

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

PJ Discount,

Appellant,

v.

Case Number: C0209499

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the Retailer Operations Division properly withdrew the authorization of PJ Discount to participate 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 Code of Regulations (CFR) Part 278 in its administration of the SNAP, when it withdrew the authorization of PJ Discount as a SNAP retail store on May 1, 2018.

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 SNAP retail stores be reauthorized on a set schedule. As part of this process, store owners must complete a reauthorization application and an onsite visit by an FNS contractor is then conducted to determine the Appellant’s continued eligibility to participate as a SNAP retailer.

The record shows that the Appellant applied for reauthorization in an application it signed on February 21, 2018. On March 13, 2018, the Appellant business was visited by an FNS contractor in an effort to determine whether or not the firm met eligibility requirements to be

reauthorized in the 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.

The Retailer Operations Division determined that the business 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 products staple food category making the business ineligible under Criterion A. Additionally, both the application and the store visit report indicated that PJ Discount was not eligible under Criterion B.

In a letter dated May 1, 2018, the Retailer Operations Division informed the Appellant that its authorization to participate as an authorized retailer in SNAP was being withdrawn because it did not offer for sale a variety of foods in sufficient quantities on a continuous basis and was found to carry too few items in the four staple food categories. The letter also informed the 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.

In a letter postmarked May 24, 2018, the Appellant, through counsel, appealed the Retailer Operations Division's decision and requested an administrative review of this determination. FNS granted the Appellant's request for administrative review by letter dated June 5, 2018 and implementation of the withdrawal was held in abeyance pending completion of this review.

The record indicates that on June 22, 2018, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against PJ Discount pursuant to the Freedom of Information Act (FOIA). The Appellant's counsel received FNS' response to counsel's FOIA request which is confirmed via counsel's e:mail, dated July 26, 2018, to the FNS FOIA office which had a check for payment of the FOIA documents attached. In a written response postmarked August 24, 2018, the Appellant, through counsel, provided FNS with additional information in support of the subject case.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(k)(2) and § 278.1(l)(1)(iii)

establish the authority upon which a retail food store or wholesale food concern may be withdrawn from participation in the SNAP.

7 C.F.R. § 271.2 states, in part:

Retail Food Store means: 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, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods in at least two such categories (Criterion A)...or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)...Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores...

7 C.F.R. § 278.1(b)(1)(ii) further stipulates, in part:

Application of Criterion A: In order to qualify under this criterion, firms shall: 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 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.

7 C.F.R. § 278.1(b)(1)(iii) states, in part:

Application of Criterion B: In order to qualify under this criterion, 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 C.F.R. § 278.1(b)(1)(ii)(C) states, in part:

...Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes.

7 C.F.R. § 278.1(b)(1)(iv) states, in part:

Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including candy, soft drinks, tea or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

7 C.F.R. § 278.1(b)(6) states, in part,

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 or B, so long as the applicant firm meets all other SNAP authorization requirements.

7 C.F.R. § 278.1(k)(2) states, in part:

FNS shall deny the application of any firm if it determines that:
The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section; or The firm has failed to meet the eligibility requirements...under Criterion A or Criterion B....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 C.F.R. § 278.1(l)(1)(iii) states, in part:

FNS shall withdraw the authorization of any firm authorized to participate... if ...The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...

APPELLANT'S CONTENTIONS

In the request for administrative review postmarked May 24, 2018, and in a subsequent correspondence postmarked August 24, 2018, the Appellant, through counsel, argued that:

- PJ Discount operates as a grocery retail in an approximately 2,500 square foot commercial building.
- PJ Discount stocks a variety of basic foods, including, but not limited to: candies, chips, canned meat, bakery cakes, canned vegetables, bread products, milk, eggs, beans, coffee, tea, sugar, flour, cereals, cheeses, and other items.
- PJ Discount has been authorized to participate in the SNAP for nine years and has never so much as received a warning for violating the SNAP regulations.
- In the 3rd Congressional District of Florida, where PJ Discount is located, 36,341 of the local residents receive SNAP benefits, wherein 32.7% are with one or more people 60 years of age and over, 45.0% are with children under the age of 18, and 47.1% are with disabled individual(s).
- Few of the store's SNAP participants own or have regular access to a vehicle. Accordingly, their options for traveling to the store are limited, and as such, they usually have to walk home with their food.
- As was noted in the 2016 study conducted by Store News, small grocery/convenience store customers are among some of the most loyal customers when it comes to their store selection. Some 70.5% of daily shoppers state that they shop at the same store every time, as do 62.8% of weekly shoppers. Most visits to a store the size of PJ Discount are

