

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

Marines Bakery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0212722

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the Retailer Operations Division (Retailer Operations) properly withdrew the authorization of Marines Bakery (Appellant) from participation as a retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, Appellant 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 Retailer Operations took action consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278.1(b)(1), in its administration of SNAP when it withdrew the authorization of Marines Bakery.

AUTHORITY

7 U.S.C. § 2023, and its implementing regulations at 7 CFR § 279.1, provide that a food retailer 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. The owners submitted a reauthorization application on April 25, 2018. FNS-contracted personnel conducted an onsite store visit on June 27, 2018, to ascertain Appellant's continued eligibility to participate in SNAP.

By letter dated August 30, 2018, the authorization of Appellant to participate as a retail food store in SNAP was withdrawn because the firm did not meet the eligibility criteria for stores as enunciated in the regulations at 7 CFR § 278.1(b)(1). Retailer Operations' letter informed the owners that Appellant failed to meet Criterion A because the firm did not offer for sale a variety of staple foods in required minimum quantities on a continuous basis in each of the four staple food categories, including perishable foods in at least two of those categories. The four staple food categories are: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products.

The letter also states that the firm failed to meet Criterion B, because a firm must have more than 50% of its total gross retail sales in staple foods to be eligible for authorization under Criterion B. Appellant's eligibility under the Need for Access provision was also reviewed. Appellant was found not to meet the established criteria of this provision.

In a letter dated September 6, 2018, one of the owners requested administrative review of Retailer Operations' determination. The appeal was considered timely and granted by letter dated September 24, 2018. Implementation of the withdrawal action 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, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means that the Appellant has the burden of providing relevant evidence that 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 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 at 7 CFR § 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 that 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

* 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>.

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 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*

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*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(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

All contentions have been considered in rendering this decision whether listed or not.

- We have accepted SNAP for many years because we are in a low income area of the state. We depend on the customers that benefit from SNAP. For our business it would represent a big drop in sales if we decline our SNAP customers.
- We have always sold corn and four tortillas, dairy products (milk, cheese, butter), and we are now selling fruits and vegetables. The sweet bread we sell is not for consumption in the bakery, we do not have a designated area with tables and chairs for our customers.

ANALYSIS AND FINDINGS

The authorization of a store to participate in SNAP must be in accord with the Act and the applicable regulations; those requirements cannot be waived. The reauthorization process is to

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ensure that authorized retailers continue to meet the eligibility criteria for SNAP authorization. This review is to validate or invalidate the withdrawal decision made by Retailer Operations.

Retailer Operations determined Appellant did not meet Criterion A, because Appellant did not maintain sufficient varieties or stocking units on a continuous basis in multiple staple food categories to be eligible for reauthorization.

The responding owner contends it has always sold corn and flour tortillas, dairy products (milk, cheese butter), and now sells fruits and vegetables.

The review is limited to consideration of the relevant facts as they existed at the time of the contractor's visit to the store and at the time Retailer Operations rendered its decision. It is not the authority of this review to consider subsequent remedial actions – such as adding additional 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 subsequent to the finding of a firm's ineligibility. The owners provided no evidence to support that Appellant met Criterion A at the time the decision was rendered.

Retailer Operations determined Appellant failed to meet Criterion B. Under Criterion B a business must have more than 50% of its total gross retail sales in staple foods. The evidence supports that sales of staple foods are less than 50% of Appellant's total reported retail sales. The owners did not provide evidence that Appellant's total gross retail sales were more than 50% of total gross sales.

It is clear from the contentions that Appellant does not fully understand what happened to suddenly cause the firm to be ineligible for SNAP participation after many years of program authorization. Effective January 17, 2018, SNAP regulations were amended to strengthen the requirements of program eligibility. For example, the new rule states that in order for a firm to meet program eligibility under Criterion A, it must have a minimum depth of stock of three stocking units for each variety of staple food. This stocking unit provision did not exist previously. Under the old regulation, many stores were deemed eligible for SNAP despite having only a very small number of staple foods in stock. Congress determined that such stores did not further the purposes of the program and introduced the strengthened eligibility requirements in the 2014 Farm Bill.

Another regulatory change under the new rule, and one which directly affects Marines Bakery, is a more detailed definition of the term "accessory food." Previously, the definition of accessory food was, "...food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices..." Under the new rule (again, effective January 17, 2018), the definition of accessory food was greatly expanded to reflect those foods that are generally considered snack foods or desserts as well as other food items that complement or supplement meals. Accessory foods now consist of items such as doughnuts, brownies, cupcakes, cookies, muffins, pastries, sweet rolls, pies, cakes, etc. (a full list can be found at <https://www.fns.usda.gov/retailer-eligibility-accessory-foods-store-eligibility-determinations>). Because such items were not previously and specifically listed as accessory

foods, FNS considered these items to be staple foods for purposes of determining a retailer's eligibility for SNAP.

In the case of Marines Bakery, the store visit shows that the majority of foods sold are now considered accessory foods. They are no longer staple foods for purposes of determining eligibility. Appellant's own documentation shows that approximately 56% of the firm's sales are in the sale of accessory foods. The effect on Marines Bakery is that the accessory foods are no longer considered staple foods, and the firm no longer has staple food sales of more than 50%, which is required for participation under Criterion B.

As to the Appellant's claim that a withdrawal of the firm's authorization may cause the firm to experience financial hardship, this contention unfortunately has no bearing on this matter. A firm may only participate in SNAP if it meets all program eligibility requirements.

Need for Access

When a firm fails to meet Criterion A or B, SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider authorizing the firm if it is located in an area with significantly limited access to food provided that it meets all other eligibility requirements. This Need for Access evaluation considers factors such as distance to the nearest SNAP-authorized retailer, transportation options, the extent of the Appellant's stocking deficiencies, and whether or not the firm furthers the purposes of the program.

As for Marines Bakery, the record indicates that Retailer Operations conducted a Need for Access evaluation and determined that the firm did 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.

The owners have not offered a preponderance of evidence to support that Appellant met the eligibility criteria at the time the determination was rendered. SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. If a firm does not conform to the applicable statutes and regulations, the same provide for the firm's removal from the program in accordance with the provisions detailed therein.

CONCLUSION

Based on a review of the evidence, the determination by Retailer Operations to withdraw the authorization of Appellant to participate as a SNAP retailer is sustained. Appellant does not meet the requirements of a retail food store as set forth in 7 CFR § 278.1(b)(1) of the SNAP regulations. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived.

In accordance with 7 CFR § 278.1(k)(2), 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 Marines Bakery shall become effective 30 days after receipt of this decision. Operational questions regarding the withdrawal should be directed to the office that initially took the action to withdraw Appellant; please contact Celia Mosley at (832) 308-5065. General questions regarding the application process can be handled by contacting (877) 823-4369.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008, and to the regulations at 7 CFR § 279.7 with respect to applicable rights to judicial review of this decision. 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 Appellant's owners 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, 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.

KIM DAMERON
Administrative Review Officer

June 19, 2019