

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

**Green Mill Liquor,**

**Appellant,**

**v.**

**Case Number: C0199370**

**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 Green Mill Liquor 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 Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it withdrew the authorization of Green Mill Liquor in its determination letter dated April 6, 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 store submitted an online reauthorization form FNS-252-R, entitled Supplemental Nutrition Assistance Program (SNAP) Reauthorization Application for Stores. The FNS-252-R stated that 2% of the firm’s gross retail sales were in staple foods and that 9% were in “other” food items (also known as accessory food) such as carbonated and non-carbonated beverages, condiments and spices. The remaining 89% was in non-food items which included alcohol, tobacco, lottery tickets and other non-food items. The Appellant also stated in the FNS-252-R that it had at least three (3) varieties of staple food in each of the required four (4) staple food categories.

An FNS contractor conducted a store visit on February 25, 2017 to document the firm's food inventory for the purpose of determining the continued eligibility of Green Mill Liquor to participate in the SNAP. The results of the onsite visit showed that the firm was deficient in the Dairy category. Specifically, during the store visit, the store had only two (2) varieties of staple food (milk and ice cream) in the Dairy category instead of the required three (3) varieties.

After reviewing the results of the store visit, the Retailer Operations Division requested and reviewed purchase invoices submitted by the Appellant to determine if the store normally carried at least three (3) varieties of food in the Dairy category. However, the Appellant's invoices were all dated after the store visit and were therefore insufficient proof that the firm normally carried a sufficient variety of staple food in the Dairy category prior to the store visit.

As a result, the Retailer Operations Division informed the Appellant by letter dated April 6, 2017 that the authorization of Green Mill Liquor 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 because the store did not have the required variety of food in the Dairy category. 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 dated April 10, 2017, 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 covered in the Food & 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 upon which the FNS shall withdraw the authorization of any firm authorized to participate in the program.

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

7 CFR § 271.2(1) 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 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. 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 not 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 (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-food merchandise, as well as services ...

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. [Emphasis added.]

### **APPELLANT'S CONTENTIONS**

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

- The store sent receipts and purchase invoices showing the purchase of SNAP eligible food items.
- Pictures of the store are provided showing items which are eligible for purchase with SNAP benefits.

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

Based on the store visit results, the Appellant firm did not meet Criterion A at the time of the store visit because it did not have a sufficient variety of staple foods in the Dairy category. At the time of the store visit, the firm only carried milk and ice cream. As mandated by SNAP regulations at 7 CFR § 278.1(b)(1)(ii), in order to qualify for SNAP, firms must “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.]

The Appellant initially provided invoices dated March 13, March 20 and March 23, 2017. Only the March 23, 2017 purchase invoice showed the purchase of additional dairy products including cheese and yogurt. After the administrative review request, the Appellant provided additional invoices dated during the month of April 2017; one of these invoices contained the purchase of cheese. However, because all of these invoices date from after the store visit, they are insufficient proof that the store normally carried at least three (3) varieties of staple food in the Dairy category prior to the store visit.

Lastly, although the store pictures supplied by the Appellant do show milk, cheese and butter, these pictures are undated and more likely than not date from after the store visit. It is important to clarify for the record that the purpose of this review is to validate or to invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances at the time the Retailer Operations Division rendered its decision. To maintain eligibility under Criterion A, a store must have at least three varieties of staple food in each of the four required staple food categories on a continuous basis on any given day. Instead, a review of the store visit report indicates that the Retailer Operations Division correctly determined that the store was not eligible under Criterion A at the time of the store visit and thus did not meet this continuous basis standard.

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 submitted by the Appellant on February 1, 2017. The FNS-252-R stated that only 2% of Appellant’s retail sales were from staple foods and that 89% were in non-food sales. In addition, the store visit report appears to

confirm that the store's gross retail sales are largely in non-food items including alcohol, tobacco, lottery tickets and other non-food items.

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 Retailer Operations to withdraw the authorization of Green Mill Liquor 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 re-apply for participation in the SNAP for a minimum period of six months from the effective date of the withdrawal.

### **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, 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.

RONALD C. GWINN  
Administrative Review Officer

May 30, 2017