made while the customer is on his/her way to work or school (65% of frequent shoppers buy during this time), or while running errands at night (63.3% of the surveyed shoppers shop at this time). Typically, SNAP participants who visit on a daily or weekly basis are significantly more likely to do so in the morning (6:00 am to 8:59 am) or during the late evening (7:00 pm to 10:00 pm). Also, in 2016, consumer's shopping habits trended towards an increase in the use of convenience stores, small grocers, and ethnic food stores. Specifically, according to the FMI U.S. Grocery Shopping Trends 2016 annual report, limited assortment stores (stores which have the main food items though not necessarily in a wide variety) saw an increase of consumers who use them as a primary grocer by 3% over 2015, convenience stores likely saw an increase of 3% in consumers who used their store as their primary grocer, and ethnic food stores saw a rise of 1% in a primary grocer usage.

- The Appellant's position is that as a result of its innocent misunderstanding of the 2016 amendment of 7 CFR § 278.1, wherein the dairy stocking requirements were increased, PJ Discount had a minor stocking deficiency with regard to the dairy products sold at the store. The invoices provided to FNS evidence additional dairy products that the FNS inspector did not report in the March 13, 2018 store visit report.
- Following notification by FNS of said stocking deficiency, the Appellant increased the variety of dairy products sold at PJ Discount, as evidenced by the invoices following said notification and the photographs of the store taken by the Appellant, depicting an accurate representation of the products currently stocked at the store.
- Per 7 CFR § 278.1(b)(1)(ii)(A), in the event that it is unclear as to whether a firm stocks a sufficient amount of required staple foods under Criterion A, a retailer may provide FNS with documentation, such as invoices and receipt, 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.
- The issues of law to decide herein are: (1) Whether the Appellant meets the inventory requirements of Criterion A as set forth in 7 CFR § 278.1(b)(1)(ii); and (2) In the alternative, whether PJ Discount qualifies under the "Need for Access" exception as set forth in 7 CFR § 278.1(b)(6).
- The intention of the 2016 amendment to the SNAP rules, "Enhancing Retailer Standards in the SNAP", 81 FR 90675-01, 01-02 (December 15, 2016), was to "help to ensure that SNAP households have access to healthier foods on a continuous basis", which, in turn, helps to reflect "the agency's commitment to provide the vital nutrition assistance to our most vulnerable citizens, protect taxpayer monies, and safeguard program integrity".
- The store visit survey of March 13, 2018 is incomplete, as evidenced by PJ Discount's inventory receipts submitted to FNS, dated February 20, 2018 through March 13, 2018. The said inventory receipts evidence the following dairy products: milk, Yoohoo, ice cream, double cheese, non-dairy creamer, and Core Spa protein milk shakes. Per the photographs taken during the store visit of March 13, 2018, as well as the store's inventory documentation submitted to FNS, PJ Discount stocked the following dairy products: (1) milk, (2) butter, (3), cheese, (4) non-dairy creamer, (5) protein milk; and (6) ice cream.
- Due to the Appellant's misunderstanding of the 2016 amendment to Criterion A and the resulting increase to the dairy stocking requirements, the Appellant had a minor dairy stocking deficiency. As noted by the submitted photographs following the store visit,

following notification of said stocking deficiency, and a better understanding of the increased stocking requirements, the Appellant has increased the variety of the dairy products sold at PJ Discount.

- According to USDA's website, there are eleven participating SNAP retailers within a one mile radius of PJ Discount, two of which consist of a dollar store and a Walgreens pharmacy and thus not applicable for comparison against the subject store. It is critical to note that none of these stores are comparable to the convenient location of PJ Discount, the operational hours of the store, nor are they comparable with regard to the quantity and quality of the assortments of foods sold at the subject store. All of the eleven SNAP retailers located within a one mile radius of PJ Discount are located on major streets and/or intersections, the majority of which have five lanes. These major streets and intersections are extremely congested with traffic and are constant highly populated areas. The location of these other authorized stores would cause significant hardship on the SNAP participants if they were forced to shop there. Furthermore, there are no convenience stores with a comparable inventory to that which is maintained by PJ Discount, nor, upon further information and belief, are there any other comparable stores within walking distance of the subject store's location that has comparable operational hours of PJ Discount.
- Approximately 36,341 households located in the Appellant's local population receive SNAP benefits. PJ Discount cannot be easily substituted by the other stores in the immediate vicinity both for geographical/logistical reasons, available inventory of staple foods, and operational business hours. PJ Discount is located near multiple churches, a Social Security Administration building, and a VA residence, many of which are occupied and/or visited by surrounding SNAP participants. To deny PJ Discount the authorization to accept SNAP benefits would blatantly go against the purposes of the program. Therefore, the Appellant respectfully requests that FNS be issued a "Need for Access" authorization exception pursuant to 7 CFR § 278.1(b)(6).

