

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

**98 Discount Store,**

**Appellant,**

**v.**

**Case Number: C0233971**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds the Retailer Operations Division improperly withdrew the authorization of 98 Discount Store (“Appellant”) to participate as a retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the withdrawal decision by 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 98 Discount Store to participate as a SNAP retailer.

**AUTHORITY**

7 U.S.C. § 2023 and 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**

Appellant, 98 Discount Store, was originally authorized to participate as a retailer in SNAP on December 7, 1999. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization process to determine whether the firm still meets eligibility requirements.

On October 14, 2019, Appellant submitted the required reauthorization application, FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*. On this document, Appellant reported that around 40 percent of its gross retail sales were from the sale of staple foods. The application also reported that the firm carried at least three different varieties

of foods in three of four staple food categories, with a minimum depth of stock of three stocking units for each variety. The firm reported having only two varieties in the meat, poultry, and/or fish staple food category. As part of the firm's reauthorization process, an onsite store visit was conducted by an FNS contractor on July 28, 2020, to verify the firm's reported staple food stock.

After reviewing the store visit report and photographs, and re-evaluating Appellant's reauthorization application, the Retailer Operations Division determined the firm did not maintain a sufficient variety, quantity, or percentage of staple foods to be eligible for SNAP participation under either Criterion A or Criterion B, as set forth in 7 CFR § 278.1(b)(1) of SNAP regulations.

In a letter dated August 10, 2020, the Retailer Operations Division informed Appellant that its SNAP authorization was being withdrawn because it did not meet the necessary criteria to be eligible for SNAP participation under Criterion A or B. The withdrawal letter stated Appellant failed to meet the requirements of Criterion A because it did not offer for sale a variety of foods in required minimum quantities on a continuous basis in each of the four staple food categories. It also stated that Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its total retail sales. Additionally, the letter indicated 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 Appellant does not qualify for SNAP authorization under this provision.

As a result of being found ineligible for participation under both Criteria A and B, and being found ineligible under the Need for Access provision, Appellant's SNAP authorization was withdrawn for a period of six months pursuant to regulation, at 7 CFR § 278.1(k)(2).

In a letter postmarked August 13, 2020, Appellant requested an administrative review of the withdrawal determination. The request was granted, and implementation of the withdrawal has been held in abeyance pending completion of this review.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, such as the withdrawal of a firm's SNAP authorization, the appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This 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 contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and is promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) states, in part:

FNS may 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(k)(2) states, in 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.... 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 § 271.2 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 § 271.2 defines staple food as:

...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

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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>.

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)(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]*\* 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,

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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 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(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**

Appellant submitted the following summarized contentions for administrative review, in relevant part:

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- We believe we meet all requirements of SNAP regulations.
- The majority, including more than half of our gross income, is in the staple food category.
- On the day of the visit on July 28, 2020, we were out of a few of our dairy products.
- Our buyer has been sick due to COVID-19 and we have been suffering and our store has not been restocked efficiently.
- Since the buyer is feeling better, we have been successful in restocking our dairy products and are up to par with our dairy and other produce.

Appellant also submitted two inventory purchase receipts dated July 3, 2020, and July 15, 2020, showing store inventory purchased prior to the store visit.

The preceding may represent only a summary of Appellant's contentions and evidence presented in this matter. However, in reaching a final decision, full attention was given to all contentions and evidence presented, including any not specifically summarized or referenced herein.

### **ANALYSIS AND FINDINGS**

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time the Retailer Operations Division rendered its decision.

In this case, the inventory purchase receipt dated July 15, 2020, clearly shows that the firm had ordered a sufficient amount of required dairy products within 21 calendar days prior to the store visit. This receipt, in addition to documented inventory during the store visit, establish Appellant's eligibility under Criterion A. Therefore, this review finds that the preponderance of the evidence is in favor of the Appellant, whose firm meets Criterion A eligibility requirements, as specified under program regulations.

#### **Criterion A and Criterion B Eligibility**

In order for a firm to be eligible under Criterion A, it 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 three stocking units for each variety. Eligibility under Criterion B requires that more than 50 percent of the firm's total gross retail sales be from the sale of staple foods.

Regarding Appellant, the record shows that the firm did not have enough inventory in the dairy products staple food category on the day of the store visit to meet Criterion A eligibility requirements. When the Retailer Operations Division withdrew the Appellant firm, it found that the firm had adequate stocking units of only one dairy product variety: cow milk. Store visit photos show the store also had one unit of coconut milk in inventory. Regardless, the firm did not have three stocking units of two additional varieties of dairy products, besides cow milk. Appellant contends dairy products are stocked regularly, but that on the date of the store visit, the product buyer was sick with COVID-19 and the firm had not been restocked efficiently. To

support this contention, Appellant submitted two inventory purchase receipts to show it had a sufficient inventory of dairy products at the time of the store visit.

To demonstrate inventory at the time of the store visit, inventory purchase receipts must be dated no more than 21 calendar days prior to the date of the store visit, and may not be dated on, or after, the visit. Given the store visit took place on July 28, 2020, the July 3, 2020, inventory purchase receipt submitted by Appellant falls outside of this timeframe and cannot establish eligibility. However, the remaining inventory purchase receipt, dated July 15, 2020, falls within the required timeframe and shows the purchase of 12 units of margarine, 12 units of yogurt, 12 units of cheese, 12 units of milk, and six units of butter. The receipt appears legitimate, and visible on the receipt are the vendor's name, the name of Appellant's firm, the number of unit purchased, the itemized cost per unit, and the date of purchase. Also, the receipt is marked "paid cash." Given the documented inventory during the store visit and the inventory reflected on the July 15, 2020, purchase receipt, Appellant has established the firm had sufficient inventory in the four staple food categories to meet Criterion A eligibility requirements.

### **CONCLUSION**

Based on the analysis above, the determination by the Retailer Operations Division to withdraw the SNAP authorization of 98 Discount Store, was improper and not made in accordance with SNAP regulations. As a result, the withdrawal decision by the Retailer Operations Division is reversed. The firm must remain authorized if otherwise eligible under all applicable provisions and requirements of SNAP program regulations.

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.

MICHELLE WATERS  
ADMINISTRATIVE REVIEW OFFICER

November 17, 2020