

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

Ahoskie Tobacco House,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0207782

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the decision by the Retailer Operations Division, to withdraw the authorization of **Ahoskie Tobacco House** [hereinafter, “Ahoskie Tobacco House” and/or “Appellant”] to participate in the Supplemental Nutrition Assistance Program (SNAP) as a retailer was proper. As a result **Ahoskie Tobacco House** shall not be eligible to reapply to again become a SNAP authorized retailer for a minimum period of six (6) months from the effective date of the withdrawal.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2; 7 CFR § 278.1(b)(1); and, 7 CFR § 278.1(b)(6), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew the retailer authorization of Ahoskie Tobacco House to participate in the SNAP via letter dated March 21, 2018.

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

SNAP regulations require that authorized retailers be periodically reevaluated for continued eligibility. Owners are required to complete and submit an online form FNS-252R, “Supplemental Nutrition Assistance Program Reauthorization Application for Stores” (FNS-

252R). The record shows that Appellant provided the required form FNS-252R on January 29, 2018.

In a letter dated March 21, 2018, the Retailer Operations Division informed Appellant that the SNAP retailer authorization of Ahoskie Tobacco House was being withdrawn because it no longer met the eligibility criteria for stores as enunciated in the Federal regulations at 7 CFR §§ 278.1(b)(1) and 278.1(b)(6).

This determination is documented to have been made as a result of a review of the form FNS-252R; information and materials resulting from a store visit conducted by FNS contracted personnel on February 12, 2018; and, a Need for Access evaluation as conducted under SNAP regulations at 7 CFR § 278.6(b)(6).

Via letter dated March 27, 2018, received in the office of the Chief of the Administrative Review Branch on April 4, 2018, Appellant requested an administrative review of the action to withdraw its authorization to participate as a SNAP Retailer. The appeal was granted and the withdrawal has been held in abeyance pending the outcome of this review in accordance with 7 CFR § 279.4(a).

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That 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 statute in this matter is contained in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended (the “Act”)¹ 7 USC 2018 and promulgated through regulation at 278 of Title 7 of the Code of Federal Regulations (CFR).²

7 CFR § 278.1(l)(1) of the SNAP regulations read, in relative part:

“FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons:

The firm’s continued participation in the program will not further the purposes of the program;
The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section ;

¹ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment enacted February 7, 2014 through P. L. 113-79.

² Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title07/7tab_02.tpl

The firm fails to meet 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 § 271.2 of the SNAP regulations define “*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 ~~seven~~ [*three*]³ 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~~ [*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 accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in §278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in: Food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under §278.1(b)(1) of this chapter. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.”

7 CFR § 271.2 of the SNAP regulations define “*Staple Food*” as:

“*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. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (*i.e.*, nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. 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,

³ As implemented effective January 17, 2018 via SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 which can be accessed at: <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion> . References to implementation adjustments are identified with strikethrough of the number presented in the text of the regulation followed by [number] * throughout the remainder of this document.

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)(A) relays specific program requirements for retail food store participation, which reads, in part,

“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 ... including perishable foods in at least ~~three~~ [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).” [Emphasis Added]

7 CFR § 278.1(b)(1)(ii) Application of Criterion A. In order to qualify under this criterion, 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~~ [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 ~~three~~ [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. Failure to provide verifying information related to stock when requested may result in denial or withdrawal of authorization. Failure to cooperate with store visits shall result in the denial or withdrawal of authorization.”

“(B) Offer for sale perishable staple food items in at least ~~three~~ [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 within each staple food category. For example: Apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk, soy yogurt, soft cheese, butter, sour cream, and cow milk yogurt in the dairy products category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken, beans, nuts, beef, pork, eggs, and tuna in the meat, poultry, or fish category. Variety of foods is not to be interpreted as different brands, nutrient values (e.g., low sodium and lite), flavorings (e.g.,

vanilla and chocolate), packaging types or styles (e.g., canned and frozen) or package sizes of the same or similar foods. Similar food items such as, but not limited to, tomatoes and tomato juice, different types of rice, whole milk and skim milk, ground beef and beefsteak, or different types of apples (e.g., Empire, Jonagold, and McIntosh), shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any staple food category.

Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.”

7 CFR § 278.1(b)(1)(iii) provides, in relevant part, that 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 staples. 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) describes regulatory considerations regarding SNAP participant access to authorized retail stores, reading,

“*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.”

7 CFR § 278.1 (k) reads, in part,

“FNS shall deny the application of any firm if it determines that (1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section...”

7 CFR § 278.1 (k)(2), reads, in relevant part:

“FNS shall deny the application of any firm if it determines that 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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section.”

