

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

Cracker Barrel 3 #01,

Appellant,

v.

Case Number: C0210821

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 the Retailer Operations Division properly withdrew Cracker Barrel 3 #01 (hereinafter “Appellant”) from authorization as a retailer 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 withdrawal.

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it withdrew the authorization of Cracker Barrel 3 #01.

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 Appellant firm, Cracker Barrel 3 #01, was originally authorized to participate as a retailer in SNAP on September 24, 2013. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization process to determine whether or not the firm still meets eligibility requirements.

On February 20, 2018, the Appellant firm submitted the required reauthorization application, FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*. On this document the Appellant reported that around 1 percent of its gross retail sales were from the sale of staple foods. The application also reported that the firm carried at least three different varieties in each of the four staple food categories with a minimum depth of stock of three stocking units for each variety. As part of the firm's reauthorization process, an onsite store visit was conducted by an FNS contractor on May 17, 2018, to verify the firm's reported staple food stock.

After reviewing the store visit report and photographs and re-evaluating the Appellant's reauthorization application, the Retailer Operations Division determined that the firm did not maintain a sufficient variety, quantity, or percentage of staple foods to be eligible for SNAP participation under either Criterion A or Criterion B as set forth in 7 CFR § 278.1(b)(1) of the SNAP regulations. Specifically, the firm appeared to be deficient in the dairy staple food category.

On June 13, 2018, the Retailer Operations Division sent the Appellant a proof of inventory request letter which stated that the firm was lacking in the dairy category on the day of the store visit and gave the firm an opportunity to prove, through invoices and receipts, that it normally carries the minimum number of varieties and stocking units in the dairy category. The letter stated that the invoices and receipts must be dated no more than 21 calendar days prior to the date of the store visit, and may not be dated after the visit. According to agency records, the Appellant submitted inventory purchase receipts in response to this request for information. While the receipts showed additional purchases of dairy products, they did not demonstrate that the firm met the stocking requirements for dairy products during the relevant time period. While the firm had adequate quantities of milk and cheese, the firm did not have three stocking units of a third variety of dairy products, and therefore was short of meeting eligibility requirements.

In a letter dated June 27, 2018, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it did not meet the necessary criteria to be eligible for SNAP participation under Criterion A or B. The withdrawal letter stated the Appellant failed to meet the requirements of Criterion A because it did not offer for sale on a continuous basis a variety of foods in all four staple food categories. It also stated that the Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its total retail sales. Additionally, the letter indicated 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 the Appellant does not qualify for SNAP 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, the Appellant's SNAP authorization was withdrawn for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter postmarked July 3, 2018, the Appellant, through Counsel, requested an administrative review of the withdrawal determination. The request was granted 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, an Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 untrue.

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 is promulgated through regulation under Title 7 CFR Part 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 § 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.

7 CFR § 278.1(k)(2) reads, in relevant part:

FNS shall deny the application of any firm if it determines that:

(2) 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.

7 CFR § 271.2 defines a retail food store as:

- (1) 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 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 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 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...

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)(i) states, in part:

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 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).

7 CFR § 278.1(b)(1)(ii) states, in part:

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.]**

7 CFR § 278.1(b)(1)(iii) states, in part:

In order to qualify 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...

7 CFR § 278.1(b)(6) states:

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.

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions as part of its request for administrative review, in relevant part:

- The Appellant firm is conveniently located on the corner of a residential street, near multiple churches and the Victorian Housing Authority;
- Appellant is dedicated to providing the community with constant access to a substantial quantity of staple food items and was the only store in the surrounding area that was open during Hurricane Harvey;
- While there are 12 SNAP authorized stores within a 1 mile radius of the Appellant store, none are comparable with regard to convenience of location, operational hours, or quantity and quality of the assortment of foods;
- Forcing SNAP participants, especially those who are elderly, have small children, and/or are disabled, to shop at other authorized stores in the area would cause significant hardship to them, because those stores are located near major streets with congested intersections and in highly populated areas;
- The Appellant firm meets Criterion A and had sufficient dairy products, as demonstrated by the store visit checklist and photographs, and submitted inventory documentation;
- The Appellant firm falls within the "Need for Access" exception for authorization;
- Withdrawing the Appellant firm's authorization would blatantly go against the purposes of the program; and
- Appellant requests a review of the case, and reversal of the firm's withdrawal from authorization in SNAP.

In addition to the request for review, the Appellant submitted the following documentation for consideration:

- An April 2016 article titled "Know Your Core, Protect Your Core," published in *Convenience Store News*;
- A summarized 2016 report titled *U.S. Grocery Shopping Trends, 2016*, by the Food Marketing Institute;
- A January 2018 publication titled *Profile of NSAP Households*, published by FNS;
- Numerous inventory purchase receipts from various retailers, dated April 26, 2018, through May 17, 2018 (including several already submitted to the Retailer Operations Division); and
- Undated store photographs.

