

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

Hartej Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0234300

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that FNS's Retailer Operations Division properly withdrew the authorization of Hartej 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 Hartej 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

In a letter dated August 12, 2020, the Retailer Operations Division informed the Appellant that its authorization to participate as a retailer in SNAP would be withdrawn due to the firm's failure to meet basic program eligibility requirements. This withdrawal decision was based on observations made during an agency contractor's store inspection on March 13, 2020, as well as information provided on the firm's reauthorization application dated December 9, 2019.

The Retailer Operations Division determined that the firm did not meet eligibility requirements under Criterion A or Criterion B pursuant to SNAP regulations at 7 CFR § 278.1(b)(1). The

withdrawal letter stated that the Appellant failed to meet the requirements of Criterion A because in at least one of the four staple food categories it did not offer for sale on a continuous basis a variety of foods in required minimum quantities. It also stated that the Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its total retail sales. Additionally, the letter indicated that FNS considered the firm's eligibility under the Need for Access provision of the regulations found at 7 CFR § 278.1(b)(6), but determined that the Appellant did not qualify for authorization under this provision.

As a result of being found ineligible for participation under both Criteria A and B, and being found ineligible under the Need for Access provision, the Appellant's SNAP authorization was withdrawn for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter postmarked August 22, 2020, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request was granted and implementation of the withdrawal has been held in abeyance pending the outcome 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.

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 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 as:

...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 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.

7 CFR § 278.1(b)(1)(i) states, 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

* 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...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...

(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...

* 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>.

* 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>.

7 CFR § 278.1(b)(6) states:

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 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 as described in paragraph (a) of this section.

APPELLANT'S CONTENTIONS

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

- Appellant is sorry that the inspector found not enough food in stock, especially in the dairy category. This was during the COVID-19 lockdowns and unfortunately, the firm's suppliers were not delivering 100 percent of the items ordered. Most of the merchandise was on back order.
- The store visit occurred during the start of the pandemic and it was hard to keep things on the shelves. People were in a panic and they were stocking up. Unfortunately, the store was out of milk that day. Even large retailers were out of milk or had a purchasing limit because of the surge in demand.
- Appellant did not receive the agency's June 2, 2020 letter requesting proof of inventory. The first it was aware of the inventory deficiency was when it received the withdrawal letter.
- This stocking deficiency will not happen again. The store will fix its issues to keep its shelves well-stocked. FNS is welcome to revisit the store at its convenience.
- Appellant requests that its SNAP authorization not be withdrawn because it would impact the firm's customers, especially the elderly. The firm does not want to lose these customers.

In support of its contentions, the Appellant submitted six inventory receipts and eight undated photographs in an effort to show that the store is eligible for ongoing SNAP participation.

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 in this document.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or invalidate the August 12, 2020 withdrawal determination made by the Retailer Operations Division. This review is limited to consideration of the facts that existed at the time the agency's determination was made.

After reviewing the contractor's store visit report and photographs as well as evaluating the contentions and evidence submitted by the Appellant, it is the finding of this review that Hartej Inc. does not carry sufficient staple food inventory required for continued SNAP authorization. Specifically, the firm is deficient in the dairy category. According to the contractor's report, the only dairy varieties in sufficient quantities at the time of the inspection were milk and cheese.

As described in regulations cited earlier, a firm must meet either Criterion A or Criterion B to be eligible for ongoing SNAP participation. In order for a firm to be eligible under Criterion A, it must offer for sale on a continuous basis 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 variety. In this case, the firm was deficient in one variety of dairy.

On June 2, 2020, the Retailer Operations Division sent the Appellant a letter stating that the firm was lacking staple food inventory. The letter gave the firm an opportunity to provide invoices or receipts as evidence that the store normally carries at least three stocking units of at least three different varieties of dairy products. The letter stated that the invoices or receipts must be dated no more than 21 calendar days prior to the March 13, 2020, store visit, and may not be dated on or after the date of the visit.

The record shows that the Appellant did not respond to the agency's letter.