APPELLANT'S CONTENTIONS

In the request for administrative review Appellant, through its owner of record, requests reconsideration of the decision to withdraw the SNAP authorization on the basis that:

- Appellant was not advised of the policy changes effective January 17, 2018;
- Nine (9) invoices appended verified the stocking of canned meat and poultry products, canned milk products, and bread; and, cereals and dairy products are carried although receipts could not be located;
- The City of Ahooskie has a poverty rate of 38 percent which means people in the area are dependent on SNAP; and,
- A withdrawal will put Appellant in jeopardy of closing down because 90 percent of its gross sales are directly related to SNAP.

In additional materials dated April 24, 2018 Appellant, through its owner of record indicated that he had asked the store visit inspector to note that one (1) refrigeration unit was not working in store visit report. The owner further explains that the refrigeration unit that was inoperable was the one typically used to store dairy products including milk, cheese, butter, eggs⁴ (etc.). An invoice indicating the purchase of a new refrigeration unit is provided, with indication the inoperable unit needed a new motor and was therefore replaced. Photographs of the “new refrigerator”, stocked with milk, butter, eggs, and cheese was provided along with three (3) additional photos showing bread and general canned food inventory. This additional new information was provided to the Retailer Operations Division for consideration in their final decision.

The preceding may represent only a brief 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.

ANALYSIS AND FINDINGS

The FNS-252R dated January 29, 2018, indicates that Ahooskie Tobacco House is operating a convenience store; open from 7AM until 2AM, seven (7) days per week. The material at Questions 9, 10, and 11, report Appellant to be selling at least three (3) varieties of staple food products in the breads or cereals category citing five (5) varieties as available. The dairy products is shown to include only one (1) variety; and the meat, poultry fish and fruits and vegetables show no varieties are available. With regard to the number of stocking units Appellant reported carrying at least three (3) stocking units of breads or cereals and dairy products only. Appellant reports carrying perishable foods in the breads or cereals and in the fruits and vegetables. Further, in the January 29, 2018, FNS-252R Appellant reports total retail sales for tax year 2017, with 6.57 percent attributable to staple foods.

On February 12, 2018 a FNS contractor conducted a store visit in an effort to determine whether or not Appellant met the regulatory eligibility requirements to continue to be authorized to

⁴ For the record it is noted that eggs are considered to be a staple food in the meat, poultry and fish staple food category and not in the dairy category.

redeem SNAP benefits. During the store visit photographs were taken of the firm as well as its stock and facilities; an interview was conducted with Appellant's self-identified "manager" who authorized the visit; and, a written report detailing observations made was completed that includes, in part, an assessment of inventory and a sketch of the store layout.

It is important to clarify that the purpose of the instant review is to ascertain whether or not the decision reached by the Retailer Operations Division was correct at the time it was made. There is no provision in the SNAP regulations for consideration of changes made following the submission of the materials responsive to requests from the Retailer Operations Division or the completion of the contracted store visit; therefore, the replacement of the refrigeration unit and the inventory seen in the Appellant provided photographs cannot be considered in the instant case.

Criteria A:

The store visit materials include a general report indicating that Ahsokie Tobacco House is located at the address as reported on the FNS-252R, in retail space of approximately 1,800 square feet operating under signage identifying "Ahsokie Tobacco House".

The store visit materials include an inventory sheet reporting staple food stock to include:

- No dairy products.
- Six (6) varieties of fruits/vegetables staple foods; with each of those identified to include more than three (3) stocking units; and, three (3) varieties identified as perishable.
- One (1) variety of bread and cereal staple foods; consisting of eight (8) units of loaf bread, noted as perishable.
- Four (4) varieties of meat, poultry and seafood staple foods; each with more than three (3) stocking units, none identified as perishable.

Store personnel and inspector observation are documented to have resolved that there are no SNAP/EBT items priced at more than \$5.

The report also indicates that Ahsokie Tobacco House sells non-food stock consisting of tobacco products, alcohol, lottery tickets, automobile products, health and beauty aids, paper goods, gift items, party goods, souvenirs, and, an ATM or money transfer service. On review it is noted that there are some clothes identified for sale in the store visit photographs; and, there are four (4) video gaming stations.

The record shows that the store visit reports, on the date of the store visit, Appellant was deficient in two (2) of the four (4) staple food categories, identified as Dairy products; and, breads or cereals⁵. The Retailer Operations conducted a reconciliation of the inventory as

⁵ The record does not document the results of the Retailer Operations Division reconciliation of inventory therefore there is no information regarding the breads or cereals staple food category; and, whether it was deemed to have been met by review of the store visit materials or left unaddressed as an oversight. The letter of determination did not address the breads or cereals staple food category.

reported in the store visit and issued a letter of determination indicating that Appellant did not carry three (3) stocking units in at least three (3) varieties of foods in the dairy product staple foods category.

