

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

Rico Rollo,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0226716

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support a finding that the Retailer Operations Division (Retailer Operations), properly denied the application of Rico Rollo (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 7 CFR §271.2 and § 278.1(b)(1), when it denied the application of Appellant to participate as an authorized SNAP retailer.

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

On December 5, 2019, Appellant’s ownership completed an online application for SNAP authorization. On December 17, 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 January 28, 2020, the application of Appellant to participate as a retail food store in SNAP was denied because the firm did not meet the definition and eligibility requirements of a retail food store as set forth in § 271.2 and § 278.1(b)(1) of SNAP regulations. Retailer

Operations' letter informed Appellant that the determination is based on information provided either on your authorization application and/or information obtained from a store visit on December 17, 2019.

As the firm failed to meet SNAP eligibility criterion for approval, Appellant was informed that it could not submit a new application to participate in SNAP for a period of six months as provided in § 278.1(k)(2); however, if the business model remains the same, the application may be denied for the same reasons it was denied this time.

Appellant's ownership requested administrative review by letter dated January 29, 2020. The appeal request was granted by letter dated February 11, 2020.

STANDARD OF REVIEW

In an appeal of an adverse action, 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and 7 CFR § 278. In particular, § 278.1(k) establishes 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 § 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 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% 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

* 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>.

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) provides, 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 as defined in § 271.2 of this chapter, including perishable foods in at least [two*] of the categories (Criterion A); or have more than 50% of the total gross retail sales of the establishment or route in staple foods (Criterion B).

7 CFR § 278.1(b)(1)(ii) provides, 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.

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(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 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% 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)(1)(iv) relays specific eligibility requirements for retail food store participation, which reads, in part, Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the Food Stamp Program shall not be eligible for program participation. Ineligible firms under this paragraph include, but are not limited to, store selling only accessory foods, including spices, 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% 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. Such firms may qualify, however, under the special restaurant programs that serve the elderly, disabled, and homeless population, as set forth in paragraph (d) of this section.”

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

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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.

7 CFR §278.1(k) reads, in part, FNS shall deny the application of any firm if it determines that: (1) 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 (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 for a minimum period of six months from the effective date of the denial.

APPELLANT'S CONTENTIONS

Appellant's ownership made the following summarized contentions in its request for administrative review, in relevant part:

- My business is a small minority female business, located in an under-served community, along the South Texas border. As a woman owned minority business, we ask to have our license to accept EBT be reinstated.
- We have accepted SNAP in my store for years and have never incurred any issues or complaints.
- During the visit we had everything required to be considered retail and to pass the inspection.
- The case worker then asked for receipts of sales. We use an old-fashioned cash register which does not have the option to label things that are food stamp able. It just gives the total sale. So we were only able to provide basic information.
- We believe that thousands of small mom and pop operations do not keep detailed records as through a POS and use an old school cash register as we do.

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 either validate or to invalidate the determination of Retailer Operations. This review is limited to what circumstances existed at the time of the store visit which forms the basis of Retailer Operations' decision. 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 law and implementing regulations. Each individual firm, applying to participate as a retailer in SNAP, is held accountable against the applicable laws and regulations governing SNAP as stated therein.

Criterion A

Effective January 17, 2018, SNAP regulations were amended to strengthen the requirements of program eligibility. The updated regulations state that in order for a firm to meet program eligibility under Criterion A, it must have a minimum depth of stock of three stocking units for each variety of staple food. This stocking unit provision did not exist previously. Under the old regulations, many stores, including many bakeries, were deemed eligible for SNAP despite having only a very small number of staple food items in stock. Congress determined that such stores did not further the purposes of the program and introduced the strengthened eligibility requirements in the 2014 Farm Bill.

A review of the store visit documentation indicates that Appellant was deficient by one stocking unit in the meat, poultry and/or fish staple food category. Retailer Operations correctly concluded Appellant did not qualify under Criterion A because the firm did not offer qualifying staple foods on a continuous basis in each of the four staple food categories.

Criterion B

Retailer Operations determined that Appellant did not meet Criterion B because the store's staple food sales did not comprise more than 50% of its gross retail sales. Appellant's application reported 70% its actual gross retail sales for 2018 were in staple food sales and 30% in accessory foods. The store visit photos very clearly show that Appellant appears to be primarily a bakery and the majority of foods sold are accessory foods.

Another change which directly affects Appellant is a more detailed definition of the term accessory food. Previously, the definition of accessory food was, food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices. Under the old rule, FNS considered a staple food to be any eligible food item that was not specifically listed as an accessory food. In the new rule (again, effective January 17, 2018), the definition of accessory food has been greatly expanded to reflect those foods that are generally considered snack foods or desserts as well as other food items that complement or supplement meals. Accessory foods now consist of the items mentioned earlier in this paragraph plus additional items such as chips, ice cream, doughnuts, cupcakes, cookies, muffins, pastries, sweet rolls, pies, cakes, etc. (a full list can be found at www.fns.usda.gov/snap/retailer/eligible). These items are eligible for purchase with SNAP benefits at authorized stores but are not considered staple foods for the purpose of determining SNAP eligibility.

Upon review of the store visit documentation, the record shows that Retailer Operations requested proof of sales from Appellant. Appellant's accountant responded to the request via email on January 2, 2020, and explained that Appellant sells baked goods, primarily cake rolls, and requested additional time to submit financial information as the business POS is not set up to generate reports. On January 10, 2020, Appellant's accountant emailed sales information. Upon review, the sales information reported only accessory foods, no staple foods. Retailer Operations emailed the accountant on January 15, 2020, but did not receive any additional staple food sales information.

The evidence does not support by a preponderance that Appellant had more than 50% of its total gross retail sales in staple food sales. Thus, Retailer Operations Division correctly determined that Appellant was not eligible under Criterion B.

The regulations also provide a definition of Ineligible firms as firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from Program participation. The store visit photographs indicate that Appellant operates mainly as a bakery and does not meet the very definition of a retail food store as set forth in § 271.2 and § 278.1(b)(1) of SNAP regulations. Although Appellant carried some bread, its bread sales did not comprise of more than 50% of its total gross retail sales and therefore renders it ineligible for SNAP authorization.

Need for Access

SNAP regulations at § 278.1(b)(6) state that FNS will consider authorizing a firm which fails to meet Criterion A or B as long as it is located in an area with significantly limited access to food and provided that it meets all other eligibility requirements. This Need for Access evaluation considers factors such as distance to the nearest SNAP-authorized retail store, transportation options, extent of the firm's stocking deficiencies, and whether or not the firm furthers the purposes of the program.

The record indicates that Retailer Operations conducted a Need for Access evaluation and determined that Appellant does not qualify for SNAP authorization under this provision. After an analysis of all available evidence in this case, this review finds that Need for Access was fully and properly considered and that authorization under this provision is not appropriate.

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), ownership 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 denial, which is January 28, 2020. However, if Appellant's business model remains the same, its application may be denied for the same reasons it was denied this time.

General questions regarding the SNAP application process can be handled by calling the FNS Retailer Service Center at 877-823-4369 and by consulting USDA's FNS SNAP retailer website. Operational questions regarding the denial should be directed to the office that initially took the action to deny Appellant. Please contact Raven Carter at (312) 886-5619 or raven.carter@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 owner resides or is 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. Please note that the judicial filing timeframe is mandated in the Act, and this office cannot grant an extension.

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

July 13, 2020