

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

**S Mart 1,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0212466**

**FINAL AGENCY DECISION**

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that Retailer Operations Division (Retailer Operations) properly decided to withdraw the authorization of S Mart 1 (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 action consistent with 7 CFR § 278.1(b)(1), in its administration of SNAP when it withdrew the authorization of Appellant to participate as a SNAP retail food store.

**AUTHORITY**

7 U.S.C. § 2023, and its 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**

FNS regulations require that stores be reauthorized on a set schedule. The record shows that the owners completed an online reauthorization application and the store name was changed from SU Pack It to S Mart 1. Although correspondence related to Appellant's reauthorization and pending administrative review case was addressed to SU Pack It, S Mart 1 is Appellant's new name and will be used for the purposes of this review of the imposed sanction.

FNS-contracted personnel conducted an onsite store visit July 25, 2018, to ascertain Appellant's continued eligibility to participate in SNAP.

By letter dated August 15, 2018, the authorization of Appellant to participate as a retail food store in SNAP was withdrawn, because the firm did not meet the eligibility criteria for stores as enunciated in the regulations at 7 CFR § 278.1(b)(1). Retailer Operations' letter informed the owners that Appellant failed to meet Criterion A, because the firm did not carry three stocking units in at least three varieties of foods in the dairy product staple food category.

The letter also states that the firm failed to meet Criterion B. A business must have more than 50% of its total gross retail sales in staple foods to be eligible for authorization under Criterion B. Appellant's eligibility under the need for access provision was also reviewed. Appellant was found not to meet the established criteria.

One of the owners requested administrative review by letter dated August 16, 2018. The appeal was granted by letter dated September 13, 2018.

The responding owner submitted four inventory receipts of food purchased, postmarked October 4, 2018, in support of its request for administrative review.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action 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 argument asserted is more likely to be true than untrue.

### **CONTROLLING LAW**

The controlling law in this matter is contained in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended, and 7 U.S.C. § 2018. SNAP regulations at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008.

7 CFR § 271.2 states that Retail Food Store means: "An establishment 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 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, including at least one variety of perishable foods in at least three 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 accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in: Food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.”

7 CFR § 271.2 states: “Staple food, means 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. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (i.e., nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. 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. 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) imparts program requirements for retail food store participation which states: “(A) An establishment shall normally be considered to have food business of a nature and extent that 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 in order for a retail store to qualify for authorization 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 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 define 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)(B) provides that in order to qualify under Criterion A firms shall: “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)(iii) provides that in order 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) states: “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.”

7 CFR § 278.1(l)(1) Withdrawing authorization reads: “FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons. (i) The firm’s continued participation in the program will not further the purposes of the program; (ii) The firm fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section; (iii) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section.”

7 CFR § 278.1(k)(2) requires that firms withdrawn for failure to meet program eligibility criteria “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 withdrawal.”

## **APPELLANT’S CONTENTIONS**

All contentions have been considered in rendering this decision whether listed or not.

- Request a review of my company’s eligibility to participate in the SNAP program.
- Four inventory receipts of food purchased were submitted.

## **ANALYSIS AND FINDINGS**

The authorization of a store to participate in the SNAP must be in accord with the Act and the applicable regulations; those requirements cannot be waived. The reauthorization process is to ensure that authorized retailers continue to meet the eligibility criteria for SNAP authorization. This review is to validate or to invalidate the decision made by Retailer Operations. This review is limited to consideration of the relevant facts at the time Retailer Operations' rendered its decision.

Retailer Operations determined that Appellant did not maintain sufficient varieties or stocking units on a continuous basis in the dairy staple food category to be eligible for reauthorization. This is supported by the onsite photographs and the overall record at the time the decision was rendered. Retailer Operations provides the opportunity to provide proof of inventory - receipts dated within three weeks (21 days) prior to the store visit - when a firm is barely deficient in meeting the SNAP stocking requirements. At the time of the store visit Appellant only stocked milk, lacking six stocking units and the sufficient varieties in the dairy staple food category. Accordingly, Retailer Operations did not request proof of inventory from Appellant.

The responding owner submitted four inventory receipts of food purchased. One of the receipts was dated after the store visit and cannot be considered an accurate representation of conditions as they existed on the day of the contractor's visit to the store. The other three receipts are within 21 days of the store visit and demonstrate that Appellant purchased eligible dairy items (milk and cheese). With only milk and cheese, Appellant is still not eligible for SNAP authorization under Criterion A, as it lacks the minimum depth of stock and variety in the dairy staple food category. Therefore, Retailer Operations correctly concluded Appellant did not meet Criterion, A, because the store did not offer "qualifying staple foods on a continuous basis." After reviewing all of the evidence in this case, it is clear that these receipts are insufficient to demonstrate Appellant offers "qualifying staple foods on a continuous basis."

Under Criterion B a business must have more than 50% of its total gross retail sales in staple foods. Retailer Operations determined that Appellant failed to meet Criterion B. The evidence supports that sales of staple foods are less than 50% of Appellant's total reported retail sales. The owners did not provide evidence that Appellant's total gross retail sales were more than 50% of total gross sales.

Retailer Operations considered whether the firm is located in an area with limited access to food when it failed to meet Criterion A per paragraph (b)(1)(ii) or Criterion B per paragraph (b)(1)(iii), and determined that Appellant did not qualify for marginal eligibility.

Although the owner requested another review to determine eligibility in SNAP, there are no provisions in the SNAP regulations for authorization on the basis of possible after-the-fact corrective actions implemented subsequent to a finding of ineligibility. It is not the authority of this review to consider what remedial actions may be undertaken so that a store might begin to comply with program eligibility requirements after it has been determined to not meet the regulatory eligibility criteria.

The owners have not offered a preponderance of evidence to support that Appellant met the eligibility criteria at the time the determination was rendered. SNAP authorization is an

administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. If a firm does not conform to the applicable statutes and regulations, the same provide for the firm's removal from the program in accordance with the provisions detailed therein.

## **CONCLUSION**

Based on a review of the evidence, the determination by Retailer Operations to withdraw the authorization of Appellant to participate as a SNAP retailer is sustained. The firm does not meet the requirements of a retail food store as set forth in § 278.1(b)(1) of the SNAP regulations. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived. In accordance with 7 CFR § 278.1(k)(2), the owners 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 withdrawal. Operational questions regarding the withdrawal should be directed to the office that initially took the action to withdraw Appellant; please contact Danielle Chandler at (804) 309-3880. General questions regarding the application process can be handled by contacting (877) 823-4369.

## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, and to the regulations at 7 CFR § 279.7 with respect to the applicable right to 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 thirty (30) days of receipt 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

June 12, 2019