

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review  
Alexandria, VA 22302**

Addison Road Shell,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>Case Number: C0190826</b>
	)	
Retailer Operations Division,	)	
	)	
Respondent.	)	
_____	)	

**FINAL AGENCY DETERMINATION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence that the Retailer Operations Division properly denied the application of Addison Road Shell to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of denial.

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it denied the retailer application of Addison Road Shell.

**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**

The Appellant firm was authorized to participate as a retailer in SNAP from May 6, 2011 to April 11, 2016. After five years of authorization, and in accordance with regulations at 7 CFR § 278.1(j) and (n), the Appellant was required to undergo a reauthorization process to determine the firm’s continued SNAP eligibility. However, the firm did not respond to FNS’s requests for reauthorization, which resulted in its withdrawal from SNAP participation effective April 12, 2016. Upon learning of its withdrawal from the program, the Appellant submitted a new SNAP application on April 19, 2016.

On May 28, 2016, a store visit was conducted by an FNS contractor to determine whether or not the firm met eligibility requirements to be authorized in SNAP. After reviewing the store visit report, the Retailer Operations Division determined that the firm did not carry a sufficient variety of staple foods in the dairy category or in the meat/poultry/fish category. In order for a firm to be eligible to participate in SNAP under Criterion A, it must offer for sale on a continuous basis a variety of foods in each of the four staple food categories pursuant to 7 CFR § 278.1(b)(1).

In a letter dated June 2, 2016, the Retailer Operations Division informed the Appellant that its SNAP application was denied because it did not offer for sale on a continuous basis a variety of foods in each of the four staple food categories as required under Criterion A. Specifically, the Retailer Operations Division determined that the Appellant failed to stock an ample variety of staple foods in the dairy and meat/poultry/fish categories.

The Retailer Operations Division also informed the firm that it did not meet the eligibility requirements of Criterion B because the store did not have more than 50 percent of its gross retail sales in the sale of staple foods. The Appellant previously disclosed on its SNAP application that only 2 percent of the firm's sales were derived from the sale of staple foods. Analysis of the store visit report by the Retailer Operations Division confirmed that it was very unlikely that the firm's staple food sales exceeded 50 percent of its gross retail sales. Therefore, the firm was not eligible for participation under Criterion B.

In a letter postmarked June 6, 2016, the Appellant requested an administrative review of the Retailer Operations Division's decision to deny the firm's SNAP application. The appeal was considered timely and was therefore granted.

### **STANDARD OF REVIEW**

In appeals of adverse action, such as an application denial, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means an 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 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(k) establishes the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility requirements.

7 CFR § 278.1(k)(2) 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* 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, **on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including 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... [Emphasis added.]*

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.... Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm.*

7 CFR § 278.1(b)(1)(i) states, in part:

*An establishment ... shall ... 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 ... qualifying staple food items on a continuous basis ... on any given day of operation, no fewer than three different varieties of food items in each of the four staple food categories....[emphasis added]*
- (B) Offer for sale perishable staple food items in at least two staple food items. 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...shall not each be considered as more than one staple food variety for the purpose of determining variety...*

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.*

### **APPELLANT'S CONTENTIONS**

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

- Store owner/manager was on leave for two weeks around the time of the store visit, so the groceries were not properly restocked. The store was out of some dairy and meat products when the store visit occurred, but Appellant gives its assurance that the firm carries those items.
- The firm has a lot of EBT customers and it does not want to cause any inconvenience for them.
- Appellant has made all necessary changes and has made sure that it has satisfactory food items in all categories.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final agency decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically 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 of the store visit and at the time the Retailer Operations Division rendered its decision.

On April 19, 2016, the Appellant submitted an online form FNS-252, *Supplemental Nutrition Assistance Program Application for Stores*, in which it indicated that the firm carried at least three varieties of staple foods in each of the four staple food categories. The application also indicated that the firm had 2 percent of its gross retail sales in the sale of staple foods, with 3 percent in the sale of "other" accessory foods such as candy, carbonated

drinks and condiments, and 95 percent in non-foods, such as gasoline, tobacco products and lottery tickets.

