

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

7-11 Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0223100

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is insufficient evidence to support the decision by the Retailer Operations Division to deny the application of 7-11 Mart (7-11 Mart or Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). Therefore, the determination is reversed.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b) and 7 CFR § 278.1(k), when it denied the application of the Appellant to participate as an authorized SNAP retailer.

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

In a letter dated August 22, 2019, the Retailer Operations Division informed ownership that the application of 7-11 Mart to participate as an authorized retailer in SNAP was denied because the Appellant did not meet the eligibility requirements set forth in Section 278.1(b)(1) of the SNAP regulations. Based on the August 5, 2019 FNS store visit, the Retailer Operations Division determined that 7-11 Mart failed to meet Criterion A. The Appellant did not offer for sale a variety of foods in sufficient quantities on a continuous basis because it carried too few items in the dairy products staple food category. 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 August 30, 2019, ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. In a letter postmarked October 1, 2019, ownership provided additional information in support of its request for administrative review. The appeal was granted by letter dated October 25, 2019.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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 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(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in the SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k) reads, in relevant part:

FNS shall deny the application of any firm if it determines that ... (2) 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

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 food 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 stock keeping units, or other inventory or accounting record keeping 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 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 foods 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

(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 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

APPELLANT'S CONTENTIONS

In the request for administrative review and in subsequent correspondence, the Appellant stated the following summarized contentions, in relevant part:

- The owner sent receipts to the Retailer Operations Division in response to the proof of inventory request.
- Because the store is not authorized to participate in the SNAP, the owner does not buy as much product at one time. Products are purchased as they sell.

- At the time of the store visit, the Appellant had everything in stock but it was short in butter and margarine.
- The receipts provided to the Retailer Operations Division show that the owner purchases these products and sells them.

In support of these contentions, the Appellant submitted seven (7) receipts for food purchases.

ANALYSIS AND FINDINGS

In this case, the Retailer Operations Division provided the Appellant an opportunity to provide receipts and invoices to demonstrate that it normally carried a sufficient variety of staple food items. That letter dated August 6, 2019, requested any invoices and receipts dated prior to the store visit which would document that the store normally carries at least three (3) varieties of food in the dairy products staple food category. The letter stated that the receipts would have to be dated within a 21-day period prior to the date of the store visit. In a response received by the Retailer Operations Division on August 15, 2019, the Appellant provided ten (10) purchase receipts. Of the ten receipts provided, four of the invoices were dated within the 21-day period prior to the August 5, 2019 store visit. The acceptable receipt dated July 24, 2019 shows that the Appellant purchased more than three units of margarine. Thus a preponderance of the evidence supports that the store normally carries three (3) varieties of staple foods in the dairy products staple food category. As a result, the decision of the Retailer Operations Division to deny the application of 7-11 Mart is **reversed**.

CONCLUSION

The Retailer Operations Division's decision to deny the SNAP application of 7-11 Mart is reversed. The Retailer Operations Division should continue to process the Appellant's SNAP retailer application to determine eligibility. This decision does not preclude the Retailer Operations Division from asking for additional documentation to assess if the firm currently meets the regulatory criteria to participate in the SNAP.

RIGHTS AND REMEDIES

Under the Freedom of Information Act, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

December 10, 2019