

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

Silver Star Enterprises,

Appellant,

v.

Case Number: C0218145

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the Retailer Operations Division properly withdrew the authorization of Silver Star Enterprises (hereinafter “Appellant”) from participation as a retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of withdrawal.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it withdrew the authorization of Silver Star Enterprises.

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

In a letter dated May 8, 2019, the Retailer Operations Division informed the Appellant that its authorization to participate as a retailer in SNAP would be withdrawn due to the firm’s failure to meet basic program eligibility requirements. This withdrawal decision was based on observations made during a December 4, 2018, store visit as well as information provided on the firm’s reauthorization application dated November 13, 2018.

The Retailer Operations Division determined that the firm did not meet eligibility requirements under Criterion A or Criterion B pursuant to SNAP regulations at 7 CFR § 278.1(b)(1). The

withdrawal letter stated the Appellant failed to meet the requirements of Criterion A because in at least one of the four staple food categories it did not offer for sale on a continuous basis a variety of foods in required minimum quantities. It also stated that the Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its total retail sales. Additionally, the letter indicated that FNS considered the firm's eligibility under the Need for Access provision of the regulations found at 7 CFR § 278.1(b)(6), but determined that the Appellant did not qualify for SNAP under this provision.

As a result of being found ineligible for participation under both Criteria A and B, and being found ineligible under the Need for Access provision, the Appellant's SNAP authorization was withdrawn for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter postmarked May 16, 2019, the Appellant, through counsel, requested an administrative review of the agency's determination. The request was granted and implementation of the withdrawal has been held in abeyance pending the outcome of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as the withdrawal of a firm's SNAP authorization, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 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(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) reads, in part:

FNS may 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 specification 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...for the time period specified in paragraph (k)(2) of this section.

7 CFR § 278.1(k)(2) 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.... 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 as:

(1) 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 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 as:

...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) states, 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

* 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>.

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 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...

* 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>.

* 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>.

7 CFR § 278.1(b)(6) states:

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 as described in paragraph (a) of this section.

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant has updated its inventory since receiving the May 8 withdrawal letter from FNS. Additional items have been added to bolster its stock of staple foods. The Appellant was not fully aware of the stipulations for continued SNAP authorization, but is now attempting to comply with SNAP regulations and be better prepared for its customers' needs.
- Regarding Criterion B, the store has significant gasoline sales, which, in the Appellant's opinion, should not be counted as part of its gross sales since the revenue from gasoline sales is significantly lower.
- The aggregate sales amount for staple foods is over 5 U.S.C. § 552 (b)(6) & (b)(7)(C), pursuant to figures given in the reauthorization application of November 2018.
- The store has been authorized in SNAP since 2006, with no problems of any type. This past history should be a benefit to the store.
- The firm requests reconsideration of the withdrawal decision and will strive to make considerable efforts to conform to all criteria of USDA.

In support of its contentions, the Appellant submitted copies of five inventory invoices and receipts, which the Appellant states will enhance the firm's position with regard to Criterion A.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final decision, full attention was given to all contentions submitted, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or invalidate the May 8, 2019, withdrawal determination made by the Retailer Operations Division. This review is limited to consideration of the relevant facts as they existed at the time of the contractor's visit to the store.

After reviewing the contractor's store visit report and photographs as well as evaluating the contentions and evidence submitted by the Appellant, it is the determination of this review that Silver Star Enterprises does not carry sufficient staple food inventory to be eligible for continued SNAP authorization. Specifically, the firm is deficient in the dairy category. As best as this review can determine, the only dairy varieties in sufficient quantities in the store on the day of the inspection were milk and cheese. In order for a firm to be eligible under Criterion A, it must offer 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 variety. In this case, the firm was deficient in one variety of dairy.

On April 11, 2019, the Retailer Operations Division sent the Appellant a letter stating that the firm was lacking staple food inventory. The letter gave the firm an opportunity to provide invoices or receipts as evidence that the store normally carried at least three stocking units of at least three different varieties of dairy products. The letter stated that the invoices or receipts must be dated no more than 21 calendar days prior to the December 4, 2018, store visit, and may not be dated on or after the date of the store visit.

The record shows that in response to this letter, the Appellant provided four inventory invoices dated October 16, 2018, November 13, 2018, November 15, 2018, and November 18, 2018. Three of the four receipts were within the required 21-day period noted above. The receipt from October fell outside of that period. Of the remaining three receipts, the only dairy items listed were milk and one unit of sour cream. This single container of sour cream does not meet minimum stocking requirements for a third dairy variety.

Along with the four receipts, the Appellant submitted a short statement indicating that the firm had lost a receipt for cheese and eggs which were available at the time of the inspection.

