

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

Smart Mart 2,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0215964

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of Smart Mart 2 (hereinafter Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Appellant to participate as a SNAP retail store on February 19, 2019.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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 shows that Appellant applied for reauthorization on December 12, 2018. On February 14, 2019, the Appellant firm was visited by an FNS contractor in an effort to determine whether or not the firm met eligibility requirements to be reauthorized 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.

After reviewing Appellant's application and evaluating the store visit report and photographs, the Retailer Operations Division determined that the firm did not carry a sufficient quantity or variety of staple foods to be eligible for SNAP participation under Criterion A or Criterion B. This determination was made in accordance with SNAP regulations at 7 CFR § 278.1(b)(1). According to the contractor's written record, the firm had insufficient inventory in the dairy staple food category making the firm ineligible under Criterion A. Additionally, both the application and the store visit report indicate that firm was not eligible under Criterion B.

In a letter dated February 19, 2019, the Retailer Operations Division informed Appellant that its authorization to participate as an authorized retailer in SNAP was being withdrawn because it did not offer for sale a variety of foods in sufficient quantities on a continuous basis and was found to carry too few items in the four staple food categories. The letter also informed Appellant that it did not have more than 50 percent of its total gross retail sales in staple food sales as required for authorization under Criterion B. Additionally, the letter stated 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 does not qualify for SNAP under this provision.

By letter dated February 27, 2019, Appellant appealed the Retailer Operations Division's decision and requested an administrative review of this determination. The appeal was granted and implementation of the withdrawal held in abeyance pending completion of this review. Subsequent correspondence dated March 27, 2019, was received from Appellant.

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 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 and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). 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 § 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. 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: “(A) An establishment or house-to-house trade route 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 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 define continuous basis under Criterion A 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) as currently implemented states: “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.”

7 CFR § 278.1(b)(1)(ii)(C) states: “Offer a variety of staple foods which means different types of foods within each staple food category. For example: Apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk, soy yogurt, soft cheese, butter, sour cream, and cow milk yogurt in the dairy products category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken, beans, nuts, beef, pork, eggs, and tuna in the meat, poultry, or fish category. Variety of foods is not to be interpreted as different brands, nutrient values (e.g., low sodium and lite), flavorings (e.g., vanilla and chocolate), packaging types or styles (e.g., canned and frozen) or package sizes of the same or similar foods. Similar food items such as, but not limited to, tