

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

Exxon,

Appellant,

v.

Case Number: C0207762

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of Exxon (Appellant or Exxon) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew the authorization of Appellant to participate in SNAP.

AUTHORITY

7 USC § 2023 and the 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, Appellant submitted an online reauthorization form FNS-252-R, entitled *Supplemental Nutrition Assistance Program Reauthorization Application for Stores* on February 7, 2018. The FNS-252-R reported that one percent of the firm’s actual gross retail sales were in staple foods and that only three percent were in “accessory” food items such as snack foods, carbonated and non-carbonated beverages, condiments and spices. Appellant reported that 97% of its actual gross retail sales were in non-food items (primarily gasoline). Appellant also stated in the FNS-252-R that it had at least three varieties of staple food, each consisting of at least three stocking units, in all of the required staple food categories.

An FNS contractor conducted a store visit on February 21, 2018, to document the firm's food inventory for the purpose of determining the continued eligibility of Exxon to participate in the SNAP. The store visit report showed that the store was deficient in the dairy category as it only carried one variety of staple food consisting of more than 20 stocking units of milk.

After considering the available evidence, the Retailer Operations Division informed the Appellant by letter dated March 26, 2018, that the authorization of Exxon to participate in the SNAP was withdrawn because the firm did not meet the eligibility criteria for stores as mandated by SNAP regulations at 7 CFR § 278.1(b)(1). The letter stated that the Appellant failed to meet Criterion A because the store did not have the required minimum variety of staple food in the dairy category. The store also 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 an area with significantly limited access to food under access criteria established by FNS.

In a letter postmarked March 26, 2018, ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions should be reversed. That means the 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 and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). 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 § 271.2 states that Retail Food Store means:

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 § 278.1(b)(1)(i)(A) imparts program requirements for retail food store participation, which 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 § 271.2 states:

Staple food, means 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. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (i.e., nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. 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) provides that in order for a retail store to qualify for authorization under Criterion A, 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 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.”

7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis 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)(iii) provides that in order 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. 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) regarding access states:

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) 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; 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) reads, in relevant 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.... 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.

APPELLANT’S CONTENTIONS

Appellant made the following summarized contentions in its administrative review request postmarked March 26, 2018, and additional correspondence postmarked March 28, 2018, in relevant part:

- According to the inspection report, the store is missing dairy products.
- Appellant provided invoices to show that its carries dairy all the time.
- The owner spoke to the Inspector over the phone and asked him to wait a few minutes so the owner could help answer any questions.
- The Inspector did the inspection without the store owner's permission.
- If any items were missing, they would have been delivered the next day.
- Appellant had a lot of items that were not considered in the report including cereal, milk, bread, fruit, egg, and ice cream.

In support of its contentions, Appellant provided 19 pages of invoices and five full page photographs of store stock including bananas, juice, brad, ice cream, beans, cereals, macaroni, sandwiches, butter, hot dogs, and yogurt.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

Criterion A

Federal regulations at 7 CFR § 278.1(b)(1)(ii) state that in order to qualify for SNAP authorization under Criterion A, a firm shall "offer for sale . . . 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." This means that retail stores must have qualifying staple food items displayed in a public area on a continuous basis at the time of the store visit in order to qualify for SNAP authorization under Criterion A. The store visit revealed insufficient stock in the dairy staple food category.

Appellant provided photographs to show that it carries sufficient stock. It is Appellant's responsibility to meet the requirements of Criterion A on any given day. The SNAP regulations at 7 CFR § 278.1(b)(1)(i)(A) and 7 CFR § 278.1(b)(1)(ii) require retailers to meet eligibility requirements "on a continuous basis." The purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the denial action. Therefore, Appellant's contention that it later became fully stocked is not a valid basis to reverse the determination.

Appellant also provided invoices to show that it purchased other varieties of dairy. The receipt from the Dollar Tree shows that Appellant purchased butter and cheese. However, this purchase occurred a few hours after the store visit. There were also some receipts titled Dairy Products but there was no contact information for the company. These receipts are also questionable because they indicate that Appellant regularly purchased Yami Fruit Yogurt. However, the yogurt in the photographs was for Dannon yogurt. Moreover, when Appellant is missing two varieties of food (or more than three stocking units) in a staple food category, invoices are not sufficient evidence that Appellant meets Criteria A eligibility "on a continuous basis."

Appellant explains that it had a lot of items that were not considered in the report including cereal, milk, bread, fruit, egg, and ice cream. The record shows that these items were recorded in the store visit report. However, ice cream is not considered a staple food item and eggs are not considered a dairy staple food item. Thus, these items listed do not show that Appellant carried three varieties of food in the dairy staple food category.

Criterion B

In the event of a firm's failure to meet the requirements of eligibility under Criterion A, federal regulations require that the firm's eligibility also be evaluated under Criterion B. In order to qualify for authorization under Criterion B, more than 50 percent of a retail store's total annual gross retail sales must come from the sale of staple foods. Based on the FNS store visit photographs and the application, the Retailer Operations Division determined that Appellant was also ineligible for authorization under Criterion B according to 7 CFR § 278.1(b)(1)(iii). Appellant's own SNAP application estimates that one percent of its gross annual retail sales come from the sale of staple foods. Appellant is primarily a gas station and staple food items could not possibly exceed 50% of its total annual gross retail sales. Thus, the Retailer Operations Division correctly determined that Appellant was not eligible 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.

The record indicates that the Retailer Operations Division conducted a Need for Access evaluation and appropriately determined that the Appellant firm did not qualify for SNAP authorization under this provision.

Owner's Permission

The owner that submitted the administrative review request states that it did not give the FNS contractor permission to conduct the store visit. However, the record shows that the initial owner of record was at the Appellant firm at the time of the store visit and signed the consent form as the store manager. This owner/manager actually submitted the application for reauthorization as well. Appellant's contention regarding this matter is not relevant and does not provide any valid basis for reversing the Retailer Operations Division to withdraw the authorization of Appellant to participate in the SNAP.

CONCLUSION

Based on a review of all of the evidence in this matter, the decision by the Retailer Operations Division to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained.

In accordance with 7 CFR § 278.1(k)(2) the owners will not be eligible to participate as a retail food store in the 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 of Exxon 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 7 USC § 2023 and 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 the Appellant's owners resides 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 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.

Mary Kate Karagiorgos
Administrative Review Officer

June 28, 2018