In its request for administrative review, the Appellant submitted six inventory invoices. In accordance with regulations at 7 CFR § 278.1(b)(1)(ii)(A), FNS can accept only those receipts and invoices that are dated up to 21 calendar days prior to the date of the store visit. Any inventory documents dated outside of that 21-day timeframe cannot be considered as they do not reflect inventory conditions at the time the contractor visited the store. In this case, only two of the Appellant's receipts – both from Eby-Brown – are dated within the required 21-day timeframe. Unfortunately, neither receipt shows any dairy inventory. The remaining four receipts are either dated more than 21 days prior to the store visit or after the store visit and thus cannot be considered. Similarly, the eight undated photographs provided by the Appellant are of little probative value as they were almost certainly taken after the contractor conducted its store visit. Accordingly, this review finds that the store remains deficient in the dairy category.

With regard to the Appellant's claim that the COVID-19 pandemic has caused inventory shortages at the store, this review sympathizes with the difficulties retailers have had during this crisis. However, the store visit in this case occurred on the first day or two of the pandemic. Considering this situation, the firm was given an opportunity to prove that its staple food inventory was sufficient up to 21 days prior to the store visit, which is almost three weeks before the initial surge of panic buying that began on approximately March 12, 2020. Unfortunately, the

Appellant has been unable to provide such proof. As such, this review finds that the coronavirus pandemic is not a valid reason to reverse the agency's withdrawal determination.

As to the Appellant's claim that it will fix its inventory issues and keep its shelves well-stocked with required inventory for SNAP authorization, it must be made clear that the store inspection is the key moment in determining whether or not a store is meeting inventory requirements. A determination of eligibility is limited to consideration of the facts that existed at the time the contractor visited the store. It is not the authority of this review to consider subsequent remedial actions, such as adding inventory, that have been or will be taken so that a store may begin to comply with program requirements. There are no provisions in the SNAP regulations for reversal of a withdrawal determination on the basis of corrective actions implemented after the finding of a firm's ineligibility.

As to the Appellant's request for a new store inspection, such a request cannot be granted. Unannounced store visits are conducted with the intent of discovering inventory conditions at the store on any given day of operation. A re-inspection after a determination of ineligibility could very possibly result in artificially-inflated inventory levels.

SNAP regulations require that a firm continuously maintain sufficient inventory in order to remain eligible for program participation (see 7 CFR § 278.1(b)(1)(i) and (ii)). A firm that does not maintain proper inventory at all times does not effectuate the purposes of the program and cannot remain authorized.

Based on the evidence in this case it is clear to this review that on the day of the store visit (or as stated in regulations, "on any given day of operation"), the firm did not carry sufficient varieties and quantities of staple food inventory as required for eligibility under Criterion A. The firm is also not eligible for SNAP participation under Criterion B, as the sale of staple foods does not exceed 50 percent of the firm's total sales. According to the firm's reauthorization application, just 20 percent of its sales are from the sale of staple foods.

Hardship to SNAP Households / Need for Access

The Appellant contends that a withdrawal of its SNAP authorization will have a negative impact on firm's customers, especially the elderly, who appreciate the store's convenience. The Appellant does not want to lose these customers.

With regard to these contentions, it is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store's SNAP authorization is withdrawn and households are forced to spend their benefits elsewhere. To address such situations, regulations at 7 CFR § 278.1(b)(6) state that FNS will consider authorizing a firm which fails to meet Criterion A or B as long as it is located in an area with significantly limited access to food and provided that it meets all other eligibility requirements. This Need for Access evaluation considers factors such as distance to the nearest SNAP-authorized retail store, transportation options, extent of the firm's stocking deficiencies, and whether or not the firm furthers the purposes of the program.

As for Hartej Inc., the record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the firm is not located in an area with significantly limited access to food and thus, does not qualify for SNAP authorization under this provision. After an analysis of all available evidence in this case, this review finds that Need for Access was fully and properly considered and that authorization under this provision is not appropriate.

CONCLUSION

It is the finding of this review that the Appellant firm does not meet program eligibility requirements under Criterion A or B as outlined in regulations at 7 CFR § 278.1(b)(1). Additionally, the contentions and evidence presented by the Appellant are not sufficient to show that the withdrawal decision should be reversed. Accordingly, the decision by the Retailer Operations Division to withdraw the SNAP authorization of Hartej Inc. is sustained.

Pursuant to 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 authorization withdrawal of Hartej Inc. shall become effective 30 days after receipt of this decision.

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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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

October 8, 2020