

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

**AJ's Merchandising,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0205150**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the Retailer Operations Division properly denied the application of AJ's Merchandising 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 AJ's Merchandising.

**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, AJ's Merchandising, originally applied to participate as a retailer in SNAP on September 12, 2017. According to the firm's application, the store was opened for business under the current ownership on October 1, 2017.

On October 24 and 25, 2017, two store visits were attempted by an FNS contractor in an effort to determine whether or not the firm met eligibility requirements to be authorized in SNAP. On both occasions, the store was closed. In response, the Retailer Operations Division sent the firm a letter requesting contact when another visit could be made.

On November 3, 2017, the Appellant contacted the Retailer Operations Division and stated that the store had been temporarily closed at the time of the original visits because of a medical procedure involving the owner.

On November 15, 2017, a third store visit was attempted. This time, the store was open and the contractor was able to complete its report.

After reviewing the store visit report and photographs, the Retailer Operations Division determined that the firm did not carry a sufficient variety of staple foods in order to be eligible to participate in SNAP under Criterion A. To meet this requirement, a firm must offer for sale on a continuous basis a variety of foods in each of the four staple food categories. According to the contractor's written record, the firm had insufficient inventory in the meat/poultry/fish category on the day of the visit.

On November 20, 2017, the Retailer Operations Division sent the Appellant two letters. The first informed the Appellant that the store was deficient in the meat/poultry/fish category on the day of the contractor's visit. The Appellant was given an opportunity to provide proof, such as invoices or receipts, that it normally carried sufficient quantities and varieties of meat/poultry/fish. The Appellant was given 10 calendar days to provide this information.

The second letter explained that the Appellant's original application appeared to have been filled out incorrectly. The application indicated that 80 percent of the firm's total sales were in the sale of staple foods, while 10 percent were in other foods, such as snack foods, soft drinks, and condiments, and 10 percent were in the sale of nonfoods. Based on a review of the store visit report, the Retailer Operations Division felt that the claim of 80 percent staple foods was inflated, so it asked the Appellant to make corrections to the improperly reported sales percentages.

By December 4, 2017, the Retailer Operations Division had not received a response to the two letters, so it sent a denial letter to the firm. In the denial

letter, 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 all four staple food categories as required under Criterion A.

The Retailer Operations Division also informed the Appellant 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. While the Appellant had previously disclosed on its SNAP application that 80 percent of the firm's sales were derived from the sale of staple foods, the Retailer Operations Division concluded 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.

On December 5, 2017, the day after the denial letter was sent, the Retailer Operations Division received the information from the Appellant that it had previously requested. The Appellant now claimed that 50 percent of its total sales were in staple foods, while 20 percent were in other foods, and 30 percent were in nonfoods. The Appellant also submitted four cash register receipts showing the purchase of various food items, including some meat items.

In a telephone call, the Retailer Operations Division informed the Appellant that a denial letter had already been sent by the time it received the Appellant's documentation. It also stated that the evidence provided by the Appellant did not alter the denial decision.

As a result of being found ineligible for participation under both Criteria A and B, the Appellant was informed that its SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter dated December 15, 2017, the Appellant requested an administrative review of the Retailer Operations Division's decision. The request was granted.

### **STANDARD OF REVIEW**

In an appeal 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 that 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 request for administrative review, in relevant part:

- On two separate occasions, an FNS contractor went to the store for an inspection, but the owner was hospitalized at the time.
- Appellant submitted receipts to support the purchase of meat/poultry/fish products, but they were not received by the due date established by FNS. Appellant believed that FNS would accept the postmark date. Either way, FNS informed Appellant that the receipts had the wrong date on them. Appellant argued that FNS's letter stated that the receipts should be dated 21 days prior to the store visit, but FNS said that the Appellant misinterpreted the letter.
- Appellant requests reconsideration of the denial decision. The firm is a new small business and although it does not carry a large quantity of food items or a large quantity of any merchandise, it is working diligently to increase its stock.
- The firm is a general discount store, catering to those with lower incomes in addition to the community at large.

In support of these contentions, Appellant submitted five additional inventory receipts, dated between October 20, 2017, and November 7, 2017. These receipts show the purchase of various food items, including meat products.

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

On September 12, 2017, 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 three of the four staple food categories. The Appellant's application indicated that it did not carry a minimum of three varieties in the dairy category. The application also estimated that 80 percent of the firm's gross retail sales were from the sale of staple foods, while 10 percent of its sales were in other foods, such as snack foods, soft drinks, and condiments. The Appellant estimated that 10 percent of its sales were from nonfood items. As noted earlier, in response to a letter sent by the Retailer Operations Division, the Appellant updated these sales percentages to 50 percent staple foods, 20 percent other foods, and 30 percent nonfoods.

