

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

Cafe 71,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0235572

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to withdraw the authorization of Cafe 71 to participate as a retailer in the Supplemental Nutrition Assistance Program (SNAP). The store may not reapply for SNAP authorization for a period of six (6) months after the effective date of the withdrawal.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Cafe 71.

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

As part of a routine reauthorization process, the Appellant submitted a reauthorization form FNS-252-R, entitled “Supplemental Nutrition Assistance Program Reauthorization Application for Stores” signed and dated December 13, 2019. The Appellant reported that it had more than the minimum required varieties and amounts of staple food with perishables in all staple food categories.

The Appellant also reported that its **staple** food sales comprised only **two (2) percent** of the firm’s gross retail sales. The Appellant reported that “accessory” food comprised eight (8)

percent of its gross retail sales. Accessory foods include items such as snack foods, candy, ice cream, potato chips, carbonated and non-carbonated beverages, condiments and spices. Accessory foods are eligible for purchase with SNAP benefits but are not used in calculating store eligibility. The Appellant reported that non-food items comprised 71 percent of its gross retail sales. The remaining 19 percent was comprised of SNAP ineligible hot and cold prepared food not intended for home preparation and consumption.

An FNS contractor conducted a store visit on August 6, 2020 to document the firm's food inventory for the purpose of determining the continued eligibility of Cafe 71 to participate in the SNAP. The store visit report and photographs showed that the store carried **only a single variety** of dairy staple food (20+ stocking units of milk). Therefore, the Retailer Operations Division determined that the store was deficient as it did not carry at least three (3) varieties of dairy staple food in sufficient stocking amounts.

As a result, the Retailer Operations Division informed the Appellant by letter dated August 21, 2020 that the authorization of Cafe 71 to participate in the SNAP was withdrawn because the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1). The store did not meet Criterion A as it was insufficiently stocked with dairy staple foods. The store failed to meet Criterion B because the store's staple food sales did not comprise more than 50 percent of its annual gross retail sales. Lastly, the Retailer Operations Division determined that the firm did not qualify under the Need for Access provision of 7 CFR § 278.1(b)(6) as the store was not located in a low food access area. The withdrawal letter was delivered to the store on September 2, 2020.

In a letter postmarked on September 11, 2020, the Appellant requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request for review was granted and implementation of the withdrawal was held in abeyance pending completion of this review.

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, might 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) provides the authority upon which FNS shall withdraw the SNAP authorization of any firm if it fails to maintain established eligibility criteria. 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 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.

7 CFR § 271.2 defines a retail food store, in part, as:

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 [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 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....

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. 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,

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>

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) reads, in part,

An establishment...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 [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 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...

(B) 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; 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

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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) 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.

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. 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

APPELLANT'S CONTENTIONS

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

- Normally the store carries eggs and cheese; however, Cafe 71 sold out of these items a few days before the store visit and was not able to restock until the following Friday for eggs and the following Saturday for cheese.

- As documented by a photograph emailed on October 12, 2020, the store has a mini fridge with cheese and eggs.

The preceding may represent only a brief summary of the 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

Criterion A

Under **new regulations** that went into effect on January 17, 2018, to meet Criterion A, a firm must carry no fewer than three (3) different varieties of staple food in each of the four (4) staple food categories with a minimum depth of three (3) stocking units for each qualifying staple variety. There also must be at least one (1) variety of perishable foods in at least two (2) staple food categories.

The Appellant states that the store was only temporarily out of cheese and eggs. Regarding this contention, the SNAP regulations at 7 CFR § 278.1(b)(1)(i)(A) and 7 CFR § 278.1(b)(1)(ii) require retailers to meet Criterion A eligibility requirements on a **continuous** basis and do not provide for any exceptions. Therefore, it is not an acceptable excuse that the store may have been only temporarily low on staple food. SNAP authorized stores are expected to meet the minimum variety and stocking requirements at all times.

The Retailer Operations Division determined that Cafe 71 was not eligible under Criterion A on the day of the store visit because it did not carry the minimum three (3) varieties of dairy staple food in sufficient stocking units. A review of the store visit report and photographs support that the firm was deficient in the Dairy category at the time of the store visit as it only carried a **single variety** of dairy staple food (20+ stocking units of milk). It should be noted that eggs are counted in the Meat/Poultry/Fish category and are not a dairy staple food.

In an email dated October 12, 2020, the Appellant provided a photograph of a mini fridge containing cheese, eggs and bottles of flavored milk. The staple food items in this photograph could not be counted as the photograph was taken after the store visit. However, even if the items in this photograph could be counted, the store would have still fallen short in the Dairy staple food category. The store had already received credit for the milk; and eggs are not a dairy staple food. Thus, at best, the Appellant store would have only had two (2) of the minimum required three (3) varieties of dairy staple food.

In conclusion, the Appellant offered no contentions that successfully rebut the determination of the Retailer Operations Division. Therefore, a preponderance of the evidence supports the decision of the Retailer Operations Division that Cafe 71 was not eligible under Criterion A at the time of the store visit.

Criterion B

The Retailer Operations Division determined that the Appellant store did not meet Criterion B because the store's **staple** food sales did not comprise more than 50 percent of its gross retail sales. This is confirmed by the Appellant's own reauthorization application which shows that **only two (2) percent** of the store's gross retail sales are in **staple** food items.

There is nothing in the case record which would indicate that this percentage of staple food sales to gross retail sales is inaccurate. In fact, a review of the store visit report and photographs indicate that more than 50 percent of the store's gross retail sales likely consist of non-food items including gasoline, lottery tickets, tobacco and alcohol. Based on a preponderance of the evidence, the Retailer Operations Division properly determined that the Appellant store was ineligible under Criterion B.

Need for Access

SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether or not the Appellant firm 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 the Appellant's stocking deficiencies, and whether or not the Appellant firm furthers the purposes of the program.

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

Basis of Determination

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is **limited** to what circumstances existed **at the time of the store visit** which forms the basis of the Retailer Operations Division's action. Whether or not the store has since stocked up on its staple food is not relevant to this review. The store may reapply for the SNAP six (6) months from the effective date of the withdrawal and any updated food inventory will be taken into consideration at that time.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP authorization of Cafe 71 is **sustained**. The regulations clearly state the criteria that a store must meet in order to be authorized for the SNAP. There are no exceptions to these requirements. Under 7 CFR § 278.1(k)(2), the Appellant is not eligible to submit a new application for SNAP authorization for a period of six (6) months from the effective date of the

withdrawal. This decision shall take effect 30 days after the date of delivery of the Final Agency Decision to the firm.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that 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 you reside or are 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 thirty (30) days of receipt of this Decision. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

Under the Freedom of Information Act, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

December 7, 2020