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

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the contractor's store visit and at the time the Retailer Operations Division rendered its decision.

After reviewing the store visit report and photographs, as well as evaluating the contentions and evidence submitted by the Appellant, it is the determination of this review that the Appellant firm does not carry, on a continuous basis, sufficient staple food inventory to be eligible for SNAP authorization.

Criterion A and Criterion B Eligibility

In order for a firm to be eligible under Criterion A, it must offer 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 variety. Eligibility under Criterion B requires that more than 50 percent of the firm's total gross retail sales be from the sale of staple foods.

With regard to Appellant's firm, the record shows that the firm was did not have enough inventory in the dairy products staple food categories on the day of the contractor's store visit to meet Criterion A eligibility requirements. There is no evidence that sufficient quantities of other products in these staple food categories were stored elsewhere or were temporarily relocated.

Appellant, through counsel, contends the firm had sufficient dairy products, based upon the store visit checklist and photographs, and the submitted inventory receipts. Specifically, Appellant points to the following products on the store visit photographs: N'Joy Non-Dairy Coffee Creamers and cheese dips. On the submitted inventory invoices, Appellant refers to the following items as meeting the dairy products stocking requirement: ice cream, Core Spa Protein Milk Shakes, Milk (whole and chocolate), Laughing Cow Cheese (soft spread), Country Crock Spread (butter substitute), cheddar cheese slices, Salsa Con Queso Dip, and Jalapeno Cheddar dip.

When the Retailer Operations Division withdrew the Appellant firm, it found that the firm had two dairy product varieties: milk and cheese. However, the firm did not have three stocking units of a third dairy product. Store visit photos show that firm had one stocking unit of butter. Invoices submitted in response to the June 13, 2018, proof of inventory request letter show that the firm had also purchased one stocking unit of butter substitute. However, there is no evidence that the firm had three stocking units of butter or three stocking units of butter substitute, or three stocking units of any other staple dairy product variety.

Inventory purchase invoices submitted by Appellant for the administrative review record likewise do not show that the firm had three stocking units of a third dairy variety during the relevant time period. Several of the items Appellant identifies as staple dairy products, such as non-dairy coffee creamer and ice cream, are in fact accessory foods and do not count toward Criterion A eligibility requirements. All other products identified by Appellant on the inventory invoices, with the exception of the butter substitute, are products that fall within the dairy product varieties animal milk or animal cheese, which the firm has been credited for. The one unit of butter substitute was on an invoice from Walmart, dated May 11, 2018, but that invoice was previously submitted to the Retailer Operations Division, and therefore was also accounted for. Accounting for all the evidence, the firm remains two stocking units short in a third dairy variety.

Given the firm's insufficient inventory of products in the dairy products staple food category at the time of the store visit, the firm is not eligible for SNAP authorization under Criterion A. The firm is also not eligible for SNAP participation under Criterion B, as the sale of staple foods does not exceed 50 percent of the firm's total retail sales.

Hardship to SNAP Participants

The Appellant has contended that disqualification of the firm will cause hardship for SNAP households because there are no other authorized firm nearby that are as conveniently located, or that offer the same operational hours or quantity and quality of the assortment of foods. This contention has no bearing on this case. SNAP regulations, at 7 CFR § 278.6(f), give FNS the discretion to impose a civil money penalty as a sanction in lieu of a disqualification if the subject firm sells a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households because there is no other authorized firm in the area selling as large a variety of staple food items at comparable prices. However, this flexibility only applies when an authorized firm, that meets eligibility criteria, has been disqualified because of program violations. Here, the firm has not been disqualified, but rather its authorization has been withdrawn because it does not meet eligibility criteria. Therefore, hardship to SNAP households is irrelevant in this case.

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. This Need for Access evaluation also considers other factors, such as distance to the nearest SNAP-authorized firm, transportation options, the extent of the Appellant's stocking deficiencies, and whether or not the Appellant firm furthers the purposes of the program.

The record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the Appellant firm 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, it is the determination of this review that the Appellant firm, Cracker Barrel 3 #01, does not meet eligibility requirements under Criterion A or B outlined in regulations at 7 CFR § 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 presented by the Appellant are not sufficient to show that the withdrawal decision made by the Retailer Operations Division should be reversed. Accordingly, the decision by the Retailer Operations Division to withdraw the authorization of Cracker Barrel 3 #01 to participate as a retailer in SNAP is sustained.

Pursuant to 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for authorization as a retailer in SNAP for a minimum period of six months from the date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of Cracker Barrel 3 #01 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 in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a 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.

MICHELLE WATERS
Administrative Review Officer

October 26, 2018