

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

Pharmacy of OC,

Appellant,

v.

Case Number: C0211492

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), 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 Pharmacy of OC (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The issue accepted for review is whether Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Appellant to participate as an authorized SNAP retailer on July 18, 2018.

AUTHORITY

7 U.S.C. § 2023 and the 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

In a letter dated July 18, 2018, Retailer Operations Division denied the application of Appellant to participate as an authorized retailer in SNAP. This denial action was based on evidence obtained during a store visit on July 2, 2018, as well as information provided on the firm’s retailer application.

Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations. The denial letter states “In order for a firm to be eligible to participate in SNAP, it must offer for sale staple foods intended

for home preparation and consumption and meet either Criterion A or B, as set forth in Section 278.1(b)(1) of the SNAP regulations. Under Criterion A, a firm must offer for sale, on a continuous basis, a minimum of three stocking units of three varieties of foods in each of four staple food categories, including three stocking units of one variety of perishable foods in at least three of those categories. The four staple food categories are: 1) bread or cereals; 2) dairy products; 3) vegetables or fruits; and 4) meat, poultry, or fish. Under Criterion B, a firm must have more than 50 percent of its total gross retail sales in staple foods.”

The Appellant failed to meet the requirements of Criterion A because it does not carry three stocking units in a least three varieties of foods in the dairy product staple foods category, the breads or cereals staple food category and the meat, poultry, fish staple foods category. The Appellant failed to meet the requirements of Criterion B because the firm’s staple food sales comprise 50 percent or less of its annual gross retail sales.

The determination letter also states that the Retailer Operations Division considered Appellant’s eligibility under the need for access provision at Section 278.1(b)(6) of the SNAP regulations. However, the letter stated Appellant did not qualify for SNAP authorization under this provision.

As the firm failed to meet either eligibility criterion for approval, Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in § 278.1(k)(2).

In a letter dated July 25, 2018, Appellant appealed Retailer Operations Division’s decision and requested an administrative review of this action. The appeal 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, 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 § 278.1(k)(2) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet established eligibility requirements.

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 un-carbonated 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) relays specific program requirements for retail food store participation, which reads, in part, “An establishment . . . shall . . . 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 three 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: “*Application of Criterion A*¹. In order to qualify under this criterion, 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 three 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,

¹ 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>.

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) reads, 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 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 response to the denial letter and its request for administrative review, in relevant part:

1. I personally showed to your inspector our potential of providing all kind of foods.
2. This company was approved with FNS for several years with the previous owner. We never had any problem with USDA and we are very familiar with rules and regulations.

In subsequent correspondence dated August 11, 2018, Appellant provided three pages of area google maps and four black and white copies of the stores stock in support of its position.

The preceding may represent only a brief 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.

ANALYSIS AND FINDINGS

In regards to Appellant's contentions, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of Retailer Operations, and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. 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. It is not within the scope of this review to consider actions the owner may take to qualify for participation in the SNAP subsequent to that decision.

The review of Appellant's food inventory revealed insufficient stock in the dairy staple food category, the breads or cereals staple food category and the meat, poultry, fish staple food category. On the date of the store visit, Appellant did not meet Criterion A; it did not carry three stocking units in at least three different varieties of foods in three of the four staple food categories. The store visit documentation indicates that Appellant is deficient two varieties and six stocking units in the dairy products category, one variety and four stocking units in the breads or cereals category and one variety and three stocking units in the meat, poultry, fish category.

Retailer Operations Division determined that the Appellant did not meet Criterion B because the store's staple food sales did not comprise more than 50 percent of its gross retail sales. This is confirmed by the Appellant's SNAP application which shows its staple food sales at one (1) percent of its gross retail sales. The majority of the store's gross retail sales are in non-foods at 98 percent. There is nothing in the case record which would indicate that the percentage of staple food sales to gross retail sales is inaccurate. It is the determination of this review that Retailer Operations Division properly determined that the Appellant store was ineligible under Criterion B.

SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application, and subsequently abides by the statute and implementing regulations. The evidence supports that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the denial decision was rendered.

Additionally, Appellant contends that the previous owner maintained a permit to operate SNAP at its location. With regards to this contention, SNAP regulations do not provide for the transfer of SNAP authorizations based on a previous owner's participation in the program. All retailers are given individual consideration based on the firm's ability to meet Criterion A and Criterion B as specified in 7 CFR §278.1(b)(1)(i) of the SNAP regulations. Moreover, SNAP regulations do not provide for consideration of the possible adverse impact of a firm's ability to attract customers or create sales.

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. The

record indicates that the Retailer Operations Division conducted a Need for Access evaluation and appropriately determined that the Appellant firm did not qualify for SNAP authorization under this provision.

It is important to clarify that the purpose of the instant review is to ascertain whether or not the decision reached by the Retailer Operations Division was correct at the time it was made. There is no provision in the SNAP regulations for consideration of changes made following the submission of the materials responsive to requests from the Retailer Operations Division or the completion of the contracted store visit. Similarly the regulations do not support re-visiting following a final determination by the Retailer Operations Division.

7 CFR § 278.1(k)(2) states, in part, “FNS shall deny the application of any firm if it determines that 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.” There is no agency discretion to impose a sanction less than six months when a firm does not meet the aforementioned eligibility requirements for authorization.

CONCLUSION

Based on the discussion herein, the determination by Retailer Operations Division to deny the application of Pharmacy of OC to participate as an authorized SNAP retailer is sustained. Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six months, effective July 18, 2018.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you 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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

November 29, 2018