

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

Johns Junk Barn,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0203945

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the Retailer Operations Division (Retailer Operations) properly withdrew the authorization of Johns Junk Barn (Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it withdrew the authorization of Appellant to participate as a SNAP retailer.

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

FNS regulations require that stores be reauthorized on a set schedule. FNS-contracted personnel conducted an onsite visit September 27, 2017 to ascertain Appellant’s continued eligibility to participate in the SNAP. By letter dated October 23, 2017, the authorization of Appellant to participate in the SNAP as a retail food store was withdrawn because the firm did not meet the

eligibility criteria for stores as enunciated in the regulations at 7 CFR § 278.1(b)(1). The letter informed the owners that Appellant failed to meet Criterion A because it did not offer for sale a variety of foods in sufficient quantities on a continuous basis of staple foods. The letter also states that the firm failed to meet Criterion B. A business must have more than 50 percent of its total gross retail sales in staple foods to be eligible for authorization under Criterion B. One owner requested administrative review of the withdrawal action by letter postmarked November 2, 2017. The appeal was granted by letter dated November 8, 2017.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means the 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 argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended, and 7 U.S.C. § 2018. The SNAP regulations at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008.

A retail food store defined in 7 CFR § 271.2(1) states: “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.”

Staple foods are defined in 7 CFR § 271.2 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)(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).”

7 CFR § 278.1(b)(1)(ii) states: “In order to qualify under this criterion, 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.”

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(l)(1) Withdrawing authorization states: “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) requires that firms withdrawn for failure to meet program eligibility criteria “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 withdrawal.

APPELLANT’S CONTENTIONS

The responding owner contends:

- We are short on canned food due to my supplier donating to Food Banks other than selling it.
- At this time we have lots of convenience store items and sell them for about 10 cents on the dollar.
- You are only hurting a lot of low income family with kids.
- I have done this business for over 30 years.

ANALYSIS AND FINDINGS

The reauthorization process is to ensure that authorized retailers continue to meet the eligibility criteria for SNAP authorization. It is important to clarify for the record that the purpose of this review is to validate or to invalidate the decision of Retailer Operations. Thus, this review is limited to consideration of the relevant facts and circumstances at the time Retailer Operations rendered its decision. It is not within the scope of this review to consider actions the owners may take to qualify for participation in the SNAP subsequent to that decision. The authorization of a store to participate in the SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived.

The determination regarding whether Appellant is eligible to continue to participate as an authorized SNAP retailer includes consideration of whether or not the store is an eligible firm under paragraph 7 CFR § 278.1(b)(1). The SNAP regulations at § 278.1(b)(1)(ii) are clear that under Criterion A, a firm shall “offer for sale ...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.” Retailer Operations determined that Appellant did not maintain sufficient stock of staple foods in sufficient quantities be available on a continuous basis in multiple staple food categories to be eligible to accept SNAP benefits, and failed to meet Criterion A. This is supported by the onsite report and photographs. Under Criterion B, a business must have more than 50 percent of its total gross retail sales in staple foods. Retailer Operations determined that Appellant failed to meet Criterion B. The record supports that Appellant stocks an abundance of antiques and other nonfood, nonedible SNAP items. Under review, the evidence supports that Appellant did not meet Criterion A or B when its authorization was withdrawn.

CONCLUSION

Based on a review of all of the evidence in this matter, the decision by Retailer Operations to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2) ownership shall not be eligible to reapply for participation as a retail food store in the SNAP for a minimum period of six months from the effective date of the withdrawal. Questions regarding the application process should be directed to 877-823-4369.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 and Section 279.7 of the regulations (7 CFR § 279.7) deal with the applicable rights to a judicial review of this determination. 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's owners reside or are engaged in business, or in any court of record of the State having competent jurisdiction.

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.

M. Viens
Administrative Review Officer

December 12, 2017