

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

Discount Express,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0210374

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of Discount Express (hereafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 Code of Federal Regulations (CFR) Part 278, when it withdrew Appellant's authorization to participate as a retailer in SNAP on June 5, 2018

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 FNS requires that stores be reauthorized on a set schedule. As part of that routine reauthorization process, the Appellant submitted a reauthorization application dated April 3, 2018. In a letter dated June 5, 2018, Retailer Operations Division withdrew Appellant's authorization to participate as a retailer in SNAP. This withdrawal was based on information obtained during a store visit on April 30, 2018, as well as information provided on the firm's reauthorization application. Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations.

The withdrawal letter stated that your firm fails to meet Criterion A because the store did not have the required number of staple food varieties and stocking units in the dairy, meat/poultry/fish, and breads and cereals categories on April 30, 2018. Your firm also fails to meet Criterion B because your firm's staple food sales comprise 50 percent or less of your annual gross retail sales. In addition, FNS considered your store's eligibility under the need for access provision at 7 CFR 278.1(b)(6) and determined that your firm does not qualify for SNAP authorization under this provision as the store was not located in an area with significantly limited access to food under access criteria established by FNS.

As the firm failed to meet each eligibility criterion for approval, Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided at 7 CFR § 278.1(k)(2).

In correspondence dated June 10, 2018, Appellant appealed Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

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 and Nutrition Act of 2008, as amended, 7 U.S.C. § 2018 and Section 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(l)(1) establishes the authority upon which the authorization of any firm to participate in SNAP may be withdrawn if it fails to meet established eligibility requirements.

7 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 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 § 271.2 defines staple food, in part, as... 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... 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)(A) relays specific program requirements for retail food store participation, which reads, in part, “An establishment . . . shall . . . 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 three 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: “*Application of Criterion A*¹. In order to qualify under this criterion, 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 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. 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

¹ 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>.

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(k) reads, in part, “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 § 278.1(b)(6) states in part: “*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”

APPELLANT’S CONTENTIONS

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

1. We’ve never been out of any items the customers usually purchase and have purchased before.
2. We always carried more category items than required by USDA.
3. We have been accepting EBT for the past six years, there hasn’t been a single complaint from a customer.

The preceding may represent only a brief 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.

ANALYSIS AND FINDINGS

In regards to Appellant's contentions, 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. The authorization of a store to participate in the SNAP must be in accord with the Act and the regulations, as amended; those requirements of law cannot be waived. It is not within the scope of this review to consider actions the owner may take to qualify for participation in the SNAP subsequent to that decision.

Criterion A

To meet Criterion A, a firm must carry no fewer than three (3) different varieties of staple food in each of the four (4) staple food categories with a minimum depth of three (3) stocking units for each qualifying staple variety. There also must be at least one (1) variety of perishable foods in at least three (3) staple food categories. In addition, the SNAP regulations at 7 CFR § 278.1(b)(1)(i)(A) and 7 CFR § 278.1(b)(1)(ii) require retailers to meet Criterion A eligibility requirements "on a continuous basis." After reviewing the contractor's store visit report and photographs as well as evaluating the contentions and evidence submitted by 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 participation. Appellant was deficient in the Dairy products staple food category and missing two (2) stocking units, the breads or cereals category missing two (2) stocking units and in the meats, poultry, fish category missing one (1) stocking unit.

Criterion B

In the event of a firm's failure to meet the requirements of eligibility under Criterion A, federal regulations require that the firm's eligibility also be evaluated under Criterion B. In order to qualify for authorization under Criterion B, more than 50 percent of a retail store's total annual gross retail sales must come from the sale of staple foods. Based on the FNS store visit photographs and the application, the Retailer Operations Division determined that Appellant was also ineligible for authorization under Criterion B according to 7 CFR § 278.1(b)(1)(iii). 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 reauthorization application which shows its staple food sales at one (1) percent of its gross retail sales. The majority of the store's gross retail sales are in non-foods at 95 percent. There is nothing in the case record which would indicate that the percentage of staple food sales to gross retail sales is inaccurate. It is the determination of this review that Retailer Operations Division properly determined that the Appellant store was ineligible under Criterion B.

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. The record indicates that the Retailer Operations Division conducted a Need for Access evaluation and appropriately determined that the Appellant firm did not qualify for SNAP authorization under this provision.

It is important to clarify that the purpose of the instant review is to ascertain whether or not the decision reached by the Retailer Operations Division was correct at the time it was made. There is no provision in the SNAP regulations for consideration of changes made following the submission of the materials responsive to requests from the Retailer Operations Division or the completion of the contracted store visit. Similarly the regulations do not support re-visiting following a final determination by the Retailer Operations Division.

CONCLUSION

Based on the discussion herein, the determination by Retailer Operations Division to withdraw the authorization of Discount Express to participate as a retailer in SNAP is sustained.

Pursuant to 7 CFR § 278.1(k)(2) of the SNAP regulations, Appellant shall not be eligible to submit a new application for Discount Express, for a minimum period of six months from the effective date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery of this decision. A new application for SNAP participation may be submitted 10 days prior to the expiration of the six-month withdrawal period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 Freedom of Information Act (FOIA), 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.

Monique Brooks
Administrative Review Officer

October 10, 2018