

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

**Lawrence Young Enterprises Inc d/b/a
Gary's Food Mart #1,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0202500

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 decision by the Retailer Operations Division to withdraw the authorization of Lawrence Young Enterprises Inc d/b/a Gary's Food Mart #1 (hereinafter, "Gary's Food Mart #1" and/or "Appellant") from participation as an authorized retailer in the SNAP was properly imposed.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with §7 CFR § 278.1(b)(1); 278.1(l)(1)(iii); and 278.1(k)(2), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew the authorization of Gary's Food Mart #1 from participation in SNAP in a letter dated August 25, 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

In a letter dated August 25, 2017, the Retailer Operations Division informed Gary's Food Mart #1 that it was being withdrawn from participation as an authorized retailer in the SNAP because

it did not meet the eligibility criteria as described in 7 CFR § 278.1(b)(1) of the SNAP regulations.

Additionally, Gary's Food Mart #1 was advised that because it had failed to meet the eligibility criteria for continued participation a new application to participate as an authorized SNAP retailer could not be submitted for a period of six (6) months in accordance with 7 CFR § 278.1(k)(2).

Via letter dated September 1, 2017, Appellant, through its self-reported President/Owner of record, requested an administrative review of this action, appealing the Retailer Operations Division's decision. The appeal was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative action 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 AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the "Act")¹, 7 USC 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR).² Part 278.1(l)(1)(iii) establishes the authority upon which the authorization of any firm to participate in the SNAP may be withdrawn if it fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1)(iii) reads, in part, "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) 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 (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

¹ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 which was further amended through P. L. 113-79 effective February 7, 2014.

² Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

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.”

7 CFR § 278.1(b)(1)(i) relays specific program requirements for retail food store participation, which reads, 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 relevant part, 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 three different varieties of food items in each of the four staple food categories. (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 food 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, 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 the FNS.”

7 CFR § 278.1(l) reads, in part, “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...for the time period specified in paragraph (k)(2) of this section.”

7 CFR §278.1 (k)(2), reads, in relevant part: “FNS shall deny 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;...”

SUMMARY OF EVENTS

The administrative record indicates that Gary’s Food Mart #1 was authorized as a SNAP retailer on or about July 1, 1975 upon opening. As part of a standard Agency review of SNAP authorized retailers Gary’s Food Mart #1 was subjected to periodic reauthorization for which form *FNS-252R Supplemental Nutrition Assistance Program Reauthorization Application for Stores* was electronically submitted on April 12, 2017.

The form is annotated to indicate that 10 percent of the firm’s total gross 2016 sales **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** derived from “staple” foods; 60³ percent derived from additional foods such as snack foods, soft drinks, or condiments; and, that 30 percent derived from the sale of “other” products indicating that tobacco products, alcohol, lottery, gasoline, hot food and “other” items.

The Reauthorization form asks in question 5 “Do you stock at least three different items in each of these food categories?...”. Appellant responses reported that Appellant firm typically carried at least three (3) varieties in each of the four (4) staple food groups; and, that it stocked fresh, frozen or refrigerated foods in at least two (2) of these categories.

A contracted store visit was ordered on behalf of USDA and documented to have been completed on July 11, 2017, as authorized by an individual self-identifying as a “Manager”. The store visit materials include a survey overview of the firm’s operation, supported with an inventory checklist, a sketch of the firm’s layout, and certified photographs obtained on the date of the visit.

5 U.S.C. § 552 (b)(7)(E). The contracted store visit materials indicate that Appellant operates with the use of two (2) cash registers; in approximately 1,500 square feet of retail space. The facility advertises the sale of hot pizza available for take-out.

The inventory checklist reports that on the date of the store visit available staple foods displayed for public purchase included:

- Two (2) varieties of dairy products including milk/cream and ice cream/ice milk;
- Nine (9) varieties of vegetables or fruits identified as between six (6) and 20 units of 100% fruit juices; two (2) cans each of canned pears, peaches, pineapples, berries and potatoes; between six (6) and 20 units of canned tomatoes and soups/stews; and, more than 20 units of beans/sprouts/packaged.

³ Appellant submitted both a printed copy of the form FNS-252R and a hand-written copy. Notably in the printed copy of the form 60% of total retail sales are reported as deriving from snack foods, soft drinks, or condiments and 30% are noted to be derived from non-food items. In the handwritten materials 60% is noted to be derived from snack foods, etc. and 60% are reported to be derived from non-foods.

- Seven (7) varieties of breads and cereals identified as five (5) bags of flour; pasta, cakes/muffins/pastries, and snack foods; and,
- Three (3) varieties of meats, poultry, fish consisting of canned fish, canned meats; and meat (jerky) products.

