

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

Reds Liquor,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0223005

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support a finding that the Retailer Operations Division (hereinafter Retailer Operations), properly denied the application of Reds Liquor (hereinafter Appellant) to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it denied the authorization of Appellant to participate as a SNAP retail store.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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 record shows that on July 16, 2019, Appellant submitted an application for SNAP authorization. On September 5, 2019, an FNS-contracted reviewer conducted an onsite store visit, to determine whether or not the firm met eligibility requirements to be authorized in 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.

By letter dated September 17, 2019, the application of Appellant to participate as a retail food store in SNAP was denied because the firm did not meet the eligibility criteria for stores as required by 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 offer for sale a variety of staple foods in sufficient stocking units on a continuous basis in the dairy products staple food category. Also, Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50% of its total gross retail sales.

The letter also states that Retailer Operations considered Appellant's eligibility under the Need for Access provision at Section 278.1(b)(6) of the SNAP regulations. However, 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 the SNAP for a period of six months as provided in § 278.1(k)(2).

The owners requested administrative review by letter dated September 19, 2019. The appeal request was granted by letter dated October 24, 2019.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means Appellant has the burden of providing relevant, credible evidence that 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 USC § 2018) and implemented through regulation under 7 CFR § 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 the SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k)(2) provides, 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. 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 § 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 food 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 stock keeping units, or other inventory or accounting record keeping 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.

7 CFR § 271.2 defines accessory food items, in part, as 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) provides, 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 as defined in § 271.2 of this chapter, 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 or route in staple foods (Criterion B).”

7 CFR § 278.1(b)(1)(ii) provides that for a retail store to qualify for authorization under Criterion A, a firm 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 seven 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.

7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented defines continuous basis as offering 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 qualifying staple variety on any given day of operation.

7 CFR § 278.1(b)(1)(ii) requires that stores: (B) Offer for sale perishable staple food items in at least three 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.

7 CFR § 278.1(b)(1)(ii) requires that stores: (C) Offer a variety of staple foods which means different types of foods within each staple food category 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) provides that for firms to qualify for authorization 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. However, a fee directly connected to the processing of staple foods, such as raw meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B.

7 CFR § 278.1(b)(6) deals with 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

All contentions, as stated in the request for administrative review, have been considered in rendering this decision whether listed or not.:

- Under Criterion A, we must be offering at least three stocking units of one variety in two of the categories:

- 1) Bread and Cereal- We have a variation of cereal in our aisle. This includes more than three stocking units of Raisin Brand, Fruit Loops, Frosted Flakes, Corn Pops. We also have White Bread, Wheat Bread, Tostadas, and Tortillas.
 - 2) Dairy Products- We carry ½ gallon milks, 1-gallon milks, sour cream in 8oz and 16oz sour cream, flans, dozen eggs, and different packages of cheese.
 - 3) Vegetables- We have multiple stocking of canned vegetables including sweet peas, whole corn, beans, and olives.
 - 4) Meat, Poultry, Fish- We have lunchables, bacon, and tuna. We carry multiple quantities of Vienna sausage, which include, chicken, pork, and beef. We also carry hot dog wieners as well.
- During the visit, some of our items were placed in the back of the cooler due to the cooler temperature not meeting requirements by the health department. I have enclosed a report from the Retail Food Official Inspection Report that shows the reason of those items being placed in the cooler and not for display. On Page 2 of the report, it will state the items taken from the cooler to shelf due to the temperature issue. I have also attached pictures of those items in the back of the cooler. We have also attached pictures of what our coolers look like now all the products back in AFTER the cooler has been repaired. It took us a few days for the cooler to get fixed and are currently waiting a reinspection from Public Health.

ANALYSIS AND FINDINGS

With regard to Appellant's contentions with respect to 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 Retailer Operations, 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 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.

The onsite review of Appellant's food inventory revealed insufficient varieties and stocking units in the dairy staple food category. The 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 record supports that Appellant did not have sufficient varieties and/or stocking units of dairy products, and did not meet Criterion A.

In support of its request for administrative review, Appellant submitted two receipts for food purchases. The purchase receipts submitted were not dated within 21 calendar days prior to the date of the store visit and therefore do not validate that Appellant carried three stocking units in at least three varieties of foods in the dairy products staple food category at the time that the

withdrawal action was rendered. The current store stock photos submitted cannot be used to assess inventory of required items at the time that the withdrawal action was rendered.

The owners also submitted stock photos of inventory in the cooler and a copy of the health inspection report in support of its contention that Appellant met Eligibility A. The photos submitted are not date/time stamped and do not prove inventory in the cooler at the time of the store visit and do not support the reviewer's written record and photos taken. The Public Health's Retail Food Official Inspection Report dated August 30, 2019, lists items that were removed from the sales floor to be credited back from the vendor, confirming this food was not available for sale. The owner provided insufficient evidence to support that Appellant met the eligibility requirements at the time the decision was rendered.

The evidence supports that Appellant did not meet the regulatory requirements of Criterion A at the time that the withdrawal decision was rendered. Therefore, Retailer Operations correctly concluded that Appellant did not meet Criterion A because the store did not offer "qualifying staple foods on a continuous basis".

An evaluation of the percentages of staple food sales reported on Appellant's retailer application, as well as the photographs and store inventory provided from the store visit, indicate that Appellant did not receive more than 50% of its projected annual sales from the sale of staple foods. No evidence was provided by the owners that Appellant met Criterion B at the time of the denial. Accordingly, Retailer Operations correctly determined Appellant was not eligible for authorization under Criterion B.

SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether or not 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 Appellant's stocking deficiencies, and whether or not Appellant firm furthers the purposes of the program.

The record indicates that Retailer Operations Division conducted a Need for Access evaluation and determined that 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 a review of the evidence, the Determination by Retailer Operations to deny the authorization of Appellant to participate as a SNAP retailer is sustained. In accordance with 7 CFR § 278.1(k)(2), Appellant will not be eligible to reapply for participation as a retail food store in SNAP for a minimum period of six months from September 17, 2019, the effective date of the denial. As such, the six-month waiting period has passed, which means Appellant may submit a new application at any time. General questions regarding the SNAP application process can be handled by calling the FNS Retailer Service Center at 877-823-4369. Operational

questions regarding the denial should be directed to the office that initially took action against Appellant. Please contact Peter Hein at (213) 330-2460 or peter.hein@usda.gov.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to 7 CFR § 279.7 with respect to your right to a judicial review of this Decision. 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 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 delivery 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

May 8, 2020