

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

Natalie Bakery & Cafeteria Co,

Appellant,

v.

Case Number: C0208945

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny the application of Natalie Bakery & Cafeteria Co. (hereinafter Appellant) to participate as an authorized retailer 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 of the Code of Federal Regulations (CFR) Part 278, in its administration of SNAP, when it denied the application by letter dated May 3, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

Appellant applied to participate as a SNAP retailer in an application submitted on March 21, 2018. According to the firm’s application, the store opened for business on March 2, 2005.

On April 25, 2018, the Appellant firm was visited by an FNS contractor in an effort to determine whether or not the firm met eligibility requirements to be authorized in SNAP. During this visit,

the contractor took photographs of the store and its inventory, spoke with store personnel, and completed a written report detailing its observations.

After reviewing Appellant's application and evaluating the store visit report and photographs, the Retailer Operations Division determined that the firm did not carry a sufficient quantity or variety of staple foods to be eligible for SNAP participation under Criterion A or Criterion B. This determination was made in accordance with SNAP regulations at 7 CFR § 278.1(b)(1). According to the contractor's written record, the firm had insufficient inventory in the dairy, the bread or cereals, and the meat, poultry, or fish staple food categories, making the firm ineligible under Criterion A. Additionally, both the application and the store visit report indicated that firm was not eligible under Criterion B.

In a letter dated May 3, 2018, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not offer for sale on a continuous basis a variety of staple foods in the dairy category, the bread or cereals category, or in the meat, poultry, or fish category as required for authorization under Criterion A. The letter also informed Appellant that it did not have more than 50 percent of its total gross retail sales in staple food sales as required for authorization under Criterion B. Additionally, the letter stated 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 does not qualify for SNAP 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, Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

By letter dated May 5, 2018, Appellant appealed the Retailer Operations Division's decision and requested an administrative review of this determination. The appeal was granted. No subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In appeals of adverse actions, such as an application denial, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means 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

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Parts 278.1(b)(1) and 278.1(k) establish the authority upon which any firm's SNAP retailer application may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 defines staple food, 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 . . . 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, cakes, 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) 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 § 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:

* 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>.

- (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 for a retail store to qualify for authorization 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 nonfood 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(k)(2) reads, in 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 . . . for a minimum period of six months from the effective date of the denial.”

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 following may represent a summary of 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:

- The firm carries products in every category and meets the requirements of carrying “a minimum of three stocking units of three varieties in each of four staple food categories, including three stocking units of one variety of perishable foods in at least two categories”;
- In the dairy category, milk, butter, and sour cream are always stocked. Stock is replenished from the refrigerators in the back of the store when they run low. This meets the requirement for three products, three stocking units, and at least one perishable item;
- In the vegetables or fruits category, sliced pineapples, sliced peaches, and strawberries are always stocked. Stock is replenished from the refrigerators in the back of the store when they run low. This meets the requirement for three products, three stocking units, and at least one perishable item;
- In the meat, poultry, or fish category, eggs, peas (plant based protein), black beans (plant based protein), and peanut butter are always stocked. Stock is replenished from the refrigerators in the back of the store when they run low. This meets the requirement for three products, three stocking units, and at least one perishable item; and,
- In the bread or cereals category, various types of breads, cake mixes, and wheat flour (sold by the pound) are always stocked. Some of this items are not readily available since we do not want contamination to occur so we ask the customer how much they need and get it for them. This meets the requirement for three products and three stocking units.

Appellant submitted a copy of the FNS Examples of Staple Food Varieties document dated December 8, 2016, in support of these contentions.