The record indicates that the Retailer Operations Division sent a follow-up letter to Appellant, dated August 1, 2017, asking for invoices/receipts, dated prior to the store visit, as evidence that Appellant normally carries at least three (3) varieties of products in the dairy product food category. The store visit materials identified two (2) of the three (3) required varieties as available with milk and ice cream and was seeking verification of the purchase of cheese, butter, yogurt, etc. purchased prior to the July 11, 2017 store visit.

The record includes 11 invoices 5 U.S.C. § 552 (b)(6) & (b)(7)(C) provided for consideration in response to the August 1, 2017 request showing routine delivery of milk between June 1, 2017 and July 10, 2017.

APPELLANT'S CONTENTIONS

On review, the President/Owner indicates that Gary's Food Mart #1 is one (1) of five (5) stores and that each store regularly carries the required sufficient stock of staple foods to remain SNAP authorized. However, it is stated that there was an oversight at the particular location which had since been corrected. As evidence of the correction Appellant provided an invoice dated August 8, 2017 showing the purchase of margarine, and cheese from Grocery Supply Company. Copies of the same 11 invoices 5 U.S.C. § 552 (b)(6) & (b)(7)(C) initially provided to the Retailer Operations Division were also provided for consideration.

The preceding represents only a brief summary of the contentions presented in this matter. Please be assured, however, that, in reaching a decision, full attention and consideration have been given to all contentions, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Criteria A:

Gary's Food Mart #1 was found to be deficient, from the store visit materials, in one (1) of the four (4) categories of staple foods – specifically dairy products, therefore not offering for sale on a continuous basis a variety of foods in the each of the four (4) staple food categories as required under Criterion A. The August 25, 2017 letter of withdrawal specifically references shortage of variety in the dairy products staple food category as identified in the contracted store visit report.

On careful review of the store visit photographs, coupled with consideration of the invoices as provided to the Retailer Operations Division Appellant is not found to

satisfy the regulatory requirement of carrying three (3) varieties of dairy products. Because Appellant is found to be lacking in the dairy products staple food category it is ineligible based on Criterion A evaluation. This affirms the Retailer Operations Division assessment.

It is noted that the invoice provided in the request for administrative review, dated August 8, 2017 from Grocery Supply Company shows purchase of two (2) additional varieties of dairy products with margarine and cheese, which served to verify the correction to the inventory error identified in the July 11, 2017 store visit. However, the requirements for continuous availability of foods in each of the four (4) staple food categories requires that there be evidence of a third dairy product available prior to the July 11, 2017 store visit. The August 8, 2017 invoice cannot be considered in the instant case.

Criteria B:

Under Criterion B the SNAP regulations at 7 CFR § 278.1(b)(1)(iii) states, in part, “Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services...” The reauthorization application dated April 12, 2017 clearly indicates that the percentage of total retail sales derived from staple foods at Appellant is 10 percent.

Retailer Operations Division documents that a review of the Appellant reauthorization application in combination with the store visit materials does not indicate that **more than 50 percent** of the total gross retail sales would be reasonably derived from staple food sales given the volume of non-foods such as gasoline, tobacco products, lottery sales, hot foods, automotive supplies, and miscellaneous non-food items.

Appellant has not provided any evidence to support that sale of staple foods exceed 50 percent of its total retail sales. Therefore, Appellant is found to be ineligible based on Criterion B evaluation. This affirms the Retailer Operations Division assessment.

CONCLUSION

The authorization of a firm to participate in SNAP as an authorized retailer must be in accord with the Food and Nutrition Act of 2008 and the SNAP regulations supporting the Act. Those requirements of law cannot be waived. The purpose of this review is to either validate or invalidate the earlier decision of the Retailer Operations Division. That is, the decision was either correct or incorrect **at the time it was made**. Appellant’s request to allow for consideration of the correction of the situation does not provide a basis to mitigate or reverse the current decision.

As previously indicated Gary’s Food Mart #1 was found by Retailer Operations Division not to meet either the eligibility criteria described as A or B. That determination is affirmed on administrative review based on a preponderance of evidence and reasonable considerations.

Based on the discussion above the determination by Retailer Operations Division to withdraw the authorization of Gary's Food Mart #1 is sustained. In accordance with the Food and Nutrition Act of 2008, and the SNAP regulations issued pursuant thereto this withdrawal action shall become effective 30 days after receipt of this letter and will continue for a period of six (6) months.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

NANCY BACA-STEPAN
Administrative Review Officer

November 29, 2017