

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

Beltline Shell, Inc,

Appellant,

v.

Case Number: C0219747

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division (hereinafter Retailer Operations) to withdraw the authorization of Beltline Shell, Inc. (hereinafter Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Appellant to participate as a SNAP retail store on July 1, 2019.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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

FNS regulations require that stores be reauthorized on a set schedule and a FNS-252-R retailer reauthorization application for stores be completed. The record shows that Appellant was visited by an FNS contractor on May 29, 2019, in an effort to determine whether or not the firm met eligibility requirements to be reauthorized in SNAP. During this visit, the contractor took photographs of the store and its inventory, spoke with store personnel, and completed a written report detailing its observations.

After reviewing Appellant’s application and evaluating the store visit report and photographs, Retailer Operations determined that Appellant did not carry a sufficient quantity or variety of

staple foods to be eligible for SNAP participation under Criterion A or Criterion B. This determination was made in accordance with SNAP regulations at 7 CFR § 278.1(b)(1). According to the contractor's written record, Appellant had insufficient inventory and variety in the dairy staple food category, deficient by one stocking unit, having only cheese and milk, making Appellant ineligible under Criterion A. Additionally, both the application and the store visit report indicate that Appellant was not eligible under Criterion B.

On June 18, 2019, Retailer Operations sent a letter to Appellant stating an FNS contractor visited the store and additional information is required to verify the store's staple food inventory to demonstrate eligibility under Criterion A. Retailer Operations provided Appellant an opportunity to supply invoices/receipts to verify Appellant carried at least three stocking units of three different varieties of foods in the dairy staple food category (milk, cheese, butter, yogurt, etc.). Invoices/receipts must be submitted to FNS within 10 days and must be dated within 21 calendar days prior to the store visit.

In response to ROD's request of proof of additional dairy products that are regularly stocked by the firm, Appellant submitted six invoices via email on June 26, 2019. One of the invoices was dated on the date of the store visit and the remaining five invoices did not show any additional dairy purchased beyond the dairy found in the store at the time of the visit. Appellant submitted nine more invoices on June 28, 2019. ROD determined the products purchased were alcoholic beverages and milk. None of the invoices submitted provide evidence of additional varieties of dairy products being stocked on a regular basis.

In a letter dated July 1, 2019, Retailer Operations informed Appellant that its authorization to participate as a retailer in SNAP was being withdrawn because it did not carry three stocking units in at least three varieties of foods in the dairy staple food category. The letter also informed Appellant that it did not have more than 50 percent of its total gross retail sales in staple food sales as required for authorization under Criterion B. Additionally, the letter stated 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 under this provision.

By letter postmarked July 24, 2019, Appellant appealed Retailer Operations' decision and requested an administrative review of this action. The appeal 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 adverse action, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means 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 USC § 2018) and implemented through regulation under 7 CFR § 278. In particular, 7 CFR § 278.1(l)(1) establishes the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 271.2 defines a Retail Food Store as: 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. 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 defines staple food as: 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. 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: 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 for a retail store to qualify for authorization under Criterion A, a firm shall: 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. 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.

NOTE: Full implementation of the definition of variety and stocking requirements cited above was delayed by the Consolidated Appropriations Act of 2017. Therefore, the three paragraphs below reflect the definition and stocking requirements as currently implemented.

7 CFR § 278.1(b)(1)(ii)(A) as currently implemented defines continuous basis under Criterion A 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)(ii)(B) as currently implemented: 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, unrefrigerated, or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks.

7 CFR § 278.1(b)(1)(ii)(C) as currently implemented: 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) provides that 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.

7 CFR § 278.1(b)(6) deals with the 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.

7 CFR § 278.1(l)(1) Withdrawing authorization reads in part: 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

Appellant made the following contentions:

- We request a chance to resolve the issue and correctly stock the missing dairy item. We did not understand that there had to be different products besides milk and that dairy was more than just milk.
- There are six different apartment complexes within walking distance and on the same side of the highway as our store; three house low-income families and seniors. Many in the community have very limited access to local stores and do not have cars. I am the only available store within walking distance to these apartments. Removing our ability to accept food stamps will negatively affect the elderly, children, and families in our community that cannot drive or cross the busy intersection safely.
- Our record has always been perfect and good.

In support of these contentions, Appellant submitted the following:

- 160 names petitioning Beltline Shell, Inc. be able to continue servicing the community that benefits a great number of families, elderly, and those without any means of transportation.
- Two photos showing current dairy varieties in stock in support of the request for a chance to resolve the missing dairy item due to the misunderstanding.

The preceding may represent a summary of Appellant's contentions; however, in reaching a decision, consideration was given to all contentions presented, including any not specifically referenced herein.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of Retailer Operations, and as such it is limited to consideration of the relevant facts and circumstances 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.

With regards to Appellant's contentions listed above, it is not within the scope of this review to consider actions ownership may take to qualify for continued participation in the SNAP subsequent to that decision, such as stocking all the variety of staples in each of the four staple food categories in the store on a continuous basis, planning to do so once SNAP authorized, or increasing staple food stock in order to qualify under Criterion B. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact or intended corrective actions. Therefore, any contentions that the store is now or will be sufficiently stocked with necessary items do not provide any valid basis for dismissing or mitigating the adverse action imposed.

As noted above, in order for a firm to be eligible for SNAP participation, it must qualify under either Criterion A or Criterion B, as described in 7 CFR § 278.1(b)(1). Under Criterion A, a firm must offer for sale, on a continuous basis, 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 food variety, and at least one variety of perishable foods in at least two staple food categories. Under Criterion B, a firm must have more than 50 percent of its total gross retail sales in the sale of staple food.

A store visit was conducted by an FNS contractor on May 29, 2019. A review of the store visit documentation illustrates that on the day of the visit, Appellant was deficient by one stocking unit in one variety of the dairy staple food category. Retailer Operations provided Appellant the opportunity to provide proof of inventory – invoices/receipts dated within three weeks (21 days) prior to the store visit.

As previously stated, the invoices/receipts provided by Appellant, in response to Retailer Operations' request for proof of inventory, did not show the purchase of additional dairy products needed to meet the deficiency of one stocking unit in the dairy staple food category. In missing one stocking unit in one variety of the dairy staple food category, the store did not meet

the eligibility under Criteria A. Therefore, Retailer Operations correctly concluded Appellant did not meet Criterion A.

An evaluation of the percentages of staple food sales reported on Appellant's retailer application as well as the photographs and store inventory provided from the store visit, indicate that Appellant did not receive more than 50 percent of its projected annual sales from the sale of staple foods. Appellant's accountant also confirmed staple food sales at less than 10 percent of its total gross sales. Accordingly, Retailer Operations correctly determined Appellant was not eligible for authorization under Criterion B.

The authorization of a store to participate in the SNAP must be in accord with the Act, as amended, and regulations. A full review of the store visit materials from the May 29, 2019, store visit does not indicate any material departure from the documentation as presented. A review of the store visit documentation indicates that Appellant was deficient in the dairy staple food category. Therefore, Appellant does not meet Criterion A. Appellant also does not meet Criterion B because information obtained from the store visit confirms that staple food sales comprise 50 percent or less of annual gross retail sales.

Appellant contends that he misunderstood the dairy requirements and that dairy was only milk. When store ownership signed the certification page of the SNAP retailer application to begin operating as a SNAP retailer and again when they signed the online reauthorization application to continue operating as a SNAP retailer, they confirmed they understood and agreed to abide by program rules and regulatory provisions. SNAP rules and regulations require SNAP retailers to meet required stocking requirements for staple foods on a continuous basis; however, the FNS store visit determined that the owners failed to adhere to this requirement and therefore were in violation of SNAP regulations. Stores that do not meet required stocking requirements are not eligible to be SNAP retailers. Intent to violate is not a required element with regards to stocking deficiencies. Information on staple food stocking requirements has previously been issued to all retail stores and may also be found on the FNS SNAP retailer web site, the same site that contains the online SNAP retailer application and reauthorization application.

Need for Access

Appellant requests another chance because the store has always been perfect and good. The store is located within walking distance to low-income and senior housing, where many customers do not have transportation to other stores, and many elderly, children, and families in the community who cannot drive or cross the busy intersection safely will be negatively impacted. In support of this contention, Appellant provided a petition signed by 160 of its customers.

As Appellant failed to meet Criterion A and B, Retailer Operations did consider whether Appellant is located in an area with significantly limited access to food as required under SNAP regulation 7 CFR § 278.1(b)(6). In determining whether Appellant is located in such an area, Retailer Operations considered factors such as the distance from Applicant to the nearest

currently SNAP-authorized firm and the extent of Appellant's stocking deficiencies in meeting Criterion A and Criterion B. Retailer Operations determined Appellant did not qualify for SNAP authorization under 7 CFR § 278.1(b)(6).

Some degree of inconvenience to SNAP benefit users is inherent in the failure to authorize a retailer, since the distance to the nearest SNAP-authorized firm may be longer for some SNAP benefit holders. A review of the factors and evidence considered by Retailer Operations under 7 CFR § 278.1(b)(6) supported that authorization of Appellant was not necessary for access. Therefore, the earlier determination that authorization of Appellant was not required to ensure access to food for SNAP participants, as differentiated from potential inconvenience, is sustained.

The regulations at 7 CFR § 278.1(l)(1)(iii) state, in part, "FNS shall withdraw the authorization of any firm if the firm fails to meet the requirements for eligibility under Criterion A or B . . . for the time period specified in paragraph (k)(2)" and 7 CFR § 278.1(k)(2) states, in 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 . . . for a minimum period of six months from the effective date of the denial." There is no agency discretion to impose a sanction of less than six months when a firm does not meet the eligibility requirements for authorization.

CONCLUSION

Based on a review of all of the evidence in this matter, the determination by Retailer Operations to withdraw the authorization of Appellant to participate as a retail food store in SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to participate as a retail food store in SNAP for a minimum period of six months from the effective date of the withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal action will become effective 30 days after receipt of this Decision. A new application for SNAP participation may be submitted 10 days prior to the expiration of the 6-month withdrawal period. Questions regarding the SNAP application process can be answered by the FNS Retailer Service Center at 877-823-4369.

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 owners reside, are 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 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.

KIM DAMERON
ADMINISTRATIVE REVIEW OFFICER

February 20, 2020