

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

Charter Point,

Appellant,

v.

Case Number: C0208043

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the authorization of Charter Point (hereinafter “Appellant”) to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly withdrawn by the Retailer Operations Division, Retailer Operations Branch (hereinafter “ROD Office”).

ISSUE

The issue accepted for review is whether the SNAP Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(k)(2) and § 278.1(l)(1)(iii) when it made the decision to withdraw Appellant’s authorization to participate in the SNAP.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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 record reflects that on December 31, 2012 Appellant was granted authorization to participate in the SNAP. As part of the routine reauthorization process, an inspection of Appellant’s staple food inventory was conducted on February 5, 2018. The ROD Office provided the firm an additional opportunity, via a letter dated February 14, 2018, to demonstrate, by providing additional information, that it maintained the inventory necessary to qualify. Appellant provided additional information but the ROD Office determined that the information did not demonstrate eligibility. Appellant was subsequently advised of the Department's decision to withdraw the firm’s authorization to participate in the SNAP in a letter dated April 3, 2018. The regulatory

bases given for that denial were 7 C.F.R. § 278.1(l)(ii) and (ii) and § 278.1(k)(2). The firm was instructed that its authorization would be withdrawn unless the firm timely requested an administrative review of the decision, in which case the decision would be held in abeyance pending the outcome of the review. On April 5, 2018, Appellant requested an administrative review of this decision. The request was granted.

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, 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 statute in this matter is contained in the **Food & Nutrition Act of 2008**, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(k)(2) and § 278.1(l)(1)(iii) establish the authority upon which a retail food store or wholesale food concern may be withdrawn from participation in the SNAP.

7 C.F.R. § 271.2 states, in part:

Retail Food Store means: 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)...or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)...Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores...

7 C.F.R. § 278.1(b)(1)(ii) states, in part:

Application of Criterion A. In order to qualify under this criterion, firms 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 three different varieties of food items in each of the four staple food categories with a 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.

7 C.F.R. § 278.1(b)(1)(iii) states, in part:

Application of Criterion B: In order to qualify under this criterion, 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 C.F.R. § 278.1(b)(1)(ii)(C) states, in part:

...Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes.

7 C.F.R. § 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 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.

7 C.F.R. § 278.1(b)(6) states, in part,

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 or B, so long as the applicant firm meets all other SNAP authorization requirements.

7 C.F.R. § 278.1(k)(2) states, in part:

FNS shall deny the application of any firm if it determines that:
The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section; or The firm has failed to meet the eligibility requirements...under Criterion A or Criterion B....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 C.F.R. § 278.1(l)(1)(iii) states, in part:

FNS shall withdraw the authorization of any firm authorized to participate... if ...The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...

APPELLANT'S CONTENTIONS

In Appellant's written request for review dated April 5, 2018 it was argued that:

1. Appellant was not aware of the new eligibility requirements. Appellant completed the online reauthorization application on a Thursday and the store visit occurred on the following Monday, so no additional inventory had been received and Appellant did not have any invoices in the days prior to the store visit to demonstrate eligibility.
2. Appellant now has an adequate inventory and qualifies to participate in the SNAP.
3. The firm has been in operation for about six years and has committed no violations and has no complaints against it.
4. A withdrawal of SNAP authorization will hurt the business and work a hardship upon customers.
5. Appellant requests a second opportunity to maintain adequate inventory and assures future compliance with eligibility requirements.

ANALYSIS AND FINDINGS

The record reflects that a contracted store visit to Appellant's firm was conducted on February 5, 2018. Documentation generated as a result of that visit includes photographs of the firm's interior and exterior, a store layout diagram and a store inventory survey reflecting that the firm had ample varieties of staple food stock and in the fruits and vegetables category, in the breads and cereals category and in the meats/poultry/fish category, but had an inadequate stock of staple food in the dairy category, thus failing to qualify under Criterion A. It was additionally noted that the Appellant firm maintained a considerable stock of accessory foods and prepared, ready-to-eat food, which are not considered staple food for the purposes of the SNAP. In addition, the firm maintains a substantial inventory of tobacco products, alcohol, lottery tickets, gasoline, mobile phones/accessories, automotive products, health and beauty products, paper goods, pet food, clothing, cleaning supplies, housewares and other non-food items. The firm also operated as a gas station. Thus the store visit further corroborated that staple food sales could not have reasonably exceeded 50% of gross sales. The ROD Office duly provided the firm an opportunity to provide documentation that the firm purchased the required amount of staple food inventory. Documentation provided by Appellant did not document eligibility. As staple food sales must comprise more than 50 percent of a firm's gross retail sales, the store was ineligible for authorization under Criterion B. It is noted for the record the firm's most recent application for reauthorization (FNS – 252R, signed by Appellant on January 28, 2018) indicated that the firm's staple food sales comprised less than 1% of gross sales.