In support of the Appellant's contentions, the following documents were submitted to FNS:

- 173 vendor receipts/invoices showing food products purchased for PJ Discount;
- Article entitled "Know Your Core, Protect Your Core", Convenience Store News for the Single Store Owner, April 2016;
- Annual report entitled "U.S. Grocery Shopping Trends", FMI Hartman Group, 2016.
- FNS information entitled "Profile of SNAP Households, Florida District 3", January 2018; and
- 33 color photographs of current food stock at the subject store.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Criterion A

With regard to the Appellant's contentions regarding Criterion A, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts and circumstances at the time of the 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 varieties of staples in each of the four staple food categories in the store on a continuous basis or promising to do so if approved. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact or intended corrective actions. 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.

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. A store visit was conducted by an FNS contracted Reviewer on March 13, 2018. According to the Reviewer's written record and photos taken of the store's stock, the firm had insufficient inventory in the dairy products staple food category, making the business ineligible under Criterion A.

SNAP authorization is dependent solely upon whether the firm meets the eligibility requirements for participation at the time of the reauthorization application, and subsequently abides by the statute and implementing regulations. The evidence supports that PJ Discount did not meet the regulatory requirements of Criterion A at the time that the withdrawal decision was rendered. **5 U.S.C. § 552 (b)(7)(E).**

Therefore, the Retailer Operations Division correctly concluded that PJ Discount did not meet Criterion A because the store did not offer "qualifying staple foods on a continuous basis".

Criterion B

An evaluation of the percentages of staple food sales reported on the Appellant's SNAP Retailer Reauthorization Application which it signed on February 21, 2018, as well as the photographs and store inventory information provided from the store visit indicate that PJ Discount did not receive more than 50 percent of its projected annual sales from the sale of staple foods. Accordingly, the Retailer Operations Division correctly determined that PJ Discount was not eligible for SNAP authorization under Criterion B.

Need for Access

With regard to the Appellant's contentions regarding the Need for Access provision, the 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 the Appellant's 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.

First Time Violator

The Appellant argues that PJ Discount has been authorized to participate in the SNAP for nine years and has never so much as received a warning for violating the SNAP regulations. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges. As such, PJ Discount's compliance history is not a relevant consideration in the present case.

Hardship to SNAP Customers

The Appellant argues that a SNAP authorization withdrawal of PJ Discount will impose a hardship to SNAP households. None of the eleven authorized SNAP stores located within a one mile radius of PJ Discount are comparable to the convenient location of PJ Discount, the operational hours of the store, nor are they comparable with regard to the quantity and quality of the assortments of foods sold at the subject store. All of the SNAP retailers located within a one mile radius of PJ Discount are located on major streets and/or intersections, the majority of which have five lanes. These major streets and intersections are extremely congested with traffic and are constant highly populated areas. The location of these other authorized stores would cause significant hardship on the SNAP participants if they were forced to shop there. Furthermore, there are no convenience stores with a comparable inventory to that which is maintained by PJ Discount, nor, upon further information and belief, are there any other comparable stores within walking distance of the subject store's location that has comparable operational hours of PJ Discount.

However, there are no provisions in the Food and Nutrition Act or SNAP regulations allowing hardship to SNAP customers as a consideration in determining eligibility for participation in the SNAP, with the exception of co-located wholesale/retail firms, which must meet a variety of additional requirements. PJ Discount is not a co-located wholesale/retail firm; therefore, such provisions do not apply in the present case.

CONCLUSION

Based on a review of all of the evidence in this matter, the determination by the Retailer Operations Division to withdraw the authorization of PJ Discount to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation in the SNAP for a minimum period of six months from the effective date of the withdrawal.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (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, 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.

LORIE L. CONNEEN
Administrative Review Officer

October 15, 2018