

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

Breakfast 2 Bed,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0220682

FINAL AGENCY DECISION

The United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), that Retailer Operations Division (Retailer Operations) properly withdrew the authorization of Breakfast 2 Bed (hereinafter Appellant), from participation as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

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

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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. The owner completed a reauthorization application. On June 10, 2019, FNS-contracted personnel conducted an onsite store visit to ascertain Appellant's continued eligibility to participate in SNAP. Retailer Operations informed Appellant by letter dated August 9, 2019, that its authorization to participate as a SNAP retailer would be withdrawn due to Appellant's failure to meet basic program eligibility requirements enunciated in the regulations at 7 CFR § 278.1(b)(1).

The letter also stated that Appellant failed to meet Criterion B. A business must have more than 50% of its total gross retail sales in staple foods to be eligible for authorization under Criterion B. Appellant's eligibility under the Need for Access provision was also reviewed. Appellant was found not to meet the established criteria.

The owner requested administrative review of Retailer Operations' determination by letter postmarked August 22, 2019, which included 51 pages of copied purchase receipts. The review was granted by letter dated September 12, 2019, and implementation of the withdrawal has been held in abeyance pending the outcome of this review. The owner mailed additional information postmarked September 26, 2019, which included 5 pages of copied purchase receipts.

STANDARD OF REVIEW

In appeals 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 credible, relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument 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, and 7 U.S.C. § 2018. SNAP regulations at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008.

7 CFR § 271.2, as currently implemented, defines a retail food store, in part, 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 three different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety, including at least one variety of perishable foods in at least two such categories, (Criterion A) as set forth in § 278.1(b)(1) of this chapter, or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) as set forth in § 278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stockkeeping units, or other 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 § 278.1(b)(1)(i)(A) reads, in part: An establishment 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 § 271.2 defines staple food, in part, 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.

7 CFR § 278.1(b)(1)(ii) (A), as currently implemented, states, in part: In order for a retail store to qualify for authorization under Criterion A, firms shall: (A) Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, no fewer than three different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least two staple food categories.. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit.

7 CFR § 278.1(b)(1)(iii) states, in part: In order 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. However, a fee directly connected to the processing of staple foods, such as raw meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B.

7 CFR § 278.1(b)(6) states, in part: 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(b)(1)(iv) states: Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization and authorized

firms will be withdrawn from program participation. Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross sales in foods cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

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

All contentions, as stated by the owner, have been considered in rendering this decision whether listed or not. The owner submitted 56 pages of copied purchase receipts to show store inventory.

- I am not sure how it is possible that my business does not meet criterion A or B. We have always conducted business the same way and have not had an issue with the program for over 6 years and we have always conducted business in a responsible manner in order to meet the rules and regulations of the program.
- We are the only fresh produce market in this area. Most of our inventory is made of fruits and vegetables, however, in order to comply with the program and better serve our customers we sell items from all 4 food categories.
- Cancelling this license would affect my business tremendously and would also affect the customers who come to my store for their daily fresh produce.
- We welcome you to re-inspect our store and give us a chance to keep serving our community. I ask you to please reconsider this decision and allow me to continue to be part of the SNAP program.

ANALYSIS AND FINDINGS

This review is to validate the determination by Retailer Operations and is limited to consideration of the relevant facts at the time of the decision. The authorization of a store to participate in SNAP must be in accord with the Act and the regulations, as amended; those requirements of law cannot be waived. The onsite review of Appellant's food inventory revealed insufficient varieties and stocking units in the dairy staple food category. Only one dairy variety was recorded on the store visit report. SNAP regulations at § 278.1(b)(1)(ii)(A) under Criterion A as currently implemented, require a firm shall offer for sale and normally display in a public area, 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, and at least one variety of perishable foods in at least three staple food categories.

In support of its request for administrative review, the owner submitted 56 pages of copies of purchase receipts to show store inventory. However, none of the purchase receipts were dated within 21 calendar days prior to the date of the store visit, and therefore do not validate that Appellant had the required varieties and stocking units in the dairy products staple food category at the time the withdrawal decision was made. Therefore, a preponderance of the evidence supports that on the date of the store visit, Appellant did not meet Criterion A.

Based on Appellant's own reauthorization application, store inventory information provided from the store visit, and additional sales information provided by the owner, Appellant did not receive more than 50% of its projected annual sales from the sale of staple foods. Accordingly, Retailer Operations correctly determined Appellant was not eligible for SNAP authorization under Criterion B, per 7 CFR § 278.1 (b)(1)(iii).

SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application and reauthorization. The evidence supports that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the withdrawal decision was made. The owner has not offered a preponderance of evidence to support that Appellant met the eligibility criteria at the time the determination was made.

SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether or not Appellant is located in an area with significantly limited access to food when the firm fails to meet Criterion A or Criterion B as long as it meets all other eligibility requirements. This Need for Access evaluation also considers other factors, such as distance to the nearest SNAP authorized firm, transportation options, the extent of Appellant's stocking deficiencies, and whether or not Appellant furthers the purposes of the program.

The record indicates that Retailer Operations conducted a Need for Access evaluation and determined that the Appellant firm did not qualify for SNAP authorization under this provision. After a review of all available evidence in this case, this review agrees that authorization under the Need for Access provision is not appropriate in this case.

The owner contends it has been authorized for over six years. SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. If a firm does not conform to the applicable statutes

and regulations, the same provide for the firm's removal from the program in accordance with the provisions detailed therein.

CONCLUSION

Based on a review of the evidence, the determination by Retailer Operations to withdraw the authorization of Appellant to participate as a SNAP retailer is sustained. Appellant does not meet the requirements of a retail food store as set forth in § 278.1(b)(1) of SNAP regulations. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived. The owner should consult the current regulations and retailer guidance available online to familiarize himself with the eligibility requirements for retailers.

In accordance with 7 CFR § 278.1(k)(2), the owner will not be eligible to reapply for participation as a SNAP retail food store 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 its associated regulations, this withdrawal action shall become effective 30 days after delivery of this letter.

General questions regarding the application process can be handled by contacting 877-823-4369 and by consulting the USDA website. Operational questions regarding the withdrawal should be directed to the office that initially took the action to withdraw Appellant; please contact Danielle Chandler at Danielle.Chandler@usda.gov or (804) 309-3880 with questions about operations.

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 to SNAP regulations at 7 CFR § 279.7. 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 Appellant's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within 30 days of receipt of this Decision. Please note that the judicial filing timeframe is specified in the Act, and this office is unable to grant an extension.

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

May 27, 2020