Assuming this statement is true, it would not have impacted the Retailer Operations Division's decision, as the firm was already credited with having a sufficient amount of cheese, and eggs are not a dairy product, but are instead part of the meat/poultry/fish staple food category.

In its request for administrative review, the Appellant submitted a total of five inventory invoices and receipts. Two receipts (dated November 13, 2018, and November 15, 2018) are duplicates that had already been submitted by the Appellant. The remaining three receipts are all from 2019, which is after the time of the contractor's visit to the store. As such, these three receipts cannot be considered, as they do not represent store conditions at the time of the inspection.

Based on the evidence in this case it is clear to this review that on the day of the store visit (or as stated in regulations, "on any given day of operation"), the firm did not carry sufficient dairy inventory as required for eligibility under Criterion A. The firm is also not eligible for SNAP participation under Criterion B, as the sale of staple foods does not exceed 50 percent of the firm's total sales. According to the Appellant's reauthorization application, just 30 percent of its total sales come from the sale of staple foods.

Remedial Actions Taken

The Appellant contends that the firm has updated and bolstered its staple food inventory since receiving the withdrawal letter from FNS. The Appellant claims that it was not fully aware of the stipulations for continued SNAP authorization, but is now attempting to comply with SNAP regulations and be better prepared for its customers' needs. Finally, the Appellant requests reconsideration of the withdrawal decision and states that it will strive to make considerable efforts to conform to all criteria of USDA.

With regard to these contentions, it must be restated that this review is limited to consideration of the facts as they existed at the time of the contractor's inspection. It is not the authority of this review to consider subsequent remedial actions, such as purchasing new inventory, that have been or will be taken so that a store may begin to comply with program requirements. There are no provisions in the SNAP regulations for reversal of a withdrawal determination on the basis of corrective actions implemented subsequent to the finding of a firm's ineligibility. Accordingly, the Appellant's claims regarding corrective actions do not provide a valid basis for reversing or modifying the agency's determination.

Criterion B

The Appellant argues that the store has significant gasoline sales. In the Appellant's opinion, such sales should not be counted as part of its gross sales since the revenue from gasoline sales is significantly lower. With this in mind, the Appellant contends that its aggregate sales amount for staple foods is over 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and claims this amount is pursuant to figures provided in its reauthorization application of November 2018. If gasoline sales were excluded from gross sales, the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in staple food sales would represent well over 50 percent of the firm's total sales, making the firm eligible for SNAP participation under Criterion B.

In evaluating whether or not a firm is eligible for participation under Criterion B, SNAP regulations are clear that in order to qualify under this provision, a firm must have more than 50 percent of its total gross retail sales in the sale of staple foods. In calculating total sales, all retail sales must be considered, including both food and non-food merchandise. Gasoline sales cannot be excluded from the firm's gross sales.

As to the Appellant's claim of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in staple food sales, this figure is neither accurate nor credible. According to the Appellant's November 2018 reauthorization application, the firm's staple food sales were 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for the tax year 2017. This represents just over 30 percent of the firm's total sales. However, when considering the firm's gasoline sales and its heavy emphasis on snack foods, alcohol, and tobacco products, and considering its very limited inventory of staple foods, it is likely that the firm's actual staple food sales are substantially less than either the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) figures. For most convenience stores, staple food sales constitute less than 5 percent of the firm's total sales. When gasoline sales are involved, staple food sales are often 1 percent or less. Silver Star Enterprises is a typical convenience store/gas station. As such,

a claim of 30 percent staple food sales is very likely a significant overestimation. This review finds that the firm is not close to being eligible for SNAP participation under Criterion B.

No Prior Eligibility Issues

The Appellant claims that the store has been authorized in SNAP since 2006, with no problems of any type. The Appellant argues that this past history should be a benefit to the store.

Unfortunately, this issue is irrelevant. A firm does not have a presumption of eligibility as a result of its past history. If a firm does not maintain proper inventory at all times in accordance with regulation, it does not effectuate the purposes of the program and cannot remain authorized.

Need for Access

SNAP regulations at 7 CFR § 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, the extent of the firm's stocking deficiencies, and whether or not the firm furthers the purposes of the program.

As for Silver Star Enterprises, the record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the firm 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 the analysis above, it is the determination of this review that the Appellant firm does not meet program eligibility requirements under Criterion A or B as outlined in regulations at 7 CFR § 278.1(b)(1). Additionally, the contentions and evidence presented by the Appellant are not sufficient to show that the withdrawal decision should be reversed. Accordingly, the decision by the Retailer Operations Division to withdraw the SNAP authorization of Silver Star Enterprises is sustained.

Pursuant to 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from the date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the authorization withdrawal of Silver Star Enterprises shall become effective 30 days after receipt of this decision.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

August 20, 2019