

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

Freddrick's,

Appellant,

v.

Case Number: C0201158

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the Retailer Operations Division properly withdrew the authorization of Freddrick's to participate in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Regulations (CFR) Part 278 in its administration of the SNAP, when it withdrew the authorization of Freddrick's in its Determination Letter dated April 19, 2017.

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

As part of a routine reauthorization process, the Appellant submitted an online reauthorization form FNS-252-R, entitled Supplemental Assistance Program (SNAP) Reauthorization Application for Stores. The FNS-252-R stated that 30% of the firm's gross retail sales were in staple foods and that 20% were in "other" food items (also known as accessory foods) such as carbonated and non-carbonated beverages, condiments and spices. The remaining 50% was in

non-food items which included tobacco products, alcoholic beverages, lottery tickets, hot food, clothing, gift items, party goods, souvenirs, etc. The Appellant stated in the FNS-252-R that Freddrick's had at least three different varieties of staple food in each of the required four staple food categories and that the store stocks fresh, frozen, or refrigerated foods in at least two of these staple food categories.

An FNS contractor conducted a store visit on January 25, 2017 to document the firm's food inventory for the purpose of determining the continued eligibility of Freddrick's to participate in the SNAP. The results of the onsite visit showed that the firm was deficient in the Dairy, the Breads and Cereals, and the Meats, Poultry, Fish staple food categories. Specifically, during the store visit, the store had only two varieties of staple foods in the Dairy staple food category (cheese and yogurt), only one variety of staple food in the Breads and Cereals staple food category (snack foods), and only one variety of staple food in the Meats, Poultry, Fish staple food category (eggs).

As a result, the Retailer Operations Division informed the Appellant by letter dated April 19, 2017 that the authorization of Freddrick's to participate in the SNAP was withdrawn because the firm did not meet the eligibility criteria for stores as mandated by Federal regulations at 7 CFR § 278.1(b)(1). The letter stated that Freddrick's failed to meet Criterion A because the store did not have the required variety of foods in the Dairy, Breads and Cereals, and the Meats, Poultry, Fish staple food categories. The store also failed to meet Criterion B because the store's staple food sales did not comprise more than 50 percent of its annual gross retail sales.

In a letter postmarked June 26, 2017, the Appellant requested an administrative review of the Retailer Operations Division's decision to withdraw the firm's SNAP authorization. FNS granted the Appellant's request for administrative review by letter dated July 6, 2017. Implementation of the withdrawal was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might 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 promulgated through regulation under Title 7 CFR part 278. In particular, 7 CFR § 278.1(l) establishes the authority under which FNS shall withdraw the authorization of any firm authorized to participate in the program.

7 CFR § 278.1(l)(1) Withdrawing authorization read, 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.

7 CFR § 271.2 defines a retail food store as:

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 stock keeping 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. Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption, and require no additional preparation, are not eligible for [SNAP] participation as retail food stores under § 278.1(b)(1) of this chapter. [Emphasis Added.]

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). [Emphasis Added.]

7 CFR § 271.2 defines staple foods and accessory foods, 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)(ii) states, in relevant part, that 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 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 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 to 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, 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 intended for home preparation and consumption, such as, but not limited to, 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 FNS.

7 CFR § 278.1(b)(1)(iii) provides, in relevant part: that in order for a retail store to qualify for authorization under Criterion B, it must:

. . . Have more than 50 percent of . . . total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-merchandise, as well as services . . .

7 CFR § 278.1(k)(2) 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. [Emphasis added.]

APPELLANT'S CONTENTIONS

With the Appellant's administrative review request postmarked June 26, 2017, he provided FNS with 10 color photos which showed various staple foods that were currently in stock at Freddrick's.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Criterion A

With regard to the Appellant's contentions, it is necessary to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the withdrawal action by the Retailer Operations Division. It is not the authority of this review to afford additional time during which a store may begin to comply with program requirements for becoming authorized to participate in the SNAP. At the time of the withdrawal action, the contracted Reviewer indicated that Freddrick's did not offer for sale on a continuous basis a variety of staple foods in the Dairy, the Breads and Cereals, and the Meats, Poultry, Fish staple food categories. The SNAP regulations at § 278.1(b)(1)(ii) is clear (with emphasis added) that, under Criterion A, a firm 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." (Emphasis added). This means that retail stores must have qualifying staple food items displayed in a public area at the time of the store visit in order to qualify for SNAP authorization under Criterion A. The contracted Reviewer indicated that Freddrick's was deficient in the Dairy (the store stocked cheese and yogurt only), the Breads and Cereals (the store stocked snack foods only), and the Meats, Poultry, Fish (the store stocked eggs only) staple food categories at the time of the store visit and, therefore, did not meet the requirements for SNAP authorization under Criterion A.

The Appellant did not provide FNS with any vendor invoices/receipts, dated prior to the store visit date, for foods that were purchased for Freddrick's that validate that the store normally stocks at least three different varieties of food items from the Dairy, Breads and Cereals, and the Meats, Poultry, Fish staple food categories and, therefore, the store met the SNAP eligibility requirements under Criterion A at the time of the store visit. The Appellant provided the Administrative Review Officer with 10 color photos showing various food items, to include loaf bread, cereal, rolls, margarine, milk, hot dogs, packaged lunch meat, bacon, beef steaks, etc., which he had purchased and was offering for sale at Freddrick's. However, the photos were not dated and were taken after the store visit date of January 25, 2017. Therefore, the photos cannot be considered towards verifying that Freddrick's met the SNAP eligibility requirements under Criterion A at the time of the store visit. 7 CFR § 278.1(k)(2) of the SNAP regulations is specific in its requirement that "FNS shall deny/withdraw the application of any firm if it determines that 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 ... for a minimum period of six months from the effective date of the denial/withdrawal."

Based on a preponderance of the evidence, the Retailer Operations Division correctly determined that the Appellant firm did not meet eligibility Criterion A as established by 7 CFR § 278.1(b)(1)(ii).

Criterion B

To be eligible under Criterion B staple food sales must make up more than 50 percent of the firm's total gross retail sales. Accessory food items such as carbonated and non-carbonated beverages, condiments and spices are not staple foods and are not counted towards a store's eligibility for the SNAP.

That the firm did not meet Criterion B is shown by the FNS-252-R signed by the Appellant on December 18, 2016 which stated that only 30% of Freddrick's' retail sales were from staple foods, 20% were from "other foods" including accessory foods, and that 50% were from non-food sales. In addition, the store visit report appears to confirm that only a small portion of the store's gross retail sales are in staple food sales and that the store's gross retail sales are largely in "other foods" including accessory food items and non-food items including tobacco products, alcoholic beverages, lottery tickets, hot food, clothing, gift items, party goods, souvenirs, etc.

Based on a preponderance of the evidence, the Retailer Operations Division correctly determined that the Appellant firm did not meet eligibility Criterion B as established by 7 CFR § 278.1(b)(1)(iii).

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the authorization of Freddrick's to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation in the SNAP for a minimum period of six months from the effective date of the withdrawal.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (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 Freedom of Information Act, FNS is 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.

LORIE L. CONNEEN
Administrative Review Officer

March 26, 2018