Appellant did not meet the eligibility requirements to “Offer for sale, **on a continuous basis**, [Emphasis added] a variety of qualifying foods in each of the four categories of staple foods” as delineated in the SNAP regulations at 7 CFR §§ 278.1(b)(1) and 278.1(b)(1)(ii).

On review, Appellant provided receipts; and, in subsequent correspondence dated April 24, 2018 provided additional receipts and photographs for consideration. The full materials were provided to the Retailer Operations Division and they provided documentation indicating that a full review of the materials does not reveal any additional varieties of staple foods in the dairy staple food category (no canned milk was seen in any of the photographs, either those certified as part of the store visit or those provided by Appellant).

On review it is noted that the receipts identify less than three (3) units of yogurt for additional consideration. These additions do not modify the Retailer Operations Division decision that Ahoskie Tobacco House did not meet the eligibility conditions of criterion A because it did not carry at least three (3) varieties of dairy products in units of three (3) or more each.

Criteria B:

The January 29, 2018 FNS-252R provided for consideration under the signature of ownership indicates that Ahoskie Tobacco House derived approximately 6.57% of its 2017 gross retail sales from staple foods.

The SNAP regulations at 7 CFR § 278.1 (b)(1) under Criterion B requires that **more than 50 percent** of the total gross retail sales must be in **staple foods**. Staple foods are specifically defined in 7 CFR § 271.2 as “those 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”. Neither the January 29, 2018 FNS-252R nor the materials resulting from the February 12, 2018 contracted store visit, support a conclusion that more than 50 percent of Ahoskie Tobacco House’s estimated annual retail sales would derive from staple foods.

Therefore, the Retailer Operations Division decision that Ahoskie Tobacco House did not meet the eligibility conditions of criterion B is affirmed.

Need for Access:

7 CFR § 278.1(b)(6) provides that “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.” This evaluation also includes other factors such as distance to the nearest SNAP-authorized firms, transportation options, the extent of Appellant’s stocking deficiencies, and, whether or not Appellant is considered to further the purposes of SNAP.

The record indicates that the Retailer Operations Division evaluated Ahoskie Tobacco House and determined that it was not located in a Low Food Access Area; therefore, Appellant does not qualify for SNAP authorization under this provision.

A review of the documentation contained in the official record affirms the Retailer Operations Division determination.

Reapplication:

As indicated above SNAP regulations at 7 CFR § 278.1(k)(2) states, in part that “FNS **shall deny** [withdraw] the application of any firm if it determines that 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 . . . **for a minimum period of six months from the effective date of the denial [withdrawal].**” [Emphasis Added].

Not Advised of Upcoming Policy Changes:

Appellant has indicated that it was not advised of the upcoming SNAP policy changes relative to the minimum required inventory in staple foods effective January 17, 2018; however, a review of the FNS website reveals documentation indicating that notification was mailed to **all** authorized retailers dated December 5, 2017 delineating the policy changes. Therefore, Appellant’s contention is not considered a basis to mitigate or reverse the decision of the Retailer Operations Division.

Poverty Rate:

Although Appellant indicates that the City of Ahoskie has a 38 percent poverty rate inferring that there is a high dependence on SNAP in the area no evidence of this was provided for consideration. Moreover, whether or not evidence was provided for consideration, it is not reasonable to infer a general dependency on SNAP to weigh on the eligibility of Appellant. This contention cannot be considered a basis to mitigate or reverse the decision of the Retailer Operations Division.

Economic Impact:

Appellant indicates that a withdrawal will result in jeopardy of the closure of Ahoskie Tobacco House because 90 percent of its gross sales are directly related to SNAP. On review it is noted that the FNS-252R submitted under ownership’s signature dated January 29, 2018 reports that only 15 percent of Appellant’s 2017 gross sales derived from SNAP eligible items (staple and accessory foods). The largest share of gross sales was reported deriving from tobacco products (42 percent).

Appellant’s contention is therefore not found to be a credible.

Further, it is recognized that some degree of economic hardship is a likely consequence whenever a store is withdrawn from participation in SNAP. However, there is no provision in

the Act or the SNAP regulations for waiver or reduction of consideration of eligibility conditions on the basis of possible economic hardship to the firm resulting from imposition of such conditions.

CONCLUSION

Based on the discussion above, the decision by the Retailer Operations Division to withdraw the SNAP retailer authorization of Ahoskie Tobacco House is sustained. The withdrawal will become effective 30 days from receipt of this decision by Appellant in accordance with 7 CFR § 279.5(f).

Further, in accordance with 7 CFR § 278.1(k)(2) Ahoskie Tobacco House is ineligible to reapply to again be authorized as a SNAP retailer “for a minimum period of six months from the effective date of the denial [withdrawal]”.

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.

NANCY BACA-STEPAN
Administrative Review Officer

July 6, 2018