

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review Branch  
Alexandria, VA 22302**

**Crossroads,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0201293**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the authorization of Crossroads (hereinafter “Appellant”) to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly withdrawn by the Retailer Operations Division, Retailer Operations Branch (hereinafter “ROD Office”).

**ISSUE**

The issue accepted for review is whether the SNAP Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(k)(2) and § 278.1(l)(1)(iii) when it made the decision to withdraw Appellant’s authorization to participate in the SNAP.

**AUTHORITY**

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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 record reflects that on July 18, 2012 Appellant was granted authorization to participate in the SNAP. An inspection of Appellant’s staple food inventory was conducted on May 19, 2017; Appellant was subsequently advised of the Department's decision to withdraw the firm’s authorization to participate in the SNAP in a letter dated June 27, 2017. The regulatory bases

given for that denial were 7 C.F.R. § 278.1(b)(1) and § 278.1(k)(2). The firm was instructed that its authorization would be withdrawn unless the firm timely requested an administrative review of the decision, in which case the decision would be held in abeyance pending the outcome of the review. On July 6, 2017, Appellant requested an administrative review of this decision. The request was granted.

## STANDARD OF REVIEW

In appeals of adverse actions an appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means 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 not true.

## CONTROLLING LAW

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(k)(2) and § 278.1(l)(1)(iii) establish the authority upon which a retail food store or wholesale food concern may be withdrawn from participation in the SNAP. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary for stores to qualify for participation in the SNAP.

7 C.F.R. § 271.2 states, *inter alia*:

*Retail Food Store* means: 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)...or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)...Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores...

7 C.F.R. § 278.1(b)(1)(ii) states, *inter alia*:

Application of Criterion A. In order to qualify under this criterion, 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 three different varieties of food items in each of the four staple food categories.

7 C.F.R. § 278.1(b)(1)(iii) states, *inter alia*:

Application of Criterion B: In order to qualify under this criterion, 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 C.F.R. § 278.1(b)(1)(ii)(C) states, *inter alia*:

...Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes.

7 C.F.R. § 278.1(b)(1)(iv) states, *inter alia*:

Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including candy, soft drinks, tea or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

7 C.F.R. § 278.1(k)(2) states, *inter alia*:

FNS shall deny the application of any firm if it determines that:  
The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section; or The firm has failed to meet the eligibility requirements...under Criterion A or Criterion B....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 C.F.R. § 278.1(l)(1)(iii) states, *inter alia*:

FNS shall withdraw the authorization of any firm authorized to participate... if ...The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...

### **APPELLANT'S CONTENTIONS**

In Appellant's written request for review dated July 6, 2017 it was argued that:

The firm now offers breakfast cereal, sandwich bread, milk, hot dogs, sandwich meat, canned vegetables and canned meat. The firm also sells sugar, eggs, flour, various condiments and other items. Appellant provides copies of product purchase invoices/receipts in support thereof.

## ANALYSIS AND FINDINGS

The record reflects that a contracted store visit of Appellant's firm was conducted on May 19, 2017. Documentation generated as a result of that visit includes photographs of the firm's interior and exterior, a store layout diagram and a store inventory survey reflecting that the firm had ample varieties of staple food stock in the breads and cereals category but had an inadequate stock of staple food in the dairy category, in the meats/poultry/fish category and in the fruits and vegetables category, thus failing to qualify under Criterion A. It was additionally noted that the Appellant firm maintained a considerable stock of accessory foods and prepared, ready-to-eat food, which are not considered staple food for the purposes of the SNAP. In addition, the firm maintained a substantial inventory of tobacco products, alcohol, lottery tickets, automotive products, health and beauty products, paper goods, cleaning supplies, over-the-counter medicines, gift items, party goods, jewelry, souvenirs, ATM and/or money-transfer service products and other non-food items. Moreover, the firm operated as a restaurant/carryout and as a gasoline station. Thus the store visit further corroborated that staple food sales could not have reasonably exceeded 50% of gross sales. As staple food sales must comprise more than 50 percent of a firm's gross retail sales, the store was ineligible for authorization under Criterion B. It is noted for the record the firms' most recent application for reauthorization (FNS – 252R, signed by Appellant on February 27, 2017) indicated that the firm's staple food sales comprised 10% of gross sales.

In regard to Appellant's contentions above, Appellant provided six product purchase invoices; all were dated in the month of July 2017, approximately one and one-half to two months following the May 19, 2017 store visit, and thus cannot demonstrate that the firm qualified to participate in the SNAP at an earlier time. Nonetheless, even these later invoices do not appear to demonstrate an adequate inventory of dairy items.

Appellant notes that it has added inventory since the store visit conducted on May 19, 2017, and now qualifies under Criterion A and/or B. However, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the earlier decision of the SNAP Office and as such it is limited to consideration of the relevant facts and circumstances at the time of that decision. It is not within the scope of this review to consider actions Appellant may have taken to qualify for participation in the SNAP subsequent to the referenced store visit and the resulting decision by the SNAP Office. Therefore, Appellants' contention that it may now qualify under Criterion A and/or B of the eligibility requirements is not a valid basis upon which to reverse the decision. Moreover, 7 CFR §278.1(k)(2) of the SNAP regulations is quite specific and does not provide for agency discretion in its requirement that "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." (Emphasis added.)

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. The SNAP regulations at §278.1(b)(1)(ii) are clear (with emphasis added) that, 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.” The store was deficient in three of the four staple food categories on the day of the visit, and, therefore, did not offer qualifying staple foods on a *continuous* basis. Appellant provides insufficient supporting documentation verifying that staple food sales exceeded 50% of gross sales at the time of the store visit. The receipts provided, being an incomplete record of products and services offered at the firm, cannot demonstrate that the firm qualified under Criterion B. Also, as noted above, Appellant’s most recent application to participate in the SNAP indicated that the firm’s staple food sales were 10% of its gross retail sales. Moreover, as noted above, store visit documentation, including photographs of the interior and exterior of the store, an inventory survey and a store layout diagram reflect that the firm’s staple food sales could not reasonably have exceeded 50% of gross sales.

### **CONCLUSION**

In view of the above, it is my determination that the SNAP Office’s decision to withdraw Appellant’s authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(k)(2) and § 278.1(l)(1)(iii). Therefore the withdrawal action is sustained and shall remain in effect for a period of six months. The store may reapply to participate in the SNAP up to ten days prior to the end of the six-month period. This decision will become effective 30 days following Appellant’s receipt of this document.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food & Nutrition Act of 2008 (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 provisions of the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

DANIEL S. LAY  
Administrative Review Officer

February 15, 2018