

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

**Now Save,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0232157**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of Now Save (“Appellant”) to participate 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 the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Now Save to participate as a SNAP retailer.

**AUTHORITY**

7 U.S.C. § 2023 and 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**

Appellant, Now Save, was originally authorized to participate as a retailer in SNAP on March 16, 2016. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization process to determine whether the firm still meets eligibility requirements.

On November 18, 2019, Appellant submitted the required reauthorization application, FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*. On this document, Appellant reported that around 6 percent of its gross retail sales were from the sale of

staple foods. The application also reported that the firm carried at least three different varieties of foods in all four staple food categories, with a minimum depth of stock of three stocking units for each variety. As part of the firm's reauthorization process, an onsite store visit was conducted by an FNS contractor on December 23, 2019, to verify the firm's reported staple food stock.

After reviewing the store visit report and photographs, and re-evaluating Appellant's reauthorization application, the Retailer Operations Division determined the firm did not maintain a sufficient variety, quantity, or percentage of staple foods to be eligible for SNAP participation under either Criterion A or Criterion B, as set forth in 7 CFR § 278.1(b)(1) of SNAP regulations.

In a letter dated June 23, 2020, the Retailer Operations Division informed Appellant that its SNAP authorization was being withdrawn because it did not meet the necessary criteria to be eligible for SNAP participation under Criterion A or B. The withdrawal letter stated Appellant failed to meet the requirements of Criterion A because it did not offer for sale a variety of foods in required minimum quantities on a continuous basis in each of the four staple food categories. It also stated that 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 Appellant does not qualify for SNAP 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, 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 June 30, 2020, Appellant requested an administrative review of the withdrawal determination. The request was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

## **STANDARD OF REVIEW**

In an appeal of an 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. This 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 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 is 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) states, 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) states, 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.... 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,

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\* 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>.

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 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**

Appellant submitted the following summarized contentions for administrative review, and in subsequent correspondence dated July 29, 2020, in relevant part:

- At the time of inspection, Appellant had an issue with the cooler that was not working, and so did not have milk and eggs at that time.
- Immediately after inspection, this was corrected and the firm has all required inventory to meet Category A.
- The store is off the interstate and services a lower-income area with low end motels across the state highway, a high school, as well as homeless individuals who live under the bridge close to the store.
- Although the store is very tiny with very limited space, it carries the essentials to meet SNAP criterion.
- Appellant apologizes that during the last inspection, due to outage, the store may not have had some items, but Appellant is now very vigilant and is in compliance.

In support of its contentions, Appellant submitted three inventory invoices to show the store now has all needed items in the dairy products staple food category.

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\* 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>.

The preceding may represent only a summary of Appellant's contentions and evidence presented in this matter. However, in reaching a final decision, full attention was given to all contentions and evidence presented, including any not specifically summarized or referenced herein.

## **ANALYSIS AND FINDINGS**

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time the Retailer Operations Division rendered its decision.

After reviewing the store visit report and photographs, as well as evaluating the contentions and evidence submitted by Appellant, it is the determination of this review that Appellant does not carry, on a continuous basis, sufficient staple food inventory to be eligible for SNAP authorization.

### **Criterion A and Criterion B Eligibility**

In order for a firm to be eligible under Criterion A, it 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 variety. Eligibility under Criterion B requires that more than 50 percent of the firm's total gross retail sales be from the sale of staple foods.

Regarding Appellant, the record shows that the firm was did not have enough inventory in the dairy products staple food category on the day of the store visit to meet Criterion A eligibility requirements. When the Retailer Operations Division withdrew the Appellant firm, it found that the firm had adequate stocking units of only one dairy product variety: milk. The firm had only two stocking units of cheese and had no stocking units of a third variety of dairy products. Appellant contends that there was an issue with the store cooler at the time of the store visit and that is why inventory was inadequate to meet SNAP requirements.

Due to the firm's insufficient inventory of staple food items in the dairy products a staple food category at the time of the store visit, the firm is not eligible for SNAP authorization under Criterion A. Further, given that Appellant indicated during reauthorization application that around 6 percent of the firm's total sales come from the sale of staple food, 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 retail sales.

### **Impact on SNAP Households**

Appellant implies the store is important for SNAP households the store is off the interstate and services a lower-income area with low end motels across the state highway, a high school, as well as homeless individuals who live under the bridge close to the store. This contention has no bearing on this case. SNAP regulations, at 7 CFR § 278.6(f), give FNS the discretion to impose a civil money penalty as a sanction in lieu of a disqualification if the subject firm sells a substantial variety of staple food items and the firm's disqualification would cause hardship to

SNAP households because there is no other authorized firm in the area selling as large a variety of staple food items at comparable prices. However, this flexibility only applies when an authorized firm, that meets eligibility criteria, has been disqualified because of program violations. Here, the firm has not been disqualified, but rather its SNAP authorization is being withdrawn because it does not meet eligibility criteria. Therefore, the impact to SNAP households is irrelevant in this case.

### **Remedial Actions Taken**

Appellant contends that the firm now has all the required inventory to meet Criterion A. Appellant submitted three inventory purchase invoices showing purchases of food products, including dairy products. These invoices are dated July 13, 2020, July 16, 2020, and July 23, 2020.

With regard to these contentions, it must be restated that this review 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 that the Retailer Operations Division rendered its withdrawal decision. It is not the authority of this review to consider subsequent remedial actions 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 a reversal of a withdrawal decision on the basis of alleged or planned corrective actions implemented subsequent to the finding of a firm's ineligibility.

Therefore, Appellant's contentions regarding improvements to its staple food inventory do not provide a valid basis for reversing the Retailer Operations Division's withdrawal determination.

### **Need for Access**

SNAP regulations, at 7 CFR § 278.1(b)(6), state that FNS will consider whether or not Appellant 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 Appellant's stocking deficiencies, and whether or not Appellant furthers the purposes of the program.

The record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined Appellant does 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**

Based on the analysis above, the determination by the Retailer Operations Division to withdraw the SNAP authorization of Now Save, is sustained. The firm does not meet eligibility requirements under Criterion A or B as outlined in regulations, at 7 CFR § 278.1(b)(1), and is not eligible for authorization under Need for Access, as provided under 7 CFR § 278.1(b)(6).

Additionally, the contentions presented by Appellant are not sufficient to show that the withdrawal decision made by the Retailer Operations Division should be reversed.

Pursuant to 7 CFR § 278.1(k)(2), Appellant shall not be eligible to reapply for authorization as a retailer in SNAP for a minimum period of six months from the effective date of the withdrawal. In accordance with the Food and Nutrition Act of 2008 and SNAP regulations, the withdrawal of Now Save shall become effective 30 days after receipt of this decision.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this determination are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in SNAP regulations, at 7 CFR § 279.7. If 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.

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.

MICHELLE WATERS  
ADMINISTRATIVE REVIEW OFFICER

August 27, 2020