Regarding contention 1 above, the agency has taken due steps to notify all retailers, though multiple media and formats, of the recent changes in eligibility requirements; no public information effort is certain to be 100% effective, though the agency must abide by and implement the statute and regulations in effect at any given time without exception. Additionally, said statute and regulations provide no latitude to reverse an eligibility decision correctly made due to a retailer's claim that it did not know the pertinent eligibility requirements.

Moreover, Appellant signed its reauthorization application on January 28, 2018, a Sunday, and the store visit was conducted on February 5, 2018, a Monday, over one week later. To the extent Appellant contends that extenuating circumstances may have contributed to the level and composition of staple food inventory observed at the firm on the day of the store visit, there is no provision in the statute, regulation or agency policy which allows such considerations to warrant a reversal of a withdrawal decision correctly made. Additionally, as noted above, 7 C.F.R. §278.1(l)(1)(iii) clearly provides that FNS shall withdraw the authorization of any firm authorized to participate if the firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section.

Appellant provided product purchase invoices which failed to demonstrate that it maintained an adequate inventory of staple foods in the dairy category, thus failing to qualify under Criterion A. As noted, the firms' most recent application for reauthorization (FNS – 252R, signed by Appellant on January 28, 2018) indicated that the firm's staple food sales comprised less than 1% of gross sales, thus failing to qualify under Criterion B.

Regarding contention 2 above, Appellant notes that it has added inventory since the store visit conducted on February 5, 2018, and now qualifies under Criterion A and/or B. However, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the earlier decision of the SNAP Office and as such it is limited to consideration of the relevant facts and circumstances at the time of that decision. It is not within the scope of this review to consider actions Appellant may have taken to qualify for participation in the SNAP subsequent to the referenced store visit and the resulting decision by the SNAP Office. Therefore, Appellants' contention that it may now qualify under Criterion A and/or B of the eligibility requirements is not a valid basis upon which to reverse the decision. Moreover, 7 CFR §278.1(l)(1)(iii) of the SNAP regulations is quite specific and does not provide for agency discretion in its requirement that FNS *shall* withdraw the authorization of any firm if it determines that...the firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B. (Emphasis added.)

With regard to contention 3 above, the firm's withdrawal does not result from any action the ROD Office considered violative, such as the sale ineligible food items in exchange for SNAP benefits or trafficking in SNAP benefits; thus the firm's compliance history is not a relevant consideration in the present case.

In regard to contention 4 above, to the extent Appellant implies that a failure to reverse the withdrawal decision will work a hardship upon the firm; however, there are no provisions in the Act or regulations allowing hardship to applicants and/or to SNAP customers as considerations in determining eligibility for participation in the SNAP, with the exception of co-located wholesale/retail firms, which must meet a variety of additional requirements. Appellant's store is not a co-located retail/wholesale firm and such provisions therefore do not apply in the present case.

Recent changes to the SNAP do provide that retailers located in a low food-access area may receive special consideration for participation; however, the record reflects that the ROD Office duly evaluated Appellant's eligibility for such consideration and correctly found that the firm was not located in a low food-access area.

Regarding contention 5 above, there are no provisions in the statute, regulations or agency policy which require/allow a probationary period within which an authorized firm failing to qualify may be extended additional opportunities to meet eligibility requirements.

CONCLUSION

In view of the above, it is my determination that the SNAP Office's decision to withdraw Appellant's authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(k)(2) and § 278.1(l)(1)(iii). Therefore the withdrawal action is sustained and shall remain in effect for a period of six months. The store may reapply to participate in the SNAP up to ten days prior to the end of the six-month period. This decision will become effective 30 days following Appellant's receipt of this document.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food & Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to 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.

Under the provisions of the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

DANIEL S. LAY
Administrative Review Officer

June 12, 2018