

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

Circle 1 Market #1,

Appellant,

v.

Case Number: C0201845

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the Retailer Operations Division properly withdrew the authorization of Circle 1 Market #1 (hereinafter “Circle 1 Market”) to participate in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Regulations (CFR) Part 278 in its administration of the SNAP, when it withdrew the authorization of Circle 1 Market in its Determination Letter dated July 25, 2017.

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 Appellants submitted an online SNAP authorization form FNS-252-E, entitled Supplemental Nutrition Assistance Program (SNAP) Authorization Application for Stores. The FNS-252-E stated that 30% of the firm’s gross retail sales were in staple foods and that 30% were in “other” food items (also known as accessory foods) such as carbonated and non-

carbonated beverages, condiments and spices. The FNS-252-E stated that 40% of the firm's gross retail sales were in ineligible non-food items.

An FNS contractor conducted a periodic store visit on July 11, 2017 to document the firm's food inventory for the purpose of determining the continued eligibility of Circle 1 Market to participate in the SNAP. The results of the onsite visit showed that the firm was deficient in the Dairy staple food category. Specifically, during the store visit, the store stocked only two varieties of staple foods in the Dairy staple food category (milk and ice cream).

In order to provide the firm an opportunity to document that it normally would meet the Criterion A requirements in the Dairy staple food category, the Retailer Operations Division requested, in a letter dated July 18, 2017, that the firm provide invoices/receipts describing items purchased from the following staple food category:

- Dairy Products

The Retailer Operations Division informed the Appellants that the requested invoices should demonstrate that the missing items were depleted at the time of the store visit and are currently available. The Appellants were informed that the invoices that they provided must be dated prior to the date of the store visit in order to be considered towards meeting the SNAP authorization requirements.

On July 25, 2017, the Retailer Operations Division received the Appellants' response to the July 18, 2017 request for proof of inventory. With the response, the Appellants submitted 27 vendor invoices for foods that were purchased from December 6, 2016 through July 20, 2017. Of these invoices, there were 21 invoices that were dated numerous weeks/months prior to the store visit (i.e., the invoices were too old) and one invoice that was dated after the store visit date. As such, these 22 invoices cannot be considered by FNS to determine if Circle 1 Market normally stocks at least three different varieties of staple foods in the Dairy staple food category. The remaining five invoices were dated within a few weeks of the July 11, 2017 store visit. These five invoices indicate that milk and ice cream had been purchased for Circle 1 Market. However, since milk and ice cream was in stock at the time of the store visit, these invoices do not validate that Circle 1 Market stocked at least three different varieties of staple foods in the Dairy staple food category. As Circle 1 Market was still lacking some of the required staple food items, the Retailer Operations Division determined that the store did not offer for sale on a continuous basis a variety of staple foods in the Dairy staple food category as required under Criterion A of 7 CFR §278.1(b)(1)(ii) of the SNAP regulations.

The Retailer Operations Division then informed the Appellant by letter dated July 25, 2017 that the authorization of Circle 1 Market to participate in the SNAP was withdrawn because the firm did not meet the eligibility criteria for stores as mandated by Federal regulations at 7 CFR § 278.1(b)(1). The letter stated that Circle 1 Market failed to meet Criterion A because the store did not have the required variety of foods in the Dairy staple food 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.

In a letter postmarked August 3, 2017, the Appellants requested an administrative review of the Retailer Operations Division's decision to withdraw the firm's SNAP authorization. FNS granted the Appellants' request for administrative review by letter dated August 9, 2017 and implementation of the withdrawal was 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 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 U.S.C. § 2018, and promulgated through regulation under Title 7 CFR part 278. In particular, 7 CFR § 278.1(l) establishes the authority under which FNS shall withdraw the authorization of any firm authorized to participate in the program.

7 CFR § 278.1(l)(1) Withdrawing authorization read, 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.

7 CFR § 271.2 defines a retail food store 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, 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 stock keeping 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. Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption, and require no additional preparation, are not eligible for [SNAP] participation as retail food stores under § 278.1(b)(1) of this chapter. [Emphasis Added.]

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). [Emphasis Added.]

7 CFR § 271.2 defines staple foods and accessory foods, 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)(ii) states, in relevant part, that 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; [Emphasis added.]
- (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;
- (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 to 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, 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 intended for home preparation and consumption, such as, but not limited to, 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 FNS.

7 CFR § 278.1(b)(1)(iii) provides, in relevant part: that in order for a retail store to qualify for authorization under Criterion B, it must:

. . . Have more than 50 percent of . . . total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-merchandise, as well as services . . .

