

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

Ocean State Job Lot #416,

Appellant,

v.

Case Number: C0218568

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is insufficient evidence to support the decision of the Retailer Operations Division to deny the application of Ocean State Job Lot #416 to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). Instead, a preponderance of the evidence supports that the firm is eligible for SNAP authorization under Criterion A. As a result, the decision of the Retailer Operations Division is **reversed**.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b) and 7 CFR § 278.1(k), when it denied the application of the Appellant to participate as an authorized 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

The Retailer Operations Division received an application from the Appellant on April 11, 2019. In a letter dated May 14, 2019, the Retailer Operations Division informed the Appellant that the store did not meet Criterion A because the store did not meet the perishable foods requirement for two (2) staple food categories. The Retailer Operations Division also determined that the store failed to meet eligibility Criterion B because the store's staple food sales comprised 50 percent or less of its annual gross retail sales. Lastly, the store did not meet the need for access provision at 7 CFR § 278.1(b)(6) as the store was not located in a low food access area.

Therefore, the store's application was denied. The denial letter was delivered to the Appellant via UPS on May 20, 2019.

In a letter postmarked May 30, 2019, the Appellant requested an administrative review of the Retailer Operation Division's denial of its SNAP application. The request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might 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(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k) 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

7 CFR § 271.2 defines a retail food store, in part, as:

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

* 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>

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, in part, as:

... those 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)(A) reads, 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

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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

7 CFR § 278.1(k)(2) states, in part:

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 § 278.1(b)(6) states in part:

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

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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

APPELLANT'S CONTENTIONS

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

- At a minimum, the store offers fresh lemons and fresh bread for purchase as its perishable food items in two (2) different staple food categories.
- The Appellant store location cannot provide purchase invoices and receipts as products are purchased by the corporate distribution center and then allocated to its stores as needed. In lieu of these purchase invoices/receipts, the firm has submitted documentation of its inventory transaction audit reporting system relating to 36 stocking units of fresh lemons allocated to the store location #416 on April 4, 2019.
- To further support that the store was allocated 36 fresh lemons on April 4, 2019, the firm has provided its distribution center Inspection/Load Sheet and Bill of Lading associated with store location #416 (Appellant's Exhibit 2.) The Inspection/Load Sheet illustrates that Trailer 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was loaded on April 2, 2019, with a destination for the store location #416. A distribution team lead or manager completed a "Load Quality Inspection" report and noted on this Inspection/Load Sheet that the trailer contained fresh lemons, further identified by its item code number.
- The Bill of Lading report shows that Trailer 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was picked up on April 4, 2019 and shipped to the Appellant store location #416.
- As further evidence that Trailer 5 U.S.C. § 552 (b)(6) & (b)(7)(C) contained fresh lemons, the firm has provided its Store Manifest Report (or "SID Manifest") labelled Exhibit 3. The shipment identification number (SID) of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) within the Store Manifest matches the SID number located on right hand side of the Bill of Lading. Within the Store Manifest, on "Page 2", fresh lemons are identified as being part of the shipment, with the quantity of 36 stocking units. This line item contains the SKID pallet number which matches the SKID pallet number on the case label.

The preceding may represent only a brief summary of the 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.

ANALYSIS AND FINDINGS

Store Visit

Under new regulations implemented on January 17, 2018, to meet Criterion A, a firm must carry no fewer than three (3) different varieties of staple food in each of the four (4) staple food categories with a minimum depth of stock of three (3) stocking units for each qualifying variety. In addition, there must be at least one (1) variety of perishable foods in at least two (2) staple food categories. The SNAP regulations at 7 CFR § 278.1(b)(1)(i)(A) and 7 CFR § 278.1(b)(1)(ii) require retailers to meet Criterion A eligibility requirements “on a continuous basis.”

A store visit conducted on April 22, 2019 documented that Ocean State Job Lot #416 met and exceeded the minimum variety and stocking requirements in each of the four staple food categories. In addition, the store carried bread and rolls in sufficient stocking units to qualify as one of the required perishable items in the Breads/Cereals category. However, the store visit report did not identify another perishable food item in a second staple food category as required by SNAP regulations.

Proof of Inventory Request

As a result, on April 30, 2019, the Retailer Operations Division sent a Proof of Inventory letter to the Appellant requesting that the store submit any purchase invoices or receipts to verify that the store carried at least three (3) stocking units of at least one (1) variety of perishables in at least two (2) of the four (4) staple food categories. The letter stated that the invoices/receipts had to be dated no more than 21 days prior to the date of the store visit and not on or after the store visit.

In response, the Appellant submitted a letter dated May 10, 2019. The letter explained that individual stores do not have purchase invoices and receipts as all purchases are made at the corporate level with food products allocated to individual stores by the corporate distribution center. Therefore, in lieu of purchase invoices, the Appellant provided screen shots from its Inventory Transaction Audit Reporting system. Appellant’s Exhibit A showed that store #416 was allocated 36 stocking units of fresh lemons on April 4, 2019. The store adjusted out five (5) stocking units of lemons as “destroyed” on April 15, 2019. One stocking unit was sold on April 29, 2019. The Appellant also provided a completed and signed manager’s SNAP checklist for April 22, 2019 through April 27, 2019 purportedly documenting that the store had sufficient perishable foods (lemons and Tony’s bakery) for Criterion A eligibility on a daily basis. Lastly, the Appellant provided a case label for the lemons shipped to store #416.

The Retailer Operations Division determined that this information was insufficient to establish that the Appellant store carried a perishable food item in a second staple food category and denied the store in its letter dated May 14, 2019.

New Information from the Appellant

In its administrative review request, the store again provided the aforementioned screen shots of its inventory audit system which indicated that the store had 31 stocking units of lemons on the day of the store visit; the manager's checklist for April 22-April 27, 2019; and the case label for the lemons shipped to the store in April 2019.

However, as new information, the firm provided additional documents to support its contention that the store carried lemons on the day of the store visit. The Appellant provided a shipment inspection/load sheet for April 2, 2019 indicating that a case of lemons was on SKID pallet # 5 U.S.C. § 552 (b)(6) & (b)(7)(C) matching the aforementioned case label for lemons. A Bill of Lading dated April 4, 2019 and a Store Manifest Report dated April 4, 2019 at 10:36:53 for shipment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (matching the Bill of Lading) documents the shipment and delivery of 36 stocking units of lemons.

When combined with the documentation provided in response to the Proof of Inventory letter, this new information is sufficient to support by a preponderance of the evidence that the store had sufficient stocking units of fresh lemons at the time of the store visit and/or it normally carried these items within the 21-day period prior to the store visit. Therefore, these lemons constituted a perishable item in a second staple food category making the store eligible under Criterion A.

CONCLUSION

A preponderance of the evidence supports that the store normally carried perishables in sufficient stocking units in both the Bread/Cereals category and the Fruits/Vegetable category at the time of the store visit or within the 21-day period prior to the store visit. Based on the analysis above, the decision by the Retailer Operations Division to deny the SNAP application of Ocean State Job Lot #416 is **reversed**.

RIGHTS AND REMEDIES

Under the Freedom of Information Act, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

September 10, 2019