

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

Fat Boys Of Main Street,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0223265

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that Retailer Operations Division (hereinafter Retailer Operations) properly withdrew the authorization of Fat Boys Of Main Street (hereinafter Appellant), to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took action consistent with Title 7 of the Code of Federal Regulations (CFR), Section 278.1(b)(1), in its administration of SNAP, when it withdrew the authorization of Appellant to participate as a SNAP retail food store.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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

FNS regulations require that stores be reauthorized on a set schedule. The owner completed a reauthorization application. On November 26, 2018, FNS-contracted personnel conducted an onsite store visit to ascertain Appellant's continued eligibility to participate in SNAP. By letter dated September 5, 2019, Retailer Operations requested proof of dairy inventory. Appellant

responded by letter September 9, 2019, and provided some receipts to Retailer Operations for review.

By letter dated September 20, 2019, the authorization of Appellant to participate as a retail food store in SNAP was withdrawn because the firm did not meet the eligibility criteria for stores as enunciated in the regulations at 7 CFR § 278.1(b)(1). Retailer Operations' letter informed Appellant that it failed to meet Criterion A because it did not offer for sale a variety of staple foods in sufficient stocking units on a continuous basis in the established staple foods categories, specifically the dairy staple food category.

The letter also states that the firm failed to meet Criterion B. A business must have more than 50% of its total gross retail sales in staple foods to be eligible for authorization under Criterion B. Appellant's eligibility under the need for access provision was also reviewed. Appellant was found not to meet the established criteria.

By letter dated September 24, 2019, Appellant requested administrative review with supporting documentation. The appeal was granted by letter dated October 30, 2019, and implementation of the withdrawal was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means Appellant has the burden of providing credible, relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended, and 7 U.S.C. § 2018. The SNAP regulations at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008.

7 CFR § 271.2 states that Retail Food Store means: "An establishment 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 seven 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 three 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 accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter.

Entities that have more than 50 percent of their total gross retail sales in: Food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under 278.1(b)(1) of this chapter. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.” 7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis as offering 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 qualifying staple variety on any given day of operation.

7 CFR § 278.1(b)(1)(i) imparts program requirements for retail food store participation, which states: “(A) An establishment or house-to-house trade route 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 of this chapter, 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 or route in staple foods (Criterion B).”

7 CFR § 271.2 states: “Staple food, means 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.”

7 CFR § 278.1(b)(1)(ii) provides that in order for a retail store to qualify for authorization 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 seven 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.” 7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis as offering 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 qualifying staple variety on any given day of operation.

7 CFR § 278.1(b)(1)(iii) provides that in order for firms to qualify for authorization 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. However, a fee directly connected to the processing of staple foods, such as raw

meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B.”

7 CFR § 278.1(b)(6) regarding access states: “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.”

7 CFR § 278.1(b)(1)(iv) states: “Ineligible firms: Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization and authorized firms will be withdrawn from program participation. Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, 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 sales in foods cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout, 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 CFR § 278.1(l)(1) Withdrawing authorization reads: “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 specifications 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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section.”

7 CFR § 278.1(k)(2) requires that firms withdrawn for failure to meet program eligibility criteria “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 withdrawal.

APPELLANT’S CONTENTIONS

All contentions as stated, have been considered in rendering this decision whether listed or not:

- I give invoices to my accountant’s office for sales tax and tax returns. I sent in copies of invoices me and my bookkeeper could find. I apologize for the fading, but they were from so long ago, and my bookkeeper had water damage to their storage facility where my business paperwork was stored.
- I stock multiple dairy products along with all the other food groups.

In support of its contentions, Appellant advanced:

- A copy of a letter to the accounting firm, dated July 15, 2019, addressing water damage caused by the roof collapse.
- Twelve photos were advanced to show stock as of September 23, 2019.
- Multiple inventory receipts of which seven were not duplicative.
- Tax records in response to Retailer Operations' initial request for information needed for reauthorization.

ANALYSIS AND FINDINGS

This review is to validate the determination by Retailer Operations and is limited to consideration of the relevant facts at the time of the decision. 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 onsite review of Appellant's food inventory revealed insufficient varieties and stocking units in the dairy staple food category. The SNAP regulations at § 278.1(b)(1)(ii)(A) under Criterion A as currently implemented, require a firm shall offer for sale and normally display in a public area, 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 on any given day of operation, and at least one variety of perishable foods in at least three staple food categories.

The responding owner and his bookkeeper provided multiple receipts in response to Retailer Operations' request for proof of dairy inventory and in the request for administrative review. Upon review, seven of the receipts were not duplicative. Two of those seven receipts were not legible; however, the date was not within the required 21 calendar days prior to the store visit and therefore cannot be considered. Four of the receipts did not establish that Appellant had the required varieties and stocking units in the dairy staple food category at the time the decision was rendered; these receipts show the purchase of milk, which supports the inventory Appellant had at the time of the store visit. Of all the receipts provided, the only one that shows the purchase of margarine, the missing stock item, was dated on the day of the store visit and time stamped after the store visit had occurred. Again, the date was not within the required 21 calendar days, prior to the store visit, and therefore cannot be considered. Therefore, a preponderance of the evidence supports that on the date of the store visit Appellant did not meet Criterion A.

As to the photos submitted, these are representative of current stock. As such, they are not relevant to Appellant's stock at the time the withdrawal decision was rendered.

Based on Appellant's own reauthorization application, Appellant's staple food sales comprise of approximately 12% of its gross retail sales for tax year 2017. In addition, the photographs and store inventory information provided from the store visit indicate Appellant did not receive more than 50% of its projected annual sales from the sale of staple foods. Accordingly, Retailer Operations correctly determined Appellant was not eligible for SNAP authorization under Criterion B per 7 CFR § 278.1 (b)(1)(iii).

The record indicates Retailer Operations conducted a Need for Access evaluation and determined Appellant did 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.

SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application and reauthorization. The evidence supports that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the withdrawal decision was rendered. Appellant has not offered a preponderance of evidence to support that it met the eligibility criteria at the time the determination was rendered.

SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. If a firm does not conform to the applicable statutes and regulations, the same provide for the firm's removal from the program in accordance with the provisions detailed therein.

CONCLUSION

Based on a review of the evidence, the determination by Retailer Operations to withdraw the authorization of Appellant to participate as a SNAP retailer is sustained. Appellant does not meet the requirements of a retail food store as set forth in § 278.1(b)(1) of the SNAP regulations. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived.

In accordance with 7 CFR § 278.1(k)(2), Appellant will not be eligible to reapply for participation as a retail food store in SNAP for a minimum period of six months from the effective date of the 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 letter.

General questions regarding the application process can be handled by contacting 877-823-4369 and by consulting the USDA website. Operational questions regarding the withdrawal should be directed to the office that initially took the action to withdraw Appellant; please contact Karla Morris at (972) 454-1856 or Karla.Morris@usda.gov.

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 to the SNAP regulations at 7 CFR § 279.7. 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 Appellant's owners 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 30 days of receipt of this Decision. Please note that

the judicial filing timeframe is specified in the Act, and this office is unable to grant an extension.

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.

KIM DAMERON
Administrative Review Officer

April 30, 2020