

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

Ravenstown Grocery Store, LLC #1,

Appellant,

v.

Case Number: C0207769

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to deny the application of Ravenstown Grocery Store, LLC #1 (hereinafter referred to as “Ravenstown”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for six months from the effective date of the denial decision.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1) and 7 CFR § 278.1(k) in its administration of the SNAP 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 Appellant applied to participate in the SNAP as an authorized retailer on February 7, 2018. In a letter dated March 23, 2018, the Retailer Operations Division

informed the Appellant that the store did not carry a sufficient variety of staple food items in the dairy category and therefore did not meet eligibility Criterion A. 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 meet the need for access provision at 7 CFR § 278.1(b)(6). Therefore, the store's application was denied.

In a letter postmarked April 3, 2018, 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

^{*} 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>.

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, 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 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

* 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>.

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 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:

- The store should be eligible under Criterion B as the sale of food makes up 55 percent of its gross retail sales. This includes food stuff like snacks, beverages, milk, cereals, breads and other food products.
- The store visit survey does not reflect the actual circumstances of the store. On the day of the inspection, the store was half closed due to snow and water leaking from the ceiling and the store was transferring food to the warehouse cooler. The store asked the contractor to come back another day and he said he

- would, but never did.
- The Appellant provided purchase invoices dating from after the store visit and its request for administrative review as well as undated store pictures.

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

Criterion A

To meet eligibility 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 staple variety and at least one (1) variety of perishable foods in at least two (2) staple food categories.

The store visit on March 4, 2018 documented that Ravenstown carried **only a single variety** (20+ units of canned and fresh milk) of staple food in the dairy category that met or exceeded the minimum stocking requirements. Although the store had cheese, infant formula and margarine, it only had two (2) stocking units each of these items and thus did not meet the minimum stocking requirement of three (3) units.

As a result of the store visit, the Retailer Operations Division sent an inventory letter to Ravenstown on March 12, 2018 asking for invoices or receipts dated within 21 days before the store visit showing the purchase of dairy products. In response, the Appellant provided 121 pages of copies of all of its purchase invoices and receipts, not just limited to dairy purchases, dating back to the store opening in 2017. These invoice copies documented that a package of 29 American cheese singles was last purchased on November 12, 2017 and Yoplait yogurt was last purchased on January 8, 2018. Because these items were beyond the 21-day timeframe they were not sufficient to conclude that Ravenstown normally maintained the minimum required variety and stocking units in the dairy category on a continuous basis. Therefore, the Retailer Operations Division determined that the firm was not eligible under Criterion A.

The Appellant states that on the day of the inspection, the store was half closed due to snow and water leaking from the ceiling and the store was transferring food to the warehouse cooler. Regarding this contention, it is the Appellant's responsibility to meet the requirements of Criterion A on any given day. The SNAP regulations at

7 CFR § 278.1(b)(1)(i)(A) and 7 CFR § 278.1(b)(1)(ii) require retailers to meet eligibility requirements “on a continuous basis.”

It should also be noted that the store visit report documents that store personnel confirmed with the contractor that the store did not have any storage coolers or freezers and that no food was stored offsite. The store did have food in a small storage area outside of public view but the food items stored there only consisted of carbonated and non-carbonated beverages and a box of graham crackers. Furthermore, the store pictures show no evidence that food was being transferred to another location as there were not any empty shelves in the store.

During the administrative review, the Appellant provided additional purchase invoices dating from **after** the denial decision as well as undated store pictures likely taken sometime after the denial decision. It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. Therefore, this review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division’s action.

In conclusion, the case record documents that, at the time of the store visit, Ravenstown only carried a single variety of staple food in the dairy category that met the minimum stocking requirements. Therefore, based on a preponderance of the evidence, the Retailer Operations Division properly determined that the Ravenstown was ineligible for SNAP authorization under Criterion A.

Criterion B

The Appellant states that Ravenstown should be eligible under Criterion B as the sale of food makes up 55 percent of its gross retail sales. According to the Appellant, this percentage includes snacks, beverages, milk, cereals, breads and other food products. Regarding this contention, the Appellant fails to distinguish between **accessory** foods and **staple** foods as defined under 7 CFR § 271.2. **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. However, the SNAP regulation at 7 CFR § 278.1(b)(1)(iii) states that in order to qualify under Criterion B, a firm must have more than 50 percent of their total gross sales in **staple** foods. Therefore, accessory food items are not counted in the Criterion B eligibility calculation.

The Retailer Operations Division determined that the Appellant store 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 application which estimated its staple food sales at only 24 percent of its gross retail sales.

There is nothing in the case record which would indicate that this percentage of staple food sales to gross retail sales is not accurate. Based on a preponderance of the evidence, the Retailer Operations Division properly determined that the Appellant store was ineligible under Criterion B.

Need for Access

The Appellant contends that its customers will be dissatisfied if the store is not authorized. Whether or not the store's customers will be dissatisfied is not relevant to the eligibility determination under the SNAP regulations. However, 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 appropriately 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.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to deny the SNAP application of Ravenstown Grocery Store, LLC #1 is sustained. The regulations clearly state the criteria that a store must meet in order to be authorized for the SNAP. There are no exceptions to these requirements. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization until six months after March 23, 2018, the effective date of the denial decision.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

RONALD C. GWINN
Administrative Review Officer

June 6, 2018