

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

**Circle R,**

**Appellant,**

**v.**

**Case Number: C0212727**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the Retailer Operations Division (Retailer Operations) properly withdrew the authorization of Circle R (Appellant) from participation as an authorized retail food store 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 the withdrawal.

**ISSUE**

The issue accepted for review is whether or not Retailer Operations took action consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it withdrew Appellant's authorization to participate as a SNAP retail food store.

**AUTHORITY**

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, provide that a food retailer 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**

In accordance with regulations, each SNAP authorized firm is required to undergo a periodic reauthorization process to determine whether or not the firm still meets eligibility requirements.

The record shows that Appellant submitted the required reauthorization application,

FNS-252-R SNAP Reauthorization Application for Stores on April 20, 2018. As part of the reauthorization process, an onsite store visit was conducted by an FNS contractor on August 1, 2018, to ascertain Appellant's continued eligibility to participate as a SNAP retail food store.

In a letter dated August 22, 2018, Retailer Operations informed Appellant that its authorization to participate as a retail food store in SNAP would be withdrawn due to the firm's failure to meet either Criterion A or Criterion B, as set forth in 7 CFR § 278.1(b)(1). This withdrawal decision was based on observations made during the store visit as well as information provided on Appellant's reauthorization application.

Retailer Operations' determined Appellant failed to meet the inventory requirements under Criterion A, because it did not carry three stocking units in at least three varieties of foods in the dairy and the meat/poultry/fish staple food categories. The letter also stated that Appellant failed to meet Criterion B because its staple food sales comprise 50% or less of its annual gross retail sales. Additionally, the letter indicated that FNS considered Appellant's eligibility under the Need for Access provision at 7 CFR 278.1(b)(6), but determined Appellant did not qualify for authorization under this provision.

As a result of being found ineligible for participation under both Criteria A and B, and being found ineligible under the Need for Access provision, Appellant's SNAP authorization was withdrawn for a period of six months pursuant to regulations at 7 CFR § 278.1(k)(2).

By letter postmarked September 5, 2018, Appellant appealed Retailer Operations' determination and requested administrative review. The appeal was considered timely and therefore granted by letter dated September 21, 2018, and implementation of the withdrawal has been held in abeyance pending completion of this review.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, such as the withdrawal of a firm's SNAP authorization, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

## **CONTROLLING LAW AND REGULATIONS**

The controlling law in this matter is found in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through SNAP regulations under 7 CFR § 278. In particular, 7 CFR § 278.1(l)(1) and § 278.1(k)(2) establishes the authority upon which FNS shall withdraw SNAP authorization of any firm that 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 § 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. 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, 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) imparts program requirements for retail food store participation which states: “(A) An establishment 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 § 278.1(b)(1)(ii) provides that in order for a retail store to qualify for authorization 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 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)(ii)(B) provides that in order to qualify under Criterion A firms shall: “Offer for sale perishable staple food items in at least three 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.”

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) 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) Withdrawing authorization reads: “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 specifications 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; 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) requires that firms withdrawn for failure to meet program eligibility criteria “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 withdrawal.”

## **APPELLANT'S CONTENTIONS**

Appellant's responses regarding this matter are essentially as follows:

- For continued authorization as a participating SNAP retailer, we are going to follow the guidelines for criteria A and continuously carry the staple items (Fruit, Poultry, Milk, Bread/Cereal) in the required quantities as prescribed.

In reaching a final decision, consideration was given to all contentions submitted, including any not specifically summarized or explicitly referenced in this document.

## **ANALYSIS AND FINDINGS**

The purpose of this review is to either validate or to invalidate the August 22, 2018, decision made by Retailer Operations.

A review of the store visit documentation shows that on the day of the visit Appellant was deficient by two varieties and six stocking units in the dairy staple food category, and was also deficient by one stocking unit in the meat, poultry, fish staple food category.

In Appellant's request for administrative review, Appellant responded that it will follow the guidelines for criteria A and continuously carry the staple items in the required quantities as prescribed.

This review is limited to consideration of the circumstances at the time Retailer Operations' determination was made. It is not within this review's scope to consider actions Appellant may have taken subsequent to this determination to comply with requirements for SNAP authorization, including stocking the store sufficiently to meet SNAP-authorization criteria.

In being deficient in two varieties and six stocking units in the dairy staple food category and also deficient in one stocking unit in the meat, poultry, fish staple food category, the store did not meet the eligibility under Criterion A. Therefore, Retailer Operations correctly concluded Appellant did not meet Criterion, A, because the store did not offer "qualifying staple foods on a continuous basis."

Under Criterion B a business must have more than 50% of its total gross retail sales in staple foods. Retailer Operations determined that Appellant failed to meet Criterion B. The evidence supports that sales of staple foods are less than 50% of Appellant's total reported retail sales. Appellant did not provide evidence that its total gross retail sales were more than 50% of total gross sales.

Retailer Operations considered whether the firm is located in an area with limited access to food when it failed to meet Criterion A per paragraph (b)(1)(ii) or Criterion B per paragraph (b)(1)(iii), and determined that Appellant did not qualify for marginal eligibility.

Appellant has not offered a preponderance of evidence to support it met the eligibility criteria at the time the determination was rendered. SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. If a firm does not conform to the applicable statutes and regulations, the same provide for the firm's removal from the program in accordance with the provisions detailed therein.

## **CONCLUSION**

Based on a review of the evidence, the determination by Retailer Operations to withdraw the authorization of Appellant to participate as a SNAP retail food store is sustained. Appellant does not meet the requirements of a retail food store as set forth in § 278.1(b)(1) of the SNAP regulations. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived. In accordance with 7 CFR § 278.1(k)(2), the owners will not be eligible to reapply for participation as a SNAP retail food store for a minimum period of six months from the effective date of the withdrawal. Operational questions regarding the withdrawal should be directed to the office that initially took the action to withdraw Appellant; please contact Danielle Chandler at (804) 309-3880. General questions regarding the application process can be handled by contacting (877) 823-4369.

## **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008, and to 7 CFR § 279.7 of the regulations with respect to applicable rights to judicial review of this decision. 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 Appellant's owners 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 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.

Kim Dameron  
Administrative Review Officer

June 19, 2019