarding access states: “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(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(l)(1) Withdrawing authorization reads: “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 specifications 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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section.”

7 CFR § 278.1(k)(2) requires that firms withdrawn for failure to meet program eligibility criteria “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 withdrawal.

APPELLANT’S CONTENTIONS

All contentions, as presented, and submissions have been considered in making this decision, whether listed or not.

- I received the withdrawal letter for not having at least 3 variety dairy product. In store we carry Milk, ice cream, butter, cheese, cream cheese, yogurt. When the inspector come down, we were doing store organizing so our merchandise is kind of everywhere unfortunately we were. out couple. of dairy products like Cream cheese, butter, Yogurt. At the same time lots of distributor having issue-delivery the product as you know during pandemic. We did extra mile to shop at other retail bring back to our store EBT eligible product, but we didn't keep the receipt. We took over the store for 3 months and doing our best to keep up servicing our neighborhood, we are doing our best to make our customer convenience.
- The owner who own the store before were really not a store because it really dirty, and when we take over, we are doing our best to clean and make the store affordable for everyone around our neighborhood. Because the store is in a neighborhood, I really want to ask for a chance to do this right, whatever we need to qualify EBT Programs, our neighbor loves us as the new owner, If you want, I can get our EBT customers to signs a letter to show their interest with the new management.
- Once again, please let us have a second chance to give EBT services to our neighbors. Also please let us know if you are interest in looking at before and after our store clean, please let us get a second chance, we will make sure the fulfil dairy Product that we are missing, and also fulfil other Staple Foods the Neighborhood need.
- Thank you so much for reconsidered, we making the store better for the neighborhood than before the last owner, people love us and support us and since there not lots store accept ebt around us people alway come by and say hi to us. So we working our best the get ebt for our

neighbor. Thank you so much and pls let us have a chance to be a part of the ebt program
thank you and appreciated

- Before really bad and no one would appreciate the store, and when we take over, we make it right for the neighbor and majority of them are giving good feed back for us

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 dairy products staple food category. The SNAP regulations at Section 278.1(b)(1)(ii)(A) under Criterion A, as currently implemented, require 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 evidence supports that Appellant did not meet Criterion A at the time of the determination. The record includes some receipts provided by the owner, however these did not support that Appellant stocked the required dairy varieties and stocking units. The photos provided are of current stock, and as such as not relevant to this decision. On review, insufficient evidence was advanced to support that Appellant met Criterion A at the time the determination was rendered.

Based on Appellant's own reauthorization application, Retailer Operations determined that Appellant was also ineligible for authorization under Criterion B per 7 CFR § 278.1 (b)(1)(iii). The owner estimated the firm's retail sales from staple foods were 5% of its total retail sales. The owner provided no evidence to support that Appellant met Criterion B at the time of the withdrawal. Retailer Operations also properly reviewed the firm for need for access as per the regulations at 7 CFR § 278.1(b)(6), and found it did not qualify.

SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of reauthorization. The preponderance of evidence supports that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the withdrawal decision was made. SNAP authorization is an administrative privilege granted upon evidence of eligibility and continued compliance with the governing laws and regulations. If a firm does not conform to the applicable statutes and regulations, the same provide for the firm's removal from the SNAP.

CONCLUSION

Based on a review of the evidence, the determination by Retailer Operations to withdraw 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 when it was withdrawn. 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 (6)

months from the effective date of the withdrawal. This decision will take effect thirty (30) days after the date of delivery to the firm.

General questions regarding the SNAP application process can be handled by contacting 877-823-4369, and by consulting the USDA website.

RIGHTS AND REMEDIES

Your 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 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

October 28, 2021