

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

On the Corner,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0214742

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the Retailer Operations Division (Retailer Operations) properly withdrew the authorization of On the Corner (hereinafter “Appellant”) from participation 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 or not Retailer Operations took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it withdrew the authorization of Appellant.

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. The owners completed a reauthorization application. FNS-contracted personnel conducted an onsite store visit on November 7, 2018, to ascertain Appellant’s continued eligibility to participate in SNAP.

By letter dated November 27, 2018, the authorization of Appellant to participate as a retail food store in SNAP was withdrawn, because the firm did not meet eligibility criteria for stores as enunciated in the regulations at 7 CFR § 278.1(b)(1).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 it did not have the required number of varieties and stocking units in the dairy and meat/poultry/fish staple food categories.

The letter also states that the firm failed to meet Criterion B. A firm must have more than 50% of its total gross retail sales in staple foods to be eligible for authorization under Criterion B. The staple food percentage of gross retail sales according to the reauthorization application submission was less than 1%.

Appellant's eligibility under the Need for Access provision at 7 CFR § 278.1(b)(6) was also reviewed. Retailer Operations determined that Appellant did not qualify for marginal eligibility.

As a result of being found ineligible for participation under Criterion 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).

A letter requesting administrative review was dated December 3, 2018. The appeal was granted by letter dated December 19, 2018, and implementation of the withdrawal has been held in abeyance pending the outcome of this review.

STANDARD OF REVIEW

In an appeal of adverse action, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that Appellant has the burden of providing credible, 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 Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended, and 7 U.S.C. § 2018. SNAP regulations at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008.

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

* 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>.

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 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

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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(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.

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;

* 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>.

- (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.

APPELLANT'S CONTENTIONS

All contentions as stated, have been considered in rendering this decision whether listed or not:

- I am aware that that my store is lacking the required number of staple food varieties.
- I am trying my best to juggle things; my wife has deteriorating health and we have to travel for her treatment, my daughter and her husband had an accident, and my store manager has been taking care of the store during these difficult family crises.
- I have been in this business for a long time and have done well. This is my first time not meeting the requirements. My business will be devastated if you cancel my permit. Please revisit the store and you will find my store up to your requirements.

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

ANALYSIS AND FINDINGS

This review is to validate or to invalidate the determination by Retailer Operations; as such it is limited to consideration of the relevant facts at the time of the decision. The authorization of a store to participate in SNAP must be in accord with the Act and the regulations, as amended; those requirements of law cannot be waived. The onsite review of Appellant's food inventory revealed insufficient varieties and stocking units in the dairy and meat/poultry/fish staple food categories.

SNAP regulations at Section 278.1(b)(1)(ii)(A) under Criterion A, as currently implemented, require a firm shall offer for sale and normally display in a public area, 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 on any given day of operation and at least one variety of perishable foods in at least three staple food categories. The submitted request for review supports that Appellant did not have the staple foods in stock in the varieties and stocking units required by the regulations at the time the determination was rendered. A

preponderance of the evidence supports that on the date of the store visit, Appellant did not meet Criterion A.

Based on Appellant's own reauthorization application, Appellant's staple food sales comprise less than one percent of its gross retail sales. Retailer Operations thus determined that Appellant was also ineligible for authorization under Criterion B per 7 CFR § 278.1 (b)(1)(iii). No evidence was provided by ownership to support that Appellant met Criterion B at the time of the withdrawal. Retailer Operations also properly accessed the firm for Need for Access, per the regulations at 7 CFR § 278.1(b)(6), and determined it did not qualify.

SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application and reauthorization. The evidence supports that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the withdrawal decision was rendered. The responding owner has not offered a preponderance of evidence to support that Appellant met the eligibility criteria at the time the determination was rendered.

Hardship to Appellant

The responding owner asserts that withdrawal of authorization would be devastating to his business. Economic hardship is a likely consequence whenever a store's SNAP authorization is withdrawn. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship to the firm would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to economic hardship of the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been withdrawn from the program in the past for similar deficiencies. Therefore, Appellant's contention that it will incur economic hardship based on deficiencies in meeting the eligibility requirements does not provide any valid basis for dismissing the withdrawal of Appellant's authorization.

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. That Appellant has been authorized for a long time, or may have taken action to now comply with the regulations, has no bearing on the review of the withdrawal of reauthorization decision at the time it was rendered.

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. The firm does not meet the requirements of a retail food store as set forth in Section 278.1(b)(1) of 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), the owners will not be eligible to reapply for participation as a retail food store in SNAP for a minimum period of six months from the effective date of the withdrawal. This decision will take effect 30 days after the date of delivery to the firm.

General questions regarding the application process can be handled by contacting 877-823-4369 and by consulting the USDA website. Operational questions regarding the withdrawal should be directed to the office that initially took the action to withdraw Appellant; please contact Raven Carter at (312) 886-5619

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008, and to the regulations at 7 CFR§ 279.7. 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 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

October 21, 2019