On May 28, 2016, an FNS contractor conducted a store visit at the firm to verify the information contained in the Appellant's application. Based on the store visit results, the Retailer Operations Division determined that the firm's SNAP application was not accurate. According to the contractor's written record of the store visit as well as photographs that were taken during the visit, the Appellant firm did not carry a sufficient variety of staple foods in either the dairy category or the meat/poultry/fish category. At the time of the visit, the only dairy product carried by the firm was ice cream, and the only available items in the meat/poultry fish category were jerky and a few cans of Vienna sausage.

This review conducted additional analysis of the contractor's report and photographs and discovered that the firm also failed to carry a sufficient variety of staple foods in the fruits/vegetables category. The only items in this category that were visible on the store's shelves were 100 percent fruit juice and nuts. The store offered no canned fruits and vegetables, no fresh produce, or any other product in which the main ingredient was fruits or vegetables.

As noted earlier, in order to be eligible to participate under Criterion A, a firm must offer for sale at least three varieties of foods in each of the four staple food categories. In this case, the store visit indicated that the Appellant firm stocked a sufficient variety in only one category (breads/cereals), and was insufficient in the three remaining categories.

Based on this evaluation, it is the determination of this review that the firm does not meet eligibility requirements for either Criterion A or Criterion B. On the day of the store visit, the firm was clearly lacking in dairy products and did not carry a sufficient variety of fruits/vegetables or meat/poultry/fish products. Therefore, the firm does not meet Criterion A. Additionally, based on the volume of nonfoods and accessory foods sold at the store, it is extremely unlikely that the sale of staple foods exceed 50 percent of the firm's total sales. The Appellant's application also acknowledges that only 2 percent of its total sales are derived from the sale of staple foods. Therefore, the firm does not meet Criterion B.

### **Groceries Not Properly Restocked**

The Appellant has argued that at the time of the contractor's store visit, the owner/manager was on leave, which resulted in groceries not being properly restocked. The Appellant acknowledges that it was "out of some dairy and meat products" at the time of the visit, but gives its assurance that it carries those items.

Unfortunately, the Appellant has offered no evidence that it normally carries a sufficient variety of staple foods in all four categories. It provided no receipts or inventory records to show that the necessary staple foods were normally part of the firm's stock. An assertion by the owner that it carries the necessary foods to be eligible for SNAP participation is not adequate evidence and does not provide a valid basis for reversing the Retailer Operations Division's decision.

## **Inconvenience to Customers**

The Appellant contends that it has a lot of EBT customers and does not want to cause any inconvenience for those households who are accustomed to using their benefits at the store.

In regard to this contention, this review can neither confirm nor refute such an argument, as the Appellant has offered no evidence to substantiate the claim. However, this contention has no bearing on the Appellant's eligibility for SNAP authorization. A store may only accept SNAP benefits if it meets the required criteria for authorization.

## **New Inventory**

The Appellant contends that it now stocks the appropriate food items in all staple food categories as required under Criterion A and asserts that it is now eligible to participate in SNAP.

As stated earlier, this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the store visit. The Appellant has offered no evidence that at the time of the store visit Addison Road Shell normally carried, on a continuous basis and on any given day of operation, a sufficient supply of staple foods in each of the four staple food categories. Therefore, it is the determination of this review that the Appellant did not carry a sufficient variety of dairy, fruits/vegetables, or meat/poultry/fish products as required under Criterion A.

## **CONCLUSION**

The contentions presented by the Appellant are not sufficient to prove that the denial decision made by the Retailer Operations Division should be reversed. The store visit cited by the Retailer Operations Division was conducted by an FNS contractor and was thoroughly documented. A review of the report has yielded no indication of error or discrepancy. Rather the report and accompanying photographs are specific and accurate with regard to store conditions and food inventory on the day of the visit, and in all other critically pertinent details.

On the basis of the analysis above, the decision by the Retailer Operations Division to deny the application of Addison Road Shell to participate as a retailer in SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from June 2, 2016, which is the effective date of the denial.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision.

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

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JON YORGASON  
ADMINISTRATIVE REVIEW OFFICER

October 4, 2016  
DATE