

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

Shell Food Mart,

Appellant,

v.

Case Number: C0208410

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the authorization of Shell Food Mart (hereinafter “Appellant”) to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly withdrawn by the Retailer Operations Division, Retailer Operations Branch (hereinafter “ROD Office”).

ISSUE

The issue accepted for review is whether the SNAP Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(k)(2) and § 278.1(l)(1)(iii) when it made the decision to withdraw Appellant’s authorization to participate in the SNAP.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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 record reflects that on July 21, 2008 Appellant was granted authorization to participate in the SNAP. As part of the routine reauthorization process, an inspection of Appellant’s staple food inventory was conducted on March 5, 2018. The ROD Office provided the firm an additional opportunity, via a letter dated March 27, 2018, to demonstrate, by providing additional information, that it qualified to participate in the SNAP. Appellant provided additional information but the ROD Office initially determined that the information was untimely and, subsequently, determined that it did not demonstrate eligibility. Appellant was advised of the

Department's decision to withdraw the firm's authorization to participate in the SNAP in a letter dated April 10, 2018. The regulatory bases given for that denial were 7 C.F.R. § 278.1(b)(6) and § 278.1(k)(2). The firm was instructed that its authorization would be withdrawn unless the firm timely requested an administrative review of the decision, in which case the decision would be held in abeyance pending the outcome of the review. On April 18, 2018, Appellant requested an administrative review of this decision. The request 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, 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 & 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 Appellant's written request for review dated April 18, 2018 it was argued that:

1. Appellant responded to the ROD Office's request for additional information in a timely manner (within the 10 day timeframe). Appellant provides the same documentation (as provided to the ROD Office) in support of its request for administrative review (Sales and Use Tax documents, Sales Summary reports, Ipayment card processing statements and daily EBT transaction listings).
2. Appellant has participated in the SNAP for nearly a decade.
3. Many of Appellant's customers rely upon the firm to accept SNAP payments; the firm provides necessary groceries for the community around the store.

ANALYSIS AND FINDINGS

The record reflects that a contracted store visit to Appellant's firm was conducted on March 5, 2018. Documentation generated as a result of that visit includes photographs of the firm's interior and exterior, a store layout diagram and a store inventory survey reflecting that the firm had ample varieties of staple food stock in the fruits and vegetables category, in the breads and cereals category and in the meats/poultry/fish category, but had an inadequate stock of staple food in the in the dairy category, thus failing to qualify under Criterion A. It was additionally noted that the Appellant firm maintained a considerable stock of accessory foods and prepared, ready-to-eat food, which are not considered staple food for the purposes of the SNAP. In addition, the firm maintained a substantial inventory of lottery tickets, tobacco products, alcohol, automotive products, health and beauty products, paper goods, cleaning supplies, gift items, souvenirs and other non-food items. The firm also operated as a gas station. Thus the store visit further corroborated that staple food sales could not have reasonably exceeded 50% of gross sales. The ROD Office duly provided the firm an opportunity to provide documentation that the firm's staple food sales met requirements. Documentation provided by Appellant was initially determined to be untimely and, subsequently, to fail to establish eligibility. As staple food sales must comprise more than 50 percent of a firm's gross retail sales, the store was determined ineligible for authorization under Criterion B. It is noted for the record the firm's most recent application for reauthorization (FNS – 252R, signed by Appellant on January 28, 2018) indicated that the firm's staple food sales comprised less than 1% of gross sales.

Regarding contention 1 above, the ROD sent an Information Request Letter dated March 27, 2018 to confirm Appellant's staple food sales percentage. The ROD Office noted that the response from Appellant was not timely received. The ROD Office provides no information regarding when the Information Request Letter was received by Appellant. Appellant states that it was received on March 29, 2018. This is not verified by the record, but if Appellant's USPS receipt is a reasonable reflection of when its response was sent (April 7, 2018, a Saturday), then the ROD Office's receipt of this response on April 10, 2018 is a similar timeframe and suggests that Appellant's response mailing date is generally accurate. If so, the retailer's response was not untimely and was sent within 10 days of Appellant's receipt of the request. The ROD Office sent its Withdrawal Letter on the same day (April 10, 2018) as it received Appellant's response, though it appears that the ROD Office had not at that time considered the response. The ROD

Office notes that the low-income/low-access assessment was conducted prior to the firm's response. Nonetheless, as ROD points out, the material provided by Appellant did not provide information allowing the ROD Office to ascertain Appellant's staple food sales percentage beyond what it provided in its reauthorization application (which was less than 1%). The Sales and Use Tax documents, Ipayment records and SNAP transaction listings do not isolate or in any way specifically identify staple food sales. Nor, therefore, would the information have provided any useable information in conducting the low-income/low-access assessment. It is noted for the record that the firm failed to qualify for eligibility on the basis of this assessment by a notably wide margin. Moreover, the records tend to support the ROD Office determination that Appellant's staple food sales did not meet or exceed 50% of gross sales. Appellant offers no commentary on its reauthorization application or the figures provided therein.

In regard to contention 2 above, Appellant may imply that a record of no prior non-compliance with eligibility requirements should be taken into consideration. However, such a record does not constitute valid grounds for reversing the SNAP Office's correct finding that the firm did not qualify to participate in the SNAP. There is no provision in the Act, regulations or agency policy that allows a reversal of a correct eligibility determination based upon a lack of a firm's prior ineligibility or upon the duration of the firm's former eligibility. Further, as noted above, the regulations stipulate that "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..." It is added for the record that it is not uncommon for a firm to qualify to participate in the SNAP at the time of application but for the firm's inventory to change such that the firm no longer qualifies at some later point. Additionally, in this case, changes in the eligibility requirements also contributed to Appellant's failure to qualify. The purpose of periodic reauthorization procedures and store visits is to confirm continued store eligibility; the agency has a regulatory and policy-based obligation and authority to monitor firms' compliance with eligibility requirements. A firm's application and subsequent authorization does not entitle the store to SNAP participation in perpetuity; a firm must maintain eligibility at all times during its participation in the SNAP regardless of changes in eligibility requirements. It is added for the record that these changes were broadly announced well in advance of implementation.

With regard to contention 3 above, to the extent Appellant implies that a failure to reverse the withdrawal decision will work a hardship upon the firm, there are no provisions in the Act, regulations or agency policy allowing hardship to retailers and/or to SNAP customers as considerations 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. Appellant's store is not a co-located retail/wholesale firm and such provisions therefore do not apply in the present case.

As referenced in the foregoing, recent changes to the SNAP do provide that retailers located in a low-income/low food-access area may receive an exception to the standard eligibility rules for participation; however, the record reflects that the ROD Office duly evaluated Appellant's eligibility for such exception and correctly found that the firm did not qualify.

CONCLUSION

In view of the above, it is my determination that the SNAP Office's decision to withdraw Appellant's authorization to participate in the SNAP is in accord with the law and regulatory provisions at 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). Therefore the withdrawal action is sustained and shall remain in effect for a period of six months. The store may reapply to participate in the SNAP up to ten days prior to the end of the six-month period. This decision will become effective 30 days following Appellant's receipt of this document.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food & Nutrition Act of 2008 (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 provisions of 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.

DANIEL S. LAY
Administrative Review Officer

June 14, 2018