

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

Food Center,

Appellant,

v.

Case Number: C0212567

Retailer Operations Division,

Respondent.

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 the Retailer Operations Division (Retailer Operations) properly decided to withdraw the authorization of Food Center (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 7 CFR § 278.1(b)(1), in its administration of the 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 owners were requested to complete a reauthorization application. FNS-contracted personnel conducted an onsite visit July 2, 2018, to ascertain Appellant's continued eligibility to participate in the SNAP. Retailer Operations sent Appellant a proof of inventory letter dated July 23, 2018, requesting evidence that your store normally carries the minimum required number of varieties, stocking

units, and perishables in the dairy staple food category. The letter stated that the invoices and receipts had to be dated no more than 21 calendar days prior to the date of the store visit, and could not be dated after the store visit. The record confirms that Appellant did not reply to this letter.

By letter dated August 21, 2018, the authorization of Appellant to participate as a retail food store in the SNAP was withdrawn because the firm did not meet the eligibility criteria for stores as enunciated in the regulations at 7 CFR § 278.1(b)(1).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 the owners that Appellant failed to meet Criterion A because it did not offer for sale a variety of staple foods in sufficient quantities on a continuous basis. Appellant failed to meet the stocking units and varieties in the dairy products 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. In addition, Appellant's eligibility under the need for access provision was accessed and Appellant was found not to meet the established criteria.

One individual requested administrative review by letter dated August 31, 2018. The appeal was granted by letter dated September 17, 2018.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action 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 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)(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. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (i.e., nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. 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(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 have been considered in rendering this decision.

- I currently have three stocking units in at least three varieties of foods in dairy products and have always carried these items for as long as I have been a SNAP retailer.
- While it is possible that one or more items were out at the time of the visit it is highly unlikely as we never sell out of milk, and cheese and yogurt are slow to sell.
- Because two items are stored in a cooler next to the front entrance rather than the large coolers, it was possibly missed during the inspection.
- I have included receipts from dates prior to July 2 and a picture of the cooler.

The vendor receipt dates were as follows: 4/13/18, 4/25/18, 5/9/18, 5/29/18, 6/26/18, 6/28/18 and 8/4/18. A copy of a photo was provided.

ANALYSIS AND FINDINGS

The reauthorization process is to ensure that authorized retailers continue to meet the eligibility criteria for SNAP authorization. This review is to validate or to invalidate the decision made by Retailer Operations. Thus, the review is limited to consideration of the relevant facts at the time Retailer Operations rendered its decision. It is not within the scope of this review to consider actions the owners may take to qualify for authorization in the SNAP subsequent to that

determination. The authorization of a store to participate in the SNAP must be in accord with the Act and the applicable regulations; those requirements cannot be waived.

The determination regarding whether Appellant is eligible to continue to participate as an authorized SNAP retailer includes consideration of whether or not the store is an eligible firm under paragraph 7 CFR § 278.1(b)(1). Retailer Operations determined that Appellant did not maintain sufficient stock of staple foods in sufficient quantities be available on a continuous basis in the dairy products staple food category to be eligible to accept SNAP benefits. This is supported by the onsite photographs and the overall record.

Under Criterion B a business must have more than 50 percent of its total gross retail sales in staple foods. Retailer Operations determined that Appellant failed to meet Criterion B. No evidence was provided that Appellant met the eligibility criteria for reauthorization at the time the withdrawal decision was made.

Retailer Operations considered whether the firm is located in an area with limited access to food when it failed to meet Criterion A per paragraph (b)(1)(ii) or Criterion B per paragraph (b)(1)(iii) and determined that Appellant did not qualify for marginal eligibility.

Appellant failed to provide proof of dairy invoices as requested in writing by Retailer Operations. Upon review, the responding individual submitted invoices however, many are dated outside of the applicable timeframe which was 21 calendar days prior to the date of the store visit, and not dated after the store visit. Only two receipts provided by Appellant are within the proper timeframe for consideration. The June 26 invoice shows milk and the June 28 invoice shows cheese. Both of these varieties were credited at the time of Retailer Operations' determination. The photograph also shows some cheese and milk and presumably was taken well after the store visit occurred, and the determination was rendered. As such, the advanced evidence does not change the determination. Appellant lacked a dairy variety and the required stocking units.

There are no provisions in the SNAP regulations for authorization on the basis of possible after-the-fact corrective actions implemented subsequent to a finding of ineligibility. It is not the authority of this review to consider what remedial actions may be undertaken so that a store might begin to comply with program eligibility requirements after it has been determined to not meet the regulatory criteria. The owners have not offered a preponderance of evidence to support that Appellant met the eligibility criteria at the time the determination was rendered.

CONCLUSION

Based on a review of all of the evidence in this matter, the decision by Retailer Operations to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2) the owners will not be eligible to reapply for participation as a retail food store in the SNAP for a minimum period of six months from the effective date of the withdrawal. General questions regarding the application process can be handled by contacting 877-823-4369.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to the regulations at 7 CFR § 279.7 with respect to applicable rights 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 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 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.

M. Viens
Administrative Review Officer

October 18, 2018