

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

**7-Eleven Frances #29767,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0222554**

**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 Retailer Operations Division (Retailer Operations) properly withdrew the authorization of 7-Eleven Frances #29767 (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. The owner completed a reauthorization application. FNS-contracted personnel conducted an onsite store visit on August 13, 2019, to ascertain Appellant's continued eligibility to participate in the SNAP. By letter dated August 21, 2019, retailer operations requested information to demonstrate adequate variety and stocking units in the dairy staple food category. The record shows that the owner provided

inventory information. Most of the invoices/receipts advanced were not dated within the required timeframe of no more than 21 calendar days prior to the date of the store visit.

By letter dated September 9, 2019, Retailer Operations withdrew the authorization of Appellant to participate as a retail food store in the SNAP 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 because it did not offer for sale a variety of staple foods in sufficient stocking units on a continuous basis in the established staple foods categories, specifically the dairy staple food category.

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. Retailer Operations also reviewed Appellant's eligibility under the need for access provision, and found that Appellant did not qualify for such.

The owner submitted a letter dated September 11, 2019, requesting administrative review and provided additional vendor invoices of products ordered for inventory. The appeal was granted by letter dated October 10, 2019. Argentum Law provided a letter dated October 30, 2019, and additional information. The law firm did not furnish a letter of representation signed by the owner, therefore it is not copied on this decision.

### **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.”

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 § 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)(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 § 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 stated, have been considered in rendering this decision whether listed or not.

- Included are copies-of invoices for Dairy Pure Whole gallon milk, Dairy Pure Whole gallon 2% milk, Dairy Pure Whole half gallon milk and Tru Moo Chocolate Quarts.
- It appears we neglected to send you invoice for the milk stocking units that we receive daily deliveries from our Central Distribution Center. These four dairy items should qualify the store to maintain the S.N.A.P. license.
- As S.N.A.P. is a very important share of our business and food offering for our neighborhood we hope this will resolve the compliance issue and not disrupt our ability to service our S.N.A.P guest.

- On October 11, 2019, the Owner and I had a telephone discussion with Ms. Morris and it was our understanding that the Store had enough stocking units of milk and cheese but was deficient in the stocking units of yogurt. Further to the telephone discussion the Owner needed to provide invoices to support at least three (3) yogurts were ordered during the 21-day period prior to the store visit (July 24<sup>th</sup> to August 13<sup>th</sup>).
- The Owner hereby submits a spreadsheet to show the total number of yogurts ordered for the Store from May 4, 2019 to October 12, 2019, together with a copy of the invoices to support the same. As shown on the spreadsheet and as supported by the invoices, the Store ordered a total of 54 yogurts over a five month period of time or averaged more than ten yogurts a month. For the Period in Question (July 24<sup>th</sup> to August 13<sup>th</sup>), we have provided invoices to show the Store ordered two yogurts and if you were to count the one yogurt ordered on July 6<sup>th</sup> there was a total of three (3) yogurts ordered.
- The Owner orders yogurt on a regular basis to keep four yogurts in stock and available for customers to purchase.
- Although there were only two yogurts ordered during the Period in Question, we have provided five months of invoices to evidence the Store was and continues to be in compliance with the SNAP regulations, including, without limitation, the requirement to carry three (3) stocking units in at least three (3) varieties of foods in the Dairy product stable foods category.
- The Owner has operated the Store for the past thirty- eight (38) years in compliance with the SNAP regulations. The Owner, however, is now in jeopardy of losing his business due to this adverse action that may cause the Store to be withdrawn from accepting SNAP benefits for the next six (6) months.
- On October 14, 2019, the Franchisor gave the Owner a Notice of Material Breach of the Franchise Agreement for the failure to be able to accept required payment methods (food stamps). If the material breach is not cured in a timely manner, the Franchisor will elect to terminate the Franchise Agreement and the Business Owner will lose the Store, which has been the source of his livelihood for the past thirty-eight (38) years. In addition to the Franchisor terminating the Franchise Agreement, the adverse action will likely cause the employees of the Business Owner to be terminated as well. Moreover, the adverse action will negatively impact the customers that depend on the Store accepting SNAP benefits.
- The Owner, for himself, his employees and his customers, hopes and prays the USDA will take into consideration his proven track record of being in compliance with the SNAP regulations over the last 38 years. Based upon the foregoing, the Owner hereby requests the USDA to not take the adverse action against the Store and allow the Store to continue to accept SNAP benefits.

## **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 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. A preponderance of the evidence supports that on the date of the store visit Appellant did not meet Criterion A.

Retailer Operations initially credited the store with having sufficient units of milk and cheese, two different dairy varieties. It should be noted that the different types of milk stated by the owner all count as one variety of dairy products, namely milk. The owner submitted invoices as requested by Retailer Operations to determine adequate varieties and stocking units to meet the eligibility requirements for reauthorization. The receipts provided by the owner still did not demonstrate that the firm had the number of stocking units required in one dairy variety. As to the yogurt variety, while the responding owner noted in writing on the invoices that the store kept four (4) on hand, the 7/31/19 invoice showed two units ordered. The other yogurt invoice for one (1) unit was dated 7/6/19, more than 21 days from the date of the store visit. As such, Retailer Operations properly did not count the July 6 invoice.

The advanced spreadsheet shows that in the entire month of July 2019, Appellant ordered three (3) units of yogurt, and zero units were ordered in August 2019. The ordering as seen in the spreadsheet from May to October does not support by a preponderance of the evidence that Appellant offered for sale on a continuous basis no fewer than three different varieties of food items in the dairy staple food category with a minimum depth of stock of three stocking units for each qualifying staple variety on any given day of operation.

Based on Appellant's own reauthorization application, Appellant's staple food sales comprise less than one percent of its gross retail sales for tax year 2017. The application shows 47% of Appellant's sales were in gasoline, and 30% were in alcohol and tobacco. Retailer Operations thus determined that Appellant was also ineligible for authorization under Criterion B per 7 CFR § 278.1 (b)(1)(iii). No evidence was provided by the owner to support that Appellant met Criterion B at the time of the withdrawal. Retailer Operations also properly accessed 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 an administrative privilege, granted upon proof of eligibility and continued proof of 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 program in accordance with the provisions detailed therein. A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds to mitigate the requirements to meet the regulatory criteria for authorization.

Ownership contends that withdrawal of Appellant's SNAP authorization will have a negative financial impact on Appellant's business. It is recognized that some degree of economic hardship is a likely consequence whenever a store is withdrawn from participation as a retail food store in SNAP. However, there is no provision in the SNAP regulations for waiver of the regulatory requirements on the basis of possible economic hardship to the firm. To allow the owner to be excused from the regulatory eligibility criteria based on purported economic

hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act, and the enforcement efforts of the USDA. Furthermore, 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 similarly withdrawn for not meeting eligibility criteria for reauthorization. Therefore, the contention that the firm may incur franchise issues based on the withdrawal of its SNAP authorization does not provide a valid basis to mitigate said withdrawal as required by the regulations cited eligibility criteria.

SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application and reauthorization. The evidence supports that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the withdrawal decision was rendered. The owner has not offered a preponderance of evidence to support that Appellant met the eligibility criteria at the time the determination was rendered.

### **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 does 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 withdrawal. This decision will take effect 30 days after the date of delivery to the firm.

General questions regarding the application process can be handled by contacting 877-823-4369, and by consulting the USDA website. Operational questions regarding the withdrawal should be directed to the office that initially took the action to withdraw Appellant; please contact Karla Morris at (972) 454-1856.

### **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 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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

November 12, 2019