

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

**3rd Ave Chevron,**

**Appellant,**

**v.**

**Case Number: C0213236**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The USDA, Food and Nutrition Service (FNS) finds that there is insufficient evidence to support the decision of the Retailer Operations Division to withdraw the authorization of 3rd Ave Chevron to participate as a retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the decision of the Retailer Operations Division is **reversed**.

**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 3rd Ave Chevron.

**AUTHORITY**

7 U.S.C. § 2023 and its 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 CHRONOLOGY**

As part of a routine reauthorization process, the Appellant submitted an online reauthorization form FNS-252-R, entitled “Supplemental Nutrition Assistance Program Reauthorization Application for Stores” on May 13, 2018. The Appellant reported that it had **less than** the minimum three (3) varieties of staple food in each of the four (4) staple food categories. The Appellant also reported that **less than** one (1) percent of the firm’s gross retail sales were in staple foods and that an additional two (2) percent were in “accessory” food items such as snack

foods, candy, ice cream, potato chips, carbonated and non-carbonated beverages, condiments and spices. Accessory foods are eligible for purchase with SNAP benefits but are not used in calculating store eligibility. The Appellant reported that 97 percent of its gross retail sales were in non-food items (primarily gasoline, alcohol and tobacco sales). Thus, on the face of the reauthorization application the store appeared to be ineligible for SNAP reauthorization.

An FNS contractor conducted a store visit on May 22, 2018 to document the firm's food inventory for the purpose of determining the continued eligibility of 3rd Ave Chevron to participate in the SNAP. The store visit report indicated that the store met the minimum requirements in three (3) staple food categories; however, the store visit report recorded that the store carried **only a single variety** of staple food in the dairy category that met the minimum stocking requirements (20+ stocking units of milk) and one variety that fell below the minimum requirements (2 stocking units of cheese).

The Retailer Operations Division sent a letter to the Appellant on September 6, 2018 requesting that the store submit any purchase invoices or receipts documenting that the store normally carried at least three (3) varieties of dairy staple food in sufficient stocking units. The letter stated that the invoices/receipts had to be dated no more than 21 days prior to the date of the store visit and not after the store visit. In response, the Appellant submitted copies of 13 invoices/receipts some of which were outside the timeframe described above. The Retailer Operations Division determined that these invoices did not document three (3) varieties of dairy staple foods in sufficient stocking units. Therefore, the Retailer Operations Division determined that the store was deficient in the dairy category.

As a result, the Retailer Operations Division informed the Appellant by letter dated September 26, 2018 that the authorization of 3rd Ave Chevron to participate in the SNAP was withdrawn because the firm did not meet the eligibility criteria for stores as mandated by Federal regulations at 7 CFR § 278.1(b)(1) as it was insufficiently stocked with dairy staple foods. The store also failed to meet Criterion B because the store's staple food sales did not comprise more than 50 percent of its annual gross retail sales. Lastly, the Retailer Operations Division determined that the firm did not qualify under the need for access provision of 7 CFR § 278.1(b)(6).

In a letter postmarked October 4, 2018, the Appellant requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request for review was granted and implementation of the withdrawal was held in abeyance pending completion of this review.

## STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

## CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(l) provides the authority upon which FNS shall withdraw the SNAP authorization of any firm if it fails to maintain established eligibility criteria.

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:

- (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 § 271.2 defines a retail food store, in part, as:

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) 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, in part, as:

... 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

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\* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 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>.

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)(A) reads, 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 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

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(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 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(k)(2) states, in part:

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 § 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 ....

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## APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The eligibility determination made by FNS is inaccurate because the firm always sell a variety of foods on a continuous basis in each of four staple food categories under Criterion A.
- To provide support for its claim, the Appellant submits receipts from the month of May 2018 as follows:
  - Receipts from BTC Wholesale Distribution dated 05/02/2018 and 05/16/2018 which confirms purchases of milk, fruits and perishable food.
  - Receipt from Halsey Food Service which dated 05/22/2018 containing different meat purchases.
  - Receipt from Walmart dated 05/06/2018 which confirms purchases of ham and butter quarts.
  - Receipt from BAMA Tomato Co., Inc. dated 05/27/2018 confirms purchase of containers of eggs.
  - Receipt from Walmart dated 05/27/2018 confirms purchases of cereals and meat.
  - Receipts from Flowers Baking of Birmingham, LLC dated 05/04/2018 and 05/25/2018 confirming purchased of Bread.

The preceding may represent only a brief summary of the Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

## ANALYSIS AND FINDINGS

### Criterion A

Under new regulations that went into effect on January 17, 2018, to meet Criterion A, a firm must carry no fewer than three (3) different varieties of staple food in each of the four (4) staple food categories with a minimum depth of three (3) stocking units for each qualifying staple variety. There also must be at least one (1) variety of perishable foods in at least two (2) staple food categories. In addition, the SNAP regulations at 7 CFR § 278.1(b)(1)(i)(A) and 7 CFR § 278.1(b)(1)(ii) require retailers to meet Criterion A eligibility requirements on a **continuous** basis.

The Retailer Operations Division determined that 3rd Ave Chevron was not eligible under Criterion A on the day of the store visit because it carried only a single variety of dairy staple food in sufficient stocking units (20+ stocking units of cheese). However, photographs taken during the store visit show that there were **five (5) stocking units of Imperial vegetable oil**

**spread** which were apparently missed by the store visit contractor and the Retailer Operations Division. Vegetable oil spread is considered by FNS to be a staple food in the dairy category. Therefore, the Imperial vegetable oil spread constitutes the **second variety of dairy staple food** in sufficient stocking units.

In response to the proof of inventory letter from the Retailer Operations Division, the Appellant provided invoices documenting the purchase of four (4) cases of 120-slice packages of cheese purchased on May 1, 2018 and May 15, 2018. These invoices were within the 21-day period prior to the date of the store visit. Therefore, these invoices document the purchase of a **third variety of dairy staple food** in sufficient stocking units.

### **CONCLUSION**

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP authorization of 3rd Ave Chevron is **reversed**. The regulations clearly state the criteria that a store must meet in order to be authorized for the SNAP and the Appellant appears to meet the requirements of Criterion A.

### **RIGHTS AND REMEDIES**

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute and unwarranted invasion of privacy.

RONALD C. GWINN  
Administrative Review Officer

February 22, 2019