After reviewing the contractor's store visit photographs and report as well as evaluating the contentions and evidence submitted by the Appellant, it is the determination of this review that the Appellant firm does not meet SNAP eligibility requirements under either Criterion A or B. As best as can be determined by this review, the only meat items in the store on the day of the contractor's visit were a few cartons of eggs.

It must be emphasized that a firm must maintain a continuous and minimum inventory of staple food items in order to be eligible for participation in SNAP. If a firm does not purchase and maintain a sufficient inventory of staple foods then it does not further the purposes of the Program. As stated in regulations cited earlier, the firm must offer for sale no fewer than three different varieties of food in each of the four staple food categories on a continuous basis in order to be eligible for participation under Criterion A. "Continuous basis" includes the day of the contractor's visit to the store.

In this case, the evidence clearly shows that the Appellant firm was significantly lacking in variety in the meat/poultry/fish category on the day of the store visit. As a result of this deficiency, the firm is not eligible for SNAP participation under Criterion A.

As for the inventory receipts provided by the Appellant, this review agrees that the November 20, 2017, proof-of-inventory request letter sent by the Retailer Operations Division is contradictory. On one hand it says that the receipts **must be dated 21 days prior to** the date of the contractor's store visit. But in the next paragraph, it says that the receipts must show that the missing items were purchased **no later than 21 days prior to** the store visit. These opposing messages from the Retailer Operations Division are clearly confusing. As such, this review has gone back and re-examined all receipts provided by the Appellant – four provided to the Retailer Operations and five submitted with the request for administrative review. Some are within 21 days of the store visit, and some are outside that period. All are prior to the store visit.

Unfortunately, the receipts do not offer sufficient evidence to show that the firm carries, on a continuous basis, the necessary variety of meat/poultry/fish to be eligible under Criterion A. For example, none of the receipts show that the merchandise was ever delivered to AJ's Merchandising. It is just as likely that the items ended up in the owner's home or elsewhere. A few receipts simply list the purchases as "meat" or "fish" and do not specify what was actually purchased. Comparing the receipts to what was on the store's shelves at the time of the contractor's visit, it appears that very few, if any, of the items listed on the receipts, meat or otherwise, ended up on the Appellant's shelves. The receipts show a surprising amount of meat, poultry, and fish purchased, and yet none of it was at the store when the contractor arrived. Further, there is a distinct lack of storage space for such items. The store has only one very small refrigeration unit, which does not appear to be large enough to house the meat items supposedly purchased by the Appellant.

In short, it is the determination of this review, that more likely than not, the Appellant did not carry a variety of meat/poultry/fish products sufficient to meet SNAP eligibility requirements and further the purposes of the Program. It must be emphasized again that in order to be eligible under Criterion A, a firm must carry sufficient quantities and varieties of food in all four staple food categories on any given day of operation. This clearly did not happen in this case.

The firm is also not eligible for participation under Criterion B as the sale of staple foods almost certainly does not exceed 50 percent of the firm's total sales. When nonfoods and snack foods are taken into consideration, it is very unlikely that the store's staple food sales are more than 50 percent of the firm's total revenue. It should be noted that Criterion B is generally reserved for stores such as butcher shops or bakeries, which normally do not carry food items in all four staple food categories, but which have most of their revenue in the sale of staple foods.

## **New Inventory**

The Appellant acknowledges that AJ's Merchandising is a new store and admits that it does not carry a large quantity of food items. But it argues that the firm is working diligently to increase its stock.

With regard to this contention, it must be restated that this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the contractor's store visit and at the time that the Retailer Operations Division rendered its denial decision. It is not the authority of this review to consider subsequent remedial actions that may have been or will be taken so that a store may begin to comply with program requirements. There are no provisions in the SNAP regulations for a reversal of an application denial on the basis of alleged or



planned corrective actions implemented subsequent to the finding of a firm's ineligibility.

Therefore, the Appellant's insinuation that the store has made improvements to its staple food inventory or will be making improvements in the future does not provide a valid basis for reversing the Retailer Operations Division's denial determination.

### **Hardship to SNAP Households**

The Appellant argues that the firm caters to those with lower incomes and provides a service to the community as a whole. This contention implies that if the firm is not authorized to accept SNAP benefits, households that use such benefits would experience some level of hardship by not being able to use them at the Appellant's store.

Unfortunately, this contention has no bearing on the Appellant's eligibility for SNAP authorization. A store may only accept SNAP benefits if it meets the minimum required eligibility criteria for authorization.

### **CONCLUSION**

Based on the analysis above, it is the determination of this review that the Appellant firm, AJ's Merchandising, does not meet eligibility requirements under Criterion A or B described in regulations at 7 CFR § 278.1(b)(1). The contentions and evidence 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 AJ's Merchandising 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 December 4, 2017, 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, 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.

JON YORGASON  
Administrative Review Officer

February 9, 2018