

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

Costa's Cash Express #2,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0229252

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination by FNS' Retailer Operations Division (hereinafter Retailer Operations) to withdraw Costa's Cash Express #2 (hereinafter Appellant) from authorization as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Appellant to participate as a SNAP retail food store.

AUTHORITY

7 U.S.C. § 2023 and the 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

The record shows that Appellant was initially authorized to participate as a SNAP retail food store on June 10, 2010. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization process to determine whether the firm still meets eligibility requirements.

The record shows Appellant applied for reauthorization on December 18, 2019. As part of the authorization process, an onsite store visit was conducted by an FNS contractor on February 15, 2020, to verify Appellant's reported staple food stock. During this visit, the contractor took photographs of Appellant and its inventory, spoke to Appellant personnel, and completed a written report detailing its observations.

After reviewing Appellant's application and evaluating the store visit report and photographs, Retailer Operations determined Appellant did not carry a sufficient quantity or variety of staple foods to be eligible for SNAP participation under Criterion A or Criterion B. This determination was made in accordance with 7 CFR § 278.1(b)(1). According to the contractor's written record, Appellant had insufficient inventory in the dairy category making it ineligible under Criterion A. Additionally, staple food sales reported by Appellant's owner and confirmed by the store visit report indicate that Appellant was not eligible under Criterion B.

By letter dated February 26, 2020, Retailer Operations sent a proof of inventory letter to Appellant, requesting that any purchase invoices or receipts documenting that it normally carried three varieties in the dairy staple food category, in sufficient stocking units, be submitted within 10 days of receiving this letter. The letter also stated that the invoices or receipts had to be dated no more than 21 days prior to the date of the store visit and not after the store visit. The case record show that Appellant did not respond within the required timeframe.

By letter dated April 7, 2020, Retailer Operations informed Appellant that its authorization to participate as an authorized retailer in SNAP was being withdrawn because it did not offer for sale a variety of foods in sufficient quantities on a continuous basis and was found to carry too few items in the four staple food categories. The letter also informed Appellant that it did not have more than 50% of its total gross retail sales in staple food sales as required for authorization under Criterion B. Additionally, the letter states that FNS considered the firm's eligibility under the Need for Access provision of the regulations found at 7 CFR § 278.1(b)(6), but determined that it does not qualify for SNAP under this provision.

By letter dated March 15, 2020, Appellant requested an administrative review of the withdrawal determination. The request was granted on April 28, 2020, and implementation of the withdrawal has been held in abeyance pending completion of this review. Appellant submitted additional correspondence on April 22, 2020.

STANDARD OF REVIEW

In an appeal of an adverse action, such as the withdrawal of a firm's SNAP authorization, Appellant bears the burden of proving by a preponderance of evidence, that the administrative action should be reversed. This means 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 AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2018, and 7 CFR § 278. 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(1) defines a retail food store, in part, as 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 [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% 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.

7 CFR § 271.2 defines staple food as 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, 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) reads, in part:

- (i) 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

*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>.

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% of the total gross retail sales of the establishment in staple foods (Criterion B).

(ii) 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 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.]*

(iii) In order to qualify under Criterion B, firms must have more than 50% 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.

* 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>.

7 CFR § 278.1(b)(6) deals with the 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 as described in paragraph (a) of this section.

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 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 for the time period specified in paragraph (k)(2) of this section.

7 CFR § 278.1(k)(2) reads, in 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 withdrawal.

APPELLANT'S CONTENTIONS

The following may represent a summary of 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:

- We have had delivery issues since we changed the store hours due to problems we were facing from a nearby school, which led to daily police involvement. The milk company that provides us with milk, cream, eggs, and cheese was unable to deliver the necessary products to our location due to route issues and minimum purchase requirements. We had to develop our own logistics to pick up and deliver milk to our downtown location.
- The site visit was probably done at a time when we were resetting certain items in the store and ran out of products but was replenished accordingly.

- We have now fully stocked the items to meet the necessary requirements to keep the eligibility for the Program. We are using BJs Wholesale Club for bread, milk and eggs. (Exhibit A).
- EBT customers depend on us more than ever, since it helps people travel less distance in this virus pandemic which has taken over everything. They purchase everyday things they need, and go home to avoid going for longer trips to markets. We have kept our location open since we are an essential community store (Exhibit B).

In support of these contentions, Appellant submitted 1 photo of 1-gallon of whole milk, 1 photo of 1 loaf of white bread, and 6 dated receipts.

ANALYSIS AND FINDINGS

With regards to Appellant's contentions listed above, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of Retailer Operations, and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. It is not within the scope of this review to consider actions ownership may take to qualify for continued participation in the SNAP subsequent to that decision, such as stocking all the variety of staples in each of the four staple food categories in the store on a continuous basis, planning to do so once SNAP authorized, or increasing staple food stock in order to qualify under Criterion B. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact or intended corrective actions. The authorization of a store to participate in SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived. Therefore, any contentions that Appellant is now or will be sufficiently stocked with necessary items do not provide any valid basis for dismissing or mitigating the adverse action imposed.

