

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

**Bus Stop Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0202467**

**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 withdrew the authorization of Bus Stop Market (hereinafter “Appellant”) from participation as a 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 withdrawal.

**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 withdrew the authorization of Bus Stop Market.

**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, Bus Stop Market, was originally authorized to participate as

a retailer in SNAP on September 23, 2002. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization process approximately every five years to determine whether or not the firm still meets eligibility requirements.

On November 29, 2016, the Appellant firm submitted the required reauthorization application, FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*. On this document the Appellant reported that 50 percent of its gross retail sales were from the sale of staple foods, while 25 percent were from “other” food items, such as snack foods, soft drinks, and condiments. The application further stated that the firm’s nonfood or hot food items constituted 25 percent of the firm’s total sales. The Appellant also reported that the firm carried at least three different varieties in each of the following staple food categories:

- Dairy
- Fruits/vegetables
- Breads/grains
- Meat/poultry/fish.

As part of the firm’s reauthorization process, an onsite store visit was conducted by an FNS contractor on July 17, 2017, to verify the firm’s reported staple food stock.

After reviewing the store visit report and photographs and re-analyzing the Appellant’s reauthorization application, the Retailer Operations Division determined that the firm did not maintain a sufficient variety or percentage of staple foods to be eligible for SNAP participation under either Criterion A or Criterion B as set forth in 7 CFR § 278.1(b)(1) of the SNAP regulations. In order for a firm to be eligible to participate in SNAP under Criterion A, it must offer for sale on a continuous basis a minimum of three varieties of food in each of the four staple food categories. To meet Criterion B, a firm must have **more than** 50 percent of its gross retail sales in the sale of staple foods.

In this case, the agency determined that the Appellant firm was lacking in every staple food category, and that its staple food sales were, more likely than not, less than 50 percent of its total sales.

Furthermore, based on the physical characteristics of the store, its marketing structure, and its substantial prepared food offerings, the Retailer Operations Division determined that the firm was not actually a grocery store, but was primarily a restaurant, and thus did not meet the definition and requirements of a retail food store for purposes of SNAP authorization.

In a letter dated August 22, 2017, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it did not

meet the necessary criteria to be eligible for SNAP participation. Specifically, the letter stated that the Appellant firm was a restaurant because more than 50 percent of its total sales were in the sale of hot and/or cold prepared, ready-to-eat foods intended for immediate consumption and requiring no additional preparation. The letter stated that the withdrawal determination was based on 7 CFR § 271.2, § 278.1(b)(1), § 278.1(l)(1)(iii), and § 278.1(k)(2).

In a letter postmarked August 28, 2017, the Appellant, through counsel, requested an administrative review of the withdrawal determination. The request was granted and implementation of the withdrawal has been held in abeyance pending completion of this review. The Appellant sent additional correspondence to the administrative review officer in a letter postmarked October 2, 2017.

### **STANDARD OF REVIEW**

In an appeal of adverse action, such as the withdrawal of a firm's SNAP authorization, 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(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) reads, in part:

FNS may 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 specification 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...for**

**the time period specified in paragraph (k)(2) of this section.** [Emphasis added.]

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.... 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.

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(b)(1)(iv) states, in part:

...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 retail sales in hot and/or cold prepared foods not intended for home preparation and consumption, 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... [Emphasis added.]

## **APPELLANT'S CONTENTIONS**

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

- Although prepared foods are sold, the store also sells unprepared foods.
- Bus Stop Market has a long history of selling specialty sausages and the business has been a neighborhood grocery store for over 75 years. In order to survive, the firm has developed prepared foods to supplement the grocery business.
- The firm's various types of homemade specialty sausages make up a large part of the inventory sold by the firm. Additionally, other cold cuts are available for purchase.
- The firm also sells milk, eggs, butter, vegetables, bread, canned goods, and pasta.

In support of its contentions, the Appellant submitted a list of deli meats, cheeses, and homemade sausages that are available for purchase by the pound. The Appellant also submitted three undated black-and-white photographs. One photo shows a portable shelving unit next to the checkout counter. The food on the shelves includes loaves of bread, spaghetti sauce, canned tomatoes, pasta, and a small amount of fresh fruits and vegetables. Another photo shows milk, butter, eggs, and cream cheese inside a cooler. The final photograph shows deli meats, cheeses, and prepared salads.

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 submitted, 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.

This review has examined the July 17, 2017 store visit report and photographs and has confirmed that on that date, the Appellant did not carry a sufficient variety of staple foods to be eligible for SNAP participation under either Criterion A or Criterion B. As best as can be determined by this review, the only dairy item in the store on July 17 was cheese, and the only items from the meat/poultry/fish category were cold cut meats and sausage. The store did not

carry any staple food items in the fruits/vegetables or breads/grains categories.

Because the Appellant firm has such limited staple food inventory, it clearly does not meet SNAP eligibility under Criterion A. As stated in regulations cited earlier, a 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 and on any given day of operation in order to be eligible for participation under Criterion A. In this case, the evidence plainly shows that the Appellant firm was lacking in every staple food 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.

It should be noted that the photographs provided by the Appellant, which show a small variety of staple foods on a portable shelving unit and in a cooler, are not persuasive enough for this review to consider reversing the withdrawal decision. Neither the portable shelving unit nor any of the foods on it or in the cooler were in the store on the day of the contractor's store visit. These appear to have been added to the store after the firm received the withdrawal letter from the Retailer Operations Division. Such inventory changes cannot be considered. As noted earlier, 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.

The firm is also not eligible under Criterion B, as the sale of staple foods almost certainly does not exceed 50 percent of the firm's total sales. As noted earlier, the Appellant indicated on its reauthorization application that staple foods constituted exactly 50 percent of the firm's total sales. However, evidence from the contractor's store visit suggests that the 50 percent approximation is likely an overestimation. It is 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.

Finally, based on the information obtained during the store visit, Bus Stop Market has all the hallmarks of a restaurant or deli rather than a retail grocery store. For example, the sign on the business does not say Bus Stop Market. Instead it says "5 U.S.C. § 552 (b)(6) & (b)(7)(C)." The store also includes a large menu board showing a wide variety of prepared foods available for purchase. The store itself contains a large, commercial-grade kitchen as well as tables and chairs for onsite dining. The store also has no shopping carts or shopping baskets, which are customary for a retail grocery establishment. The contractor itself noted on the report: "The store sells hot and cold sandwiches, prepared foods and salads, and operates as a restaurant."

While it is clear that the firm does sell some amount of meats and cheeses by the pound, it is clear to this review that the firm markets itself as a restaurant and the emphasis is most definitely on prepared meals. The firm's very limited staple

food inventory only serves to support this conclusion. Additionally, the Appellant has offered no proof, such as accounting records, to suggest that prepared foods constitute less than 50 percent of the firm's total sales.

As indicated earlier, SNAP regulations at 7 CFR § 278.1(b)(1)(iv) state that "firms that are considered to be restaurants...shall not qualify for participation as retail food stores under Criterion A or B."

## **CONCLUSION**

The contentions and evidence presented by the Appellant are not sufficient to prove that the withdrawal decision made by the Retailer Operations Division was inaccurate or that it should be reversed. The evidence from the contractor's store visit report indicates a strong likelihood that more than 50 percent of the firm's total sales come from hot and/or cold prepared, ready-to-eat foods that require no additional preparation, making the firm ineligible for participation under Criterion A or B.

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 withdraw the authorization of Bus Stop Market 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 the date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of Bus Stop Market shall 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 six-month withdrawal period.

## **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

March 9, 2018