

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

Grants Ferry BP Gas Station,

Appellant,

v.

Case Number: C0209431

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to withdraw the authorization of Grants Ferry BP Gas Station to participate as a retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for SNAP authorization for a period of six months.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Grants Ferry BP Gas Station.

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 Nutrition Assistance Program Reauthorization Application for Stores” on February 6, 2018. The FNS-252-R documented that one (1) percent of the firm’s gross retail sales were in staple foods and that six (6) percent were in “accessory” food items such as snack foods, ice cream, potato chips, carbonated and non-carbonated beverages, condiments and spices. The Appellant reported that 93 percent of its gross retail sales were in non-food items or hot and cold prepared food. Of these, the vast majority of the store’s sales were in gasoline, tobacco and alcohol. The Appellant also stated in the FNS-252-R that it

had at least the minimum three (3) varieties of staple food, each consisting of at least three (3) stocking units, in three (3) of the four (4) required staple food categories. The only exception was in the Dairy category which the Appellant stated consisted of only one (1) variety of staple food. Thus, the reauthorization application on its face indicated that the Appellant store was ineligible under Criterion A and Criterion B.

An FNS contractor conducted a store visit on February 17, 2018 to document the firm's food inventory for the purpose of determining the continued eligibility of Grants Ferry BP Gas Station to participate in the SNAP. The Retailer Operations Division determined from the store photographs that Grants Ferry BP Gas Station was deficient in that it only carried a sufficient amount of stock in two (2) staple food varieties in the Dairy category (milk and cheese) and two (2) staple food varieties in the Meat/Poultry/Fish category (beef and pork.)

After evaluating the store visit report, the Retailer Operations Division informed the Appellant by letter dated April 23, 2018 that the authorization of Grants Ferry BP Gas Station 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 the Appellant failed to meet Criterion A as it did not maintain a sufficient stock of staple foods to be eligible to accept SNAP benefits. 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. Lastly, the Retailer Operations Division determined that the firm did not qualify under the need for access provision of 7 § CFR 278.1(b)(6) as the store was not located in an area with significantly limited access to food under access criteria established by FNS. The withdrawal letter was delivered by UPS on May 3, 2018.

In a letter postmarked May 8, 2018, the Appellant requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request for review was granted and implementation of the withdrawal was 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 preponderance of the evidence, that the administrative actions should be reversed. That means an 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 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) provides the authority upon which FNS shall withdraw the SNAP authorization of any firm if it fails to maintain established eligibility criteria.

7 CFR § 278.1(l)(1) 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 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, in part, 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 qualifying staple food items on a continuous basis, evidenced by having 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, including at least one variety of 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....

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

... 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. Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will be included in the staple food category of the main ingredient as determined by FNS. **Accessory food items include foods that are generally considered snack**

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

foods or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar. Items shall not be classified as accessory food exclusively based on packaging size but rather based on the aforementioned definition and as determined by FNS. A food product containing an accessory food item as its main ingredient shall be considered an accessory food item. **Accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm.** [Emphasis added.]

7 CFR § 278.1(b)(1)(i)(A) reads, in part,

An establishment...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...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 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 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 [two*] 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. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit...

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(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 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...such as...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(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 ...

7 CFR § 278.1(k)(2) states, 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.

7 CFR § 278.1(b)(6) states in part:

Need for access. 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. In determining whether an applicant is located in such an area, FNS may consider access factors such as, but not limited to, the distance from the applicant firm to the nearest currently SNAP authorized

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firm and transportation options. In determining whether to authorize an applicant despite its failure to meet Criterion A and Criterion B, FNS will also consider factors such as, but not limited to, the extent of the applicant firm's stocking deficiencies in meeting Criterion A and Criterion B and whether the store furthers the purposes of the Program. Such considerations will be conducted during the application process

APPELLANT'S CONTENTIONS

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

- The store has been authorized for the SNAP for five (5) years.
- The store has eggs, bread, milk, cheese, cold sandwiches, fresh fruits, soft drinks, snacks, cereals and candy.
- The store was selling a lot more food stuff, but lately because of competition, it had to slow down. The area in which the store is located does not have many SNAP customers and the store is very close **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** but it still provides good customer service. The store is ready to add more food.
- A disqualification would constitute a hardship to the store as it will lose customers.