7 CFR § 278.1(k)(2) reads, 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. [Emphasis added.]

APPELLANTS' CONTENTIONS

In the request for administrative review postmarked August 3, 2017 and in a subsequent correspondence, the Appellants contended that at the time of the July 11, 2017 store visit, Circle 1 Market might have been out of some of the food items required for SNAP authorization under Criterion A due to the July 4th holiday and the unexpected increase in business.

In support of the Appellants' contention, the following documents were submitted to FNS:

- 11 undated photos of various food products stocked at Circle 1 Market; and
- 48 vendor invoices for foods that were purchased for Circle 1 Market.

The preceding may represent only a brief summary of the Appellants' contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Criterion A

With regard to the Appellants' contention, it is necessary to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the withdrawal action by the Retailer Operations Division. At the time of the withdrawal action, the contracted Reviewer indicated that Circle 1 Market did not offer for sale on a continuous basis a variety of staple foods in the Dairy staple food category. The SNAP regulations at § 278.1(b)(1)(ii) is clear (with emphasis added) that, under Criterion A, a firm 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." (Emphasis added). This means that retail stores must have qualifying staple food items displayed in a public area at the time of the store visit in order to qualify for SNAP authorization under Criterion A. The Reviewer indicated that Circle 1 Market was deficient in the Dairy staple food category at the time of the store visit (the store stocked milk and ice cream only) and, therefore, did not meet the requirements for SNAP authorization under Criterion A.

The Appellants provided the Administrative Review Officer with a total of 48 vendor invoices/receipts for purchases of staple foods from various vendors in an effort to validate that Circle 1 Market met the requirements for SNAP authorization approval under Criterion A at the time of the store visit. Of these invoices, there were 12 invoices that were dated numerous weeks/months prior to the store visit (i.e., the invoices were too old) and eight invoices that were dated after the store visit date. In addition, there were 20 invoices that did not include a date on them. As such, these 40 invoices cannot be considered by FNS to determine if Circle 1 Market normally stocks at least three different varieties of staple foods in the Dairy staple food category. The remaining eight invoices were dated within a few weeks of the July 11, 2017 store visit. However, these invoices indicate that no staple foods had been purchased from the Dairy staple food category.

The Appellants also provided the Administrative Review Officer with 11 photos showing various food items, including snack foods, flour, rice, loaf bread, rolls, cereal, fresh produce, dried beans/peas, ice cream, infant formula, etc., which were stocked at Circle 1 Market. However, the photos were not dated; therefore, they cannot be considered by FNS to verify that Circle 1 Market met the SNAP eligibility requirements under Criterion A at the time of the store visit. In order to qualify for SNAP authorization under Criterion A, a firm must "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." Since Circle 1 Market was still lacking one of the required staple food items, FNS determined that the store did not offer for sale on a continuous basis a variety of staple foods in the Dairy staple food category as required under Criterion A of 7 CFR § 278.1(b)(1)(ii) of the SNAP regulations. The Appellants failed to verify that Circle 1

Market had all of the staple foods in stock on the store visit date to qualify it for participation in the SNAP under Criterion A. 7 CFR § 278.1(k)(2) of the SNAP regulations is specific in its requirement that “FNS shall deny/withdraw 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 ... for a minimum period of six months from the effective date of the denial/withdrawal.”

Based on a preponderance of the evidence, the Retailer Operations Division correctly determined that the Appellant firm did not meet eligibility Criterion A as established by 7 CFR § 278.1(b)(1)(ii).

Criterion B

To be eligible under Criterion B staple food sales must make up more than 50 percent of the firm’s total gross retail sales. Accessory food items such as carbonated and non-carbonated beverages, condiments and spices are not staple foods and are not counted towards a store’s eligibility for the SNAP.

That the firm did not meet Criterion B is shown by the FNS-252-E submitted by the Appellants which stated that only 30% of Circle 1 Market’s retail sales were from staple foods, 30% were from “other foods” including accessory foods, and that 40% was from ineligible non-food sales. In addition, the store visit report appears to confirm that only a small portion of the store’s gross retail sales are in staple food sales and that the store’s gross retail sales are largely in “other foods” including accessory food items and ineligible non-food items including tobacco products, alcohol, lottery tickets, paper products, health and beauty aids, sunglasses, household cleaning supplies, clothing, toys, jewelry, cell phone accessories, household items, charcoal, gift items, automotive supplies, party goods, incense, souvenirs, etc.

Based on a preponderance of the evidence, the Retailer Operations Division correctly determined that the Appellant firm did not meet eligibility Criterion B as established by 7 CFR § 278.1(b)(1)(iii).

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the authorization of Circle 1 Market #1 to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellants shall not be eligible to reapply for participation in the SNAP for a minimum period of six months from the effective date of the withdrawal.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (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 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.

LORIE L. CONNEEN
Administrative Review Officer

April 12, 2018