

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

**Cumberland Exxon,**

**Appellant,**

**v.**

**Case Number: C0204797**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to deny the application of Cumberland Exxon to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) and that the Appellant may not reapply for six months from the effective date of the denial decision.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(k)(1) and (2) in its administration of the SNAP when it denied the application of the Appellant to participate as an authorized SNAP retailer.

**AUTHORITY**

7 U.S.C. § 2023 and the 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 applied to participate in the SNAP as an authorized retailer on September 18, 2017. In a letter dated November 28, 2017, the Retailer Operations Division informed the Appellant that the store did not carry a sufficient variety of

staple food items in the dairy category, one (1) of the four (4) required staple food categories, and therefore did not meet eligibility Criterion A. The Retailer Operations Division also determined that the store failed to meet eligibility Criterion B because the store's **staple food** sales comprised 50 percent or less of its annual gross retail sales. Therefore, the store's application was denied.

In a letter postmarked December 4, 2017, the Appellant requested an administrative review of the Retailer Operation Division's denial of its SNAP application. The request for administrative review was granted.

### 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 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 its implementing regulations at Part 278 of Title 7 of the Code of Federal Regulations (CFR).

7 CFR § 278.1(b)(1)(i)(A) reads, in part,

*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 ... including perishable foods in at least two of the categories (**Criterion A**); **or have more than 50 percent of the total gross retail sales ... in staple foods (Criterion B.)** [Emphasis added.]*

7 CFR § 271.2, defines "Staple food" in relevant part, as:

*... Those 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 .... Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility.... 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 part:

*In order to qualify under [Criterion A] firms shall:*

- (A) **Offer for sale ... qualifying staple food items on a continuous basis ... 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 items. 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 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 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 ....* [Emphasis added.]

7 CFR § 278.1(k) 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.* [Emphasis added.]

## APPELLANT'S CONTENTIONS

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

- The store should be eligible under Criterion A. The owners received a letter after the store visit stating that the store did not have enough dairy products but could be determined eligible if it replenished the store and provided receipts as proof.
- The Appellant provided a purchase receipt dated November 20, 2017 as evidence of additional dairy purchases.

The preceding may represent only a brief summary of the 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.

## ANALYSIS AND FINDINGS

### Store Visit Results

The case record documents that in reaching its decision to deny the Appellant's SNAP application, the Retailer Operations Division considered information obtained during a store visit conducted on October 28, 2017 by an FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. The store visit report and photographs documented that the inventory of staple food items at the time of the visit included only two (2) varieties of staple food in the dairy category (ice cream and canned cheese).

After reviewing the store visit report, the Retailer Operations Division sent the Appellant a proof of inventory letter dated November 14, 2017. That letter requested any invoices and receipts dated **prior to the store visit** which would document that the store normally carries at least three (3) varieties of food in the dairy category. In response, the Appellant provided a single receipt dated November 20, 2017 which is after the date of the store visit.

## Criterion A

The SNAP regulations at 7 CFR § 278.1(b)(1)(ii) states that a firm must carry no fewer than three (3) different varieties of food in each of the four (4) staple food categories on a **continuous** basis. The Appellant was denied under Criterion A because on the day of the store visit it carried only two (2) varieties of staple food in the dairy category.

The Appellant contends that proof of inventory letter dated November 14, 2017 stated that the store could be determined eligible if the owners replenished the store and provided receipts as proof. A review of the proof of inventory letter does not support the Appellant's contention. The letter clearly states that any invoices provided in support of the store's eligibility must be dated **before** the store visit.

There is no evidence in the case record that the store carried the minimum three (3) varieties of staple food in the dairy category at the time of the store visit. All of the invoices and receipts provided by the Appellant are dated after the store visit. SNAP regulations at 7 CFR § 278.1(b)(1)(ii)(A) requires that in order to qualify under Criterion A, a retailer must "**offer for sale ... qualifying staple food items on a continuous basis ... 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.] Based on a preponderance of the evidence, the Retailer Operations Division properly determined that the Appellant store was ineligible under Criterion A at the time of the store visit.

## Criterion B

The Retailer Operations Division determined that the Appellant did not meet Criterion B because the store's **staple** food sales did not comprise **more than 50 percent** of its gross retail sales. This is confirmed by the Appellant's application which estimated its staple food sales at 35 percent of its gross retail sales with accessory food items such as snack foods, condiments and soda accounting for 25 percent and nonfood items at 40 percent. There is nothing in the case record which would indicate that these percentages are not accurate. Based on a preponderance of the evidence, the Retailer Operations Division properly determined that the Appellant store was ineligible under Criterion B.

## CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to deny the SNAP application of Cumberland Exxon is sustained. The regulations clearly state the criteria that a store must meet in order to be authorized for the

SNAP. There are no exceptions to these requirements. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization until six months after November 28, 2017, the effective date of the denial decision.

### **RIGHTS AND REMEDIES**

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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, 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.

RONALD C. GWINN  
Administrative Review Officer

February 21, 2018