The preceding may represent only a brief summary of the Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Recent Changes to SNAP Retailer Eligibility Requirements

Although the store has been authorized for five (5) years it must still meet the current SNAP eligibility requirements. The final rule titled "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)", published on December 15, 2016, made changes to Criteria A and B requirements. Those changes were included in the "Breadth of Stock," "Definition of Variety," "Depth of Stock," "Accessory Food," and "Need for Access" provisions of the 2016 final rule. Thereafter, Sec. 765 of the Consolidated Appropriations Act of 2017, enacted on May 5, 2017, prevented implementation of the "Breadth of Stock" and "Definition of Variety" provisions of the 2016 final rule, and directed FNS to continue to utilize the breadth of stock and definition of variety requirements that were in place prior to the 2014 Farm Bill, until FNS promulgates future rulemaking to provide more flexibility in the definition of variety. The store's eligibility during its reauthorization was based on the regulatory changes referenced above.

Criterion A

The Appellant states that the store sells eggs, bread, milk, cheese, cold sandwiches, fresh fruits, soft drinks, snacks, cereals and candy. It should be noted that soft drinks, snacks, and candy are accessory foods and not staple foods. Although accessory foods can be purchased with SNAP benefits, only staple foods are considered for SNAP eligibility determinations.

The Appellant also states that the store was selling a lot more food stuff, but lately because of competition, it had to slow down. However, this contention does not offer any grounds for relief. Under the new regulations, to meet Criterion A, a firm must carry no fewer than three (3) different varieties of staple food in each of the four (4) staple food categories with a minimum depth of three (3) stocking units for each qualifying staple variety. There also must be at least one (1) variety of perishable foods in at least two (2) staple food categories. In addition, the SNAP regulations at 7 CFR § 278.1(b)(1)(i)(A) and 7 CFR § 278.1(b)(1)(ii) require retailers to meet Criterion A eligibility requirements “on a continuous basis.”

The Retailer Operations Division determined that Grants Ferry BP Gas Station was not eligible under Criterion A because on the day of the store visit it had a sufficient depth of stock **in only two (2) varieties** of staple food each in the Dairy category and the Meat/Poultry/Fish category. The pictures taken during the store visit support this conclusion. Therefore, a preponderance of the evidence indicates that the firm is not eligible under Criterion A.

Criterion B

The Retailer Operations Division determined that the Appellant store did not meet Criterion B because the store’s staple food sales did not comprise more than 50 percent of its gross retail sales. This is confirmed by the Appellant’s reauthorization application which shows its staple food sales at one (1) percent of its gross retail sales. The majority of the store’s gross retail sales are in non-food items including gasoline, tobacco and alcohol purchases. There is nothing in the case record which would indicate that this percentage of staple food sales to gross retail sales is inaccurate. Based on a preponderance of the evidence, the Retailer Operations Division properly determined that the Appellant store was ineligible under Criterion B.

Need for Access

The Appellant states that the area in which the store is located does not have many SNAP customers and the store is very close **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** but it still provides good customer service. SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether or not the Appellant firm is located in an area with significantly limited access to food when the firm fails to meet Criterion A or Criterion B as long as it meets all other eligibility requirements. This Need for Access evaluation also considers other factors, such as distance to the nearest SNAP-authorized firm, transportation options, the extent of the Appellant’s stocking deficiencies, and whether or not the Appellant firm furthers the purposes of the program.

The case record indicates that the Retailer Operations Division conducted a Need for Access evaluation and appropriately determined that the Appellant firm did not qualify for SNAP authorization under this provision. After a review of all available evidence, this review agrees that authorization under the Need for Access provision is not appropriate in this case.

Corrective Action

The Appellant states that it has tried selling a lot of different foods, but it is ready to add more. Although the store may be planning to increase its food inventory, this contention does not provide any grounds for reversing the decision of the Retailer Operations Division. To be eligible under Criterion A, a store must meet the eligibility requirements on a **continuous basis**. It is no excuse that the store was only temporarily low on staple food stock. It is also important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances which existed at the time of the store visit as this is the basis of the Retailer Operations Division's action.

Hardship to the Firm

The Appellant contends that it will suffer an economic hardship if it is not reauthorized for the SNAP. With regard to this contention, there is no provision in the SNAP regulations that would allow an otherwise ineligible firm to be authorized for the SNAP on the basis of possible economic hardship to either the owners personally or the business. To allow an otherwise ineligible firm to be authorized for the SNAP based on a purported economic hardship would render virtually meaningless the eligibility provisions of the Food and Nutrition Act of 2008

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP authorization of Grants Ferry BP Gas Station is sustained. The regulations clearly state the criteria that a store must meet in order to be authorized for the SNAP. There are no exceptions to these requirements. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six (6) months.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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, it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute and unwarranted invasion of privacy.

RONALD C. GWINN
Administrative Review Officer

July 26, 2018