ANALYSIS AND FINDINGS

The record reflects that Appellant submitted a SNAP retailer application electronically through the FNS retailer web site on March 21, 2018, that listed the store's opening date as having been March 2, 2005. This application indicated that the firm carried at least three varieties of staple foods in each of the four staple food categories with a minimum depth of stock of at least three stocking units in each staple food variety and that was at least one variety of a perishable item containing at least three stocking units in two of the staple food categories. The application further estimated that 20 percent of the firm's gross retail sales were from the sale of staple foods, while 80 percent of its sales were in other eligible foods, such as snacks, soft drinks, or condiments. The application estimated that zero percent of sales were from items not eligible for purchase with SNAP benefits, such as tobacco products, gasoline, lottery, hot food, and other nonfood merchandise. It should also be noted that the same FNS web site used to submit the SNAP retailer application contains detailed information on the staple food requirements for businesses to become authorized as SNAP retailers and also states that an onsite inspection is part of the application process.

As noted above, in order for a firm to be eligible for SNAP participation, it must qualify under either Criterion A or Criterion B, as described in 7 CFR § 278.1(b)(1). Under Criterion A, a firm must offer for sale 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 food variety and at least one variety of perishable foods in at least two staple food categories. Under Criterion B, a firm must have more than 50 percent of its total gross retail sales in the sale of staple food.

Based on a review of the contractor's store visit report, the Appellant firm is not eligible for participation as a SNAP retail store under Criterion B, as the sale of staple foods does not exceed 50 percent of the firm's total sales. Additionally, Appellant's SNAP retailer application indicates that staple foods constitute 20 percent of the firm's gross sales.

Because the firm is not eligible under Criterion B, it must meet requirements under Criterion A in order to be authorized as a SNAP retailer. However, 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 determination of this review that the Appellant firm also does not meet SNAP eligibility requirements under Criterion A and is not eligible for participation as a SNAP retailer.

As best as can be determined by this review, the store owner was using the FNS document titled "Examples of Staple Food Varieties" dated December 8, 2016, in making stocking decisions. This document reflects the changes contained in the final rule titled "Enhancing Retailer Standards in SNAP" published in December 2016. However, it does not include those changes made to the final rule contained in the Consolidated Appropriations Act 2017. This Act suspends the implementation of certain provisions of the new retailer standards. In this specific case, the

most significant change is that the provision allowing beans and peas to count in either the vegetables or fruits category or in the meat, poultry, or fish category was suspended. Currently, the law only permits beans and peas to count in the vegetables or fruits category. It was also noted that the store owner listed cake mixes as a staple food item; however, the new retailer standards reclassified cakes as accessory foods and since cake mixes produce cakes, these too are considered to be accessory foods. The FNS document “Examples of Staple Food Varieties” states that baking mixes such as pancake mix or cornbread mix would count in the bread or cereals category, but it does not list cake mixes.

The Retailer Operations Division, using the store visit inventory report and photos, correctly determined that the Appellant firm was deficient in the dairy products category stocking 10 units of butter, three units of sour cream, and one unit of milk; deficient in the meat, poultry, or fish category stocking no staple food items; and deficient in the bread or cereals category with 20+ units of buns/rolls. While the firm may have had additional units of milk as well as wheat flour in the rear of the store, stock is required to be available for purchase on a continuous basis.

It is important to clarify for the record that the purpose of this review is to validate or to invalidate the initial determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts and circumstances as they existed at the time of the contractor’s store visit and at the time the Retailer Operations Division rendered its decision. It is not within the scope of this review to consider actions ownership may take to qualify for participation in the SNAP subsequent to that decision, such as stocking all the variety of staples in each of the four staple food categories on a continuous basis, planning to do so once SNAP authorized, or increasing staple food stock in order to qualify under Criterion B. 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.

Need for Access

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 stocking deficiencies, and whether or not the Appellant firm furthers the purposes of the program.

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

CONCLUSION

After a review of the pertinent documentation, and based on the discussion above, the initial decision by Retailer Operations Division to deny the application of Appellant to participate as a retailer in SNAP is sustained.

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 effective date of the denial.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

ROBERT T. DEEGAN
Administrative Review Officer

August 20, 2018