

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

60 Mart,

Appellant,

v.

Case Number: C0207757

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, 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 60 Mart (hereinafter Appellant) to participate as a retail food store 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 of the Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Appellant to participate as a SNAP retail store on March 20, 2018.

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

FNS regulations require that SNAP retail stores be reauthorized on a set schedule. As part of this process, store owners must complete a reauthorization application and an

onsite visit by an FNS contractor is then conducted to determine Appellant's continued eligibility to participate as a SNAP retailer.

The record shows that Appellant applied for reauthorization on March 12, 2018. On March 16, 2018, the Appellant business was visited by an FNS contractor in an effort to determine whether or not the firm met eligibility requirements to be reauthorized in SNAP. During this visit, the contractor took photographs of the store and its inventory, spoke with store personnel, and completed a written report detailing its observations.

After reviewing Appellant's application and evaluating the store visit report and photographs, the Retailer Operations Division determined that the business did not carry a sufficient quantity or variety of staple foods to be eligible for SNAP participation under Criterion A or Criterion B. This determination was made in accordance with SNAP regulations at 7 CFR § 278.1(b)(1). According to the contractor's written record, the firm had insufficient inventory in the dairy products and in the bread or cereals staple food categories, making the business ineligible under Criterion A. The business also did not carry perishable foods in the bread or cereals and dairy products staple food categories. Additionally, both the application and the store visit report indicated that business was not eligible under Criterion B.

In a letter dated March 20, 2018, the Retailer Operations Division informed Appellant that its authorization to participate as an authorized retailer in SNAP was being withdrawn because it did not offer for sale a variety of foods in sufficient quantities on a continuous basis and was found to carry too few items in the four staple food categories. The letter also informed Appellant that it did not have more than 50 percent of its total gross retail sales in staple food sales as required for authorization under Criterion B. Additionally, the letter stated 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 the Appellant does not qualify for SNAP under this provision.

By letter dated March 28, 2018, Appellant appealed the Retailer Operations Division's decision and requested an administrative review of this determination. The appeal was granted and implementation of the withdrawal held in abeyance pending completion of this review. Subsequent correspondence emailed on May 1, 2018, was received from Appellant.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 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 § 271.2 defines staple food, in part, as: 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 . . . 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) 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 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 § 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 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]*¹ 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*

¹ 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>.

*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 for a retail store 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 nonfood merchandise, as well as services, such as rental fees, professional fees, and entertainment/sports/games income.

7 CFR § 278.1(l)(1) states: Withdrawing authorization. “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(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

The following may represent a summary of 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:

- The manager was the one who initially applied for SNAP in order to improve business and to help customers. He and the owner have decided to invest in modernization and remodeling and have already installed a new canopy and new pumps and will be improving the coffee bar, restroom, the parking lot, and a few other areas;
- The manager had to remove old coolers and coffee equipment in order to measure the area and get a better idea applying a new formula. He was not aware of the SNAP inspection at the time and knew he would face consequences requalifying. After receiving the denial letter, he put everything back into place that was there before. All the work is now complete and is hoping to get another chance to relicense;
- The renovations will be done around mid-June 2018. The business is hoping to keep licensed based on the number of items added for relicensing. Attached are photographs showing the merchandise just added to comply with SNAP; and,
- All the surrounding stores are licensed and it will affect the business to not be participating in SNAP.

Appellant submitted several undated color photographs showing store stock in support of these contentions.

ANALYSIS AND FINDINGS

With regards to Appellant's contentions listed above, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. It is not within the scope of this review to consider actions ownership may take to qualify for continued participation in the SNAP subsequent to that decision, such as stocking all the variety of staples in each of the four staple food categories in the store on a continuous basis or promising to do so if approved. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact or intended corrective actions. 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. Therefore, Appellant's contention that the store is now sufficiently stocked with necessary items does not provide any valid basis for dismissing or mitigating the adverse action imposed. Appellant stated in its request for administrative review that the firm was not fully stocked as it had been remodeling, but that it was now fully stocked as shown by several photographs of store stock just added to comply with SNAP. Because these photos do not represent conditions as they existed on the day of the store visit, they have no bearing on this review.

As noted above, in order for a firm to be eligible for SNAP participation, it must qualify under either Criterion A or Criterion B, as described in 7 CFR §

278.1(b)(1). Under Criterion A, a firm 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 food variety and at least one variety of perishable foods in at least two staple food categories. Under Criterion B, a firm must have more than 50 percent of its total gross retail sales in the sale of staple food.

A store visit was conducted by an FNS contracted reviewer on March 16, 2018. According to the contractor's written record, the firm had insufficient inventory in the dairy products and in the bread or cereals staple food categories, making the business ineligible under Criterion A. 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".

Ownership's SNAP retailer reauthorization application dated March 12, 2018, shows that staple foods amounted to less than 15 percent of gross annual sales. Appellant's estimate of 14.97 percent of sales coming from staple food sales shows that the Appellant business did not derive more than 50 percent of its projected annual sales from the sale of staple foods on the date of the store visit. Accordingly, the Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B.

The authorization of a store to participate in the SNAP must be in accord with the Act, as amended, and regulations. A full review of the store visit materials from the March 16, 2018, store visit does not indicate any material departure from the documentation as presented. A review of the store visit documentation indicates that Appellant was deficient in dairy products and in bread or grains. Therefore, Appellant does not meet Criterion A. Appellant also does not meet Criterion B because information provided on the reauthorization application and information obtained from the store visit confirm that staple food sales comprise 50 percent or less of annual gross retail sales.

Need for Access

SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether or not the Appellant firm is located in an area with significantly limited access to food when the firm fails to meet Criterion A or Criterion B as long as it meets all other eligibility requirements. This Need for Access evaluation also considers other factors, such as distance to the nearest SNAP authorized firm, transportation options, the extent of Appellant's stocking deficiencies, and whether or not the Appellant firm furthers the purposes of the program.

The record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the Appellant firm did not qualify for SNAP authorization under this provision. After a review of all available evidence

in this case, this review agrees that authorization under the Need for Access provision is not appropriate in this case.

CONCLUSION

Based on a review of all of the evidence in this matter, the determination by the Retailer Operations Division to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from the effective date of the withdrawal. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

It is recognized that some degree of economic hardship is a likely consequence whenever a store's authorization to participate as a retail food store is withdrawn. However, there is no provision in SNAP regulations for waiver of established eligibility requirements on the basis of possible economic hardship to the firm or to ownership resulting from a withdrawal of authorization. Giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been denied or withdrawn from the program in the past for similar reasons. Therefore, ownership's contentions that all the surrounding stores are licensed and it will affect the business to not be participating in SNAP do not provide any basis for reversing the Retailer Operations Division determination.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt 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.

ROBERT T. DEEGAN
Administrative Review Officer

June 12, 2018