As noted above, in order for a firm to be eligible for SNAP participation, it must qualify under either Criterion A or Criterion B, as described in 7 CFR § 278.1(b)(1). Under Criterion A, a firm must offer for sale, on a continuous basis, 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 food variety, and at least one variety of perishable foods in at least two staple food categories. Under Criterion B, a firm must have more than 50% of its total gross retail sales in the sale of staple food.

A store visit was conducted by an FNS contractor on February 15, 2020. According to the contractor's written record, Appellant had insufficient inventory in the dairy category making it ineligible under Criterion A. Therefore, Retailer Operations correctly concluded Appellant did not meet Criterion A because it did not offer "qualifying staple foods on a continuous basis".

Staple food sales, as reported by Appellant's owner, amounted to 5% of its gross annual sales. As Appellant's staple food sales did not derive more than 50% of its annual sales, Retailer Operations correctly determined Appellant was not eligible for authorization under Criterion B.

The authorization of a store to participate in SNAP must be in accord with the Act, as amended, and SNAP regulations. A full review of the February 15, 2020, store visit report does not indicate any material departure from the documentation as presented. A review of the store visit documentation indicates that Appellant was deficient in the dairy category. Therefore, Appellant does not meet Criterion A. Appellant also does not meet Criterion B because information obtained from Appellant's owner and the store visit report confirms that staple food sales comprise 50% or less of annual gross retail sales.

Regarding Appellant's evidence, two photos and six invoices were submitted. The photos depict a loaf of white bread and 1-gallon of cow's milk. Appellant was not deficient in the bread or cereals staple food category. Appellant met the variety and depth of stock in cow's milk, in the dairy staple food category. As such, the pictures do not provide evidence of a third variety of dairy product being stocked on a regular basis prior to the FNS store visit. Of the six invoices submitted, only two invoices dated February 10, 2020, could be considered as they were within 21-days prior to the February 15, 2020, store visit. Upon review, the invoices do not provide evidence of a third variety of dairy product being stocked on a regular basis prior to the FNS store visit, as they show the purchase of two units of cow's milk. Cow's milk is already accounted for as one variety in sufficient depth of stock during the store visit. The other four invoices are dated November 1, 2019, November 8, 2019, November 20, 2019, and February 17, 2020, and cannot be considered as they are all outside the 21-days prior to the store visit. Even if these invoices were within the required timeframe, they do not provide evidence of a third variety of dairy product as they only show the purchase of cow's milk. It should also be noted that eggs are not classified as a dairy staple food item by FNS. Having only cow's milk and cheese at the time of the store visit, Appellant was deficient in the dairy staple food category by one variety and three stocking units.

When Appellant's owner signed the certification page of the SNAP retailer application to begin operating as a SNAP retailer, and again when it signed the online reauthorization application to continue operating as a SNAP retailer, it confirmed it understood and agreed to abide by Program rules and regulatory provisions. SNAP rules and regulations require SNAP retailers to meet required stocking requirements for staple foods on a continuous basis; however, the FNS store visit determined that ownership failed to adhere to this requirement and therefore was in violation of SNAP regulations. Stores that do not meet required stocking requirements are not eligible to be SNAP retailers. Intent to violate is not a required element with regards to stocking deficiencies. Information on staple food stocking requirements has previously been issued to all retail stores and may also be found on the FNS SNAP retailer web site, the same site that contains the online SNAP retailer application and reauthorization application.

Need for Access

SNAP regulations, at 7 CFR § 278.1(b)(6), state that FNS will consider whether Appellant is located in an area with significantly limited access to food when it 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 Appellant's stocking deficiencies, and whether Appellant furthers the purposes of the Program.

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

CONCLUSION

Based on the analysis above, the determination by Retailer Operations to withdraw the SNAP authorization of Costa's Cash Express #2, is sustained. Appellant does not meet eligibility requirements under Criterion A or B, as outlined in SNAP regulation at § 278.1(b)(1), and is not eligible for authorization under Need for Access, as provided under 7 CFR § 278.1(b)(6). Additionally, the contentions and evidence presented by Appellant are not sufficient to show that the withdrawal action should be reversed.

Pursuant to 7 CFR § 278.1(k)(2), Appellant shall not be eligible to reapply for authorization as a SNAP retail food store for a minimum period of six months from the date of withdrawal. In accordance with the Food and Nutrition Act of 2008 and SNAP regulations, the withdrawal of Costa's Cash Express #2 shall become effective 30 days after receipt of this Decision.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this Decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and 7 CFR § 279.7. If a judicial review is desired, the Complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. This Complaint, naming the United States as the defendant, must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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

May 27, 2021