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

**Fast Trax,**

**Appellant,**

**v.**

**Case Number: C09208892**

**Retailer Operations Division,**

**Respondent.**

## 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 Fast Trax (hereinafter "Appellant") to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly withdrawn by the Retailer Operations Division, Retailer Operations Branch (hereinafter "ROD Office").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(b)(6), § 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 August 18, 2008 Appellant was granted authorization to participate in the SNAP. As part of the routine reauthorization process, an inspection of Appellant's staple food inventory was conducted on March 26, 2018. Appellant was subsequently advised of the Department's decision to withdraw the firm's authorization to participate in the SNAP in a letter dated April 23, 2018. The regulatory bases given for that denial were 7 C.F.R. § 7 C.F.R. § 278.1(b)(1), (6) 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 The firm was instructed that its authorization would be withdrawn unless the firm timely requested an administrative review of the decision, in which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 May 8, 2018, 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.

7 C.F.R. § 271.2 states, in part:

> *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) further stipulates, in part:

> 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 with a 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.

7 C.F.R. § 278.1(b)(1)(iii) states, in part:

> 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, in part:

> …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, in part:

> 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(b)(6) states, in part,

> 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 or B, so long as the applicant firm meets all other SNAP authorization requirements.

7 C.F.R. § 278.1(k)(2) states, in part:

> 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, in part:

> 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 correspondence dated April 4, 2018 providing documentation to the ROD Office, and in its written request for review dated May 8, 2018, it was argued that:

1. At the time of the inspection Appellant's store had just undergone a re-setting of products by the firm's vendor and many out-of-date items were removed from the shelves and replacement stock not yet been delivered.

2. Had the inspector inquired during the visit the firm would have explained the above-referenced situation.
3. Appellant provided a Schedule C tax return (Form 1040) for 2016 and also provided photographs of the shelves and coolers as of May 8, 2018 showing all necessary items are in stock, as they are on a daily basis, to meet the Criterion A requirement.

## ANALYSIS AND FINDINGS

The record reflects that a contracted store visit to Appellant's firm was conducted on March 26, 2018. 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 fruits and vegetables category but had an inadequate stock of staple food in the in the dairy category, in the breads and cereals category and in the meats/poultry/fish 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 lottery tickets, tobacco products, automotive products, health and beauty products, paper goods, cleaning products and other non-food items. The firm also operated as a gas station. Thus the store visit further corroborated that staple food sales could not have reasonably exceeded 50% of gross sales. Tax documentation provided by Appellant failed to establish eligibility. As staple food sales must comprise more than 50 percent of a firm's gross retail sales, the store was determined ineligible for authorization under Criterion B. It is noted for the record the firm's most recent application for reauthorization (FNS – 252R, signed by Appellant on March 14, 2018) indicated that the firm's staple food sales comprised less than 1% of gross sales.

In regard to contention 1 above, to the extent Appellant contends that extenuating circumstances may have contributed to the level and composition of staple food inventory observed at the firm on the day of the store visit, there is no provision in the statute, regulation or agency policy which requires/allows such considerations to warrant a reversal of a withdrawal decision correctly made. Additionally, as noted above, 7 C.F.R. §278.1(l)(1)(iii) clearly provides that FNS shall withdraw the authorization of any firm 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.

Regarding contention 2 above, Appellant's explanation, even if it had been provided to the store visit personnel and same had been documented in the store visit record, would not have demonstrated that the firm qualified; as noted in the foregoing, no provision in the statute or regulations allows consideration of extenuating circumstances in store eligibility considerations.

With regard to contention 3 above, the tax documentation, along with the handwritten breakdown of sales categories provided by Appellant, reflects that staple food sales (in 2016) were approximately .85% of total gross sales, far short of meeting Criterion B for SNAP eligibility. Photographs provided by Appellant are undated, presumably taken after the store visit, and as such unreliable representations of inventory held at an earlier time. Moreover, the photographs (though it is difficult due to the photo quality to see the products in detail) do not

appear to demonstrate that the firm would have qualified had such inventory been present at the time of the store visit.

As referenced in the foregoing (page 3 above), recent changes to the SNAP provide that retailers located in a low-income/low food-access area may receive an exception to the standard eligibility rules for participation; however, the record reflects that the ROD Office duly evaluated Appellant's eligibility for such exception and correctly found that the firm did not qualify.

## 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 at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), (6), § 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 June 22, 2018
Administrative Review Officer