

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review  
Alexandria, VA 22302**

**Frank Fuels, Inc,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0201678**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the Retailer Operations Division properly withdrew the authorization of Frank Fuels, Inc. (hereinafter “Appellant”) from participation as a retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of withdrawal.

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it withdrew the authorization of Frank Fuels, Inc.

**AUTHORITY**

7 U.S.C. § 2023 and its 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 firm, Frank Fuels, Inc., was originally authorized to participate as a retailer in SNAP on November 1, 2011. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization process approximately every five years to determine whether or not the firm still meets eligibility requirements.

On January 26, 2017, the Appellant firm submitted the required reauthorization application, FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*. On this document the Appellant reported that 20 percent of its gross retail sales were from the sale of staple foods, while 30 percent were from “other” food items, such as snack foods, soft drinks, and condiments. The application stated that the firm’s nonfood items, such as gasoline, tobacco products, and lottery tickets constituted 50 percent of the firm’s total sales. The application also reported that the firm carried at least three different varieties in each of the following staple food categories:

- Dairy
- Fruits/vegetables
- Breads/grains.

The application indicated that the firm did not carry at least three different varieties in the meat/poultry/fish category.

As part of the firm’s reauthorization process, an onsite store visit was conducted by an FNS contractor on July 13, 2017, to verify the firm’s reported staple food stock.

After reviewing the store visit report and photographs and re-evaluating the Appellant’s reauthorization application, the Retailer Operations Division determined that the firm did not maintain a sufficient variety or percentage of staple foods to be eligible for SNAP participation under either Criterion A or Criterion B as set forth in 7 CFR § 278.1(b)(1) of the SNAP regulations. In order for a firm to be eligible to participate in SNAP under Criterion A, it must offer for sale on a continuous basis a minimum of three varieties of food in each of the four staple food categories. To meet Criterion B, a firm must have more than 50 percent of its gross retail sales in the sale of staple foods.

In this case, the agency determined that the Appellant firm was lacking in every staple food category, and that its staple food sales were well below 50 percent of its total sales.

In a letter dated July 25, 2017, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it did not

meet the necessary criteria to be eligible for SNAP participation under Criterion A or B. Specifically, the letter stated that the Appellant was not eligible for Criterion A because it failed to stock an ample variety of foods in all four staple food categories. The letter also indicated that the firm fell short in Criterion B because less than 50 percent of its total sales were in the sale of staple foods.

In a letter postmarked July 28, 2017, the Appellant requested an administrative review of the withdrawal determination. The request was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

### **STANDARD OF REVIEW**

In an appeal of adverse action, such as the withdrawal of a firm's SNAP authorization, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 AND REGULATIONS**

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) reads, in part:

*FNS may 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.***  
[Emphasis added.]

7 CFR § 278.1(k)(2) 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.*

7 CFR § 271.2 defines a *retail food store* as:

*(1) 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)** 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 inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter... [Emphasis added.]*

7 CFR § 271.2 defines *staple food*, in part, as:

*... 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.... 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)(i) states, 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 two 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:

*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 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 cereals, milk, sliced breads, and cheeses...shall not each be considered as more than one staple food variety for the purpose of determining variety...*

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....*

### **APPELLANT'S CONTENTIONS**

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

- When the store was inspected, it was short and out of stock of some varieties of staple foods that are required for SNAP participation.
- Since then, the store has been restocked with a sufficient variety of foods to meet the requirements.

In support of its contentions, the Appellant submitted six undated color photographs showing a larger inventory of staple foods in the store, including deli meat, cheese, margarine, eggs, cold cheeseburgers, milk, pasta, and loaves of bread. The Appellant also provided two inventory invoices, one dated July 13,

2017 at 2:28 p.m. (a little more than five hours after the contractor's store visit occurred), and another dated July 28, 2017. These invoices show the purchase of instant soup noodles, cans of ravioli, loaves of bread, deli meat, cheese, eggs, margarine, and cold cheeseburgers.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final decision, full attention was given to all contentions submitted, including any not specifically summarized or explicitly referenced herein.

## **ANALYSIS AND FINDINGS**

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the contractor's store visit and at the time the Retailer Operations Division rendered its decision.

This review has examined the July 13, 2017 store visit report and photographs and has confirmed that on that date, the Appellant did not carry a sufficient variety of staple foods to be eligible for SNAP participation under either Criterion A or Criterion B. As best as can be determined by this review, the only dairy item in the store on that day was ice cream. The only fruits and vegetables were 100 percent fruit juice and nuts. The only breads/grains were pastries and snack foods such as crackers and chips. The only meat item was beef jerky.

Because the Appellant firm has such limited staple food inventory, it does little to further the purposes of the Supplemental Nutrition Assistance Program, which is to alleviate hunger among low-income households and to help such households obtain a more nutritious diet by increasing their food purchasing power. It must be emphasized that a firm must maintain a continuous and minimum inventory of staple food items in order to be eligible for participation in SNAP. If a firm does not maintain a sufficient inventory of staple foods then it does not further the purposes of the program.

As stated in regulations cited earlier, a firm must offer for sale no fewer than three different varieties of food in each of the four staple food categories on a continuous basis and on any given day of operation in order to be eligible for participation under Criterion A. In this case, the evidence clearly shows that the Appellant firm was lacking in every staple food category on the day of the store visit. As a result of this deficiency, the firm is not eligible for SNAP participation under Criterion A.

The firm is also not eligible under Criterion B as the sale of staple foods almost certainly does not exceed 50 percent of the firm's total sales. As noted earlier,

the Appellant indicated on its reauthorization application that staple foods constituted just 20 percent of the firm's total sales. It is noted that Criterion B is generally reserved for stores such as butcher shops or bakeries, which normally do not carry food items in all four staple food categories, but which have most of their revenue in the sale of staple foods.

### **Remedial Actions Taken**

The Appellant has argued that since the store visit occurred, the store has been restocked with a sufficient variety of foods to meet the minimum requirements for SNAP participation. In support of this contention, the Appellant submitted six undated photographs showing staple foods in coolers and on store shelves, and two inventory invoices – both dated after the store visit – listing several different staple food items that have been purchased by the firm. By providing this evidence, the Appellant implies that the firm is now eligible for participation under Criterion A. It should be noted that the bulk of the dairy and meat inventory was purchased on July 28, 2017, more than two weeks after the contractor's visit.

Unfortunately, the evidence provided by the Appellant does not prove that the firm normally carries the required staple food items. Both of the inventory receipts are dated after the contractor's visit to the store and the photographs are undated and were very likely taken after the contractor's visit. Adding food items after the initial store visit and insinuating that the store has made improvements to its staple food inventory does not mean that the store is now eligible for SNAP participation and does not prove that the store carries sufficient staple food items on a continuous basis.

It must be restated that this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the contractor's store visit. It is not the authority of this review to consider subsequent remedial actions that may have been taken so that a store may begin to comply with program requirements. There are no provisions in the SNAP regulations for a reversal of a withdrawal determination on the basis of alleged or planned corrective actions implemented subsequent to the finding of a firm's ineligibility.

Therefore, the explanation and documentation provided by the Appellant does not provide a valid basis for reversing the Retailer Operations Division's withdrawal determination.

### **CONCLUSION**

It is the conclusion of this review that on the day of the contractor's store visit the Appellant firm did not carry the required minimum inventory of staple foods

to meet eligibility requirements under Criterion A or B of the SNAP regulations. Additionally, the Appellant's evidence is insufficient to prove that it normally carries an ample inventory of staple foods. Further, the contentions presented by the Appellant do not persuade this review to conclude that the withdrawal decision made by the Retailer Operations Division should be overturned. Finally, the store visit cited by the Retailer Operations Division was conducted by an FNS contractor and was thoroughly documented. A review of the report has yielded no indication of error or discrepancy. Rather, the report and accompanying photographs are specific and accurate with regard to store conditions and food inventory on the day of the visit, and in all other critically pertinent details.

On the basis of the analysis above, the decision by the Retailer Operations Division to withdraw the authorization of Frank Fuels, Inc. to participate as a retailer in SNAP is sustained.

In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from the date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of Frank Fuels, Inc. shall become effective 30 days after receipt 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**

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 in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON  
Administrative Review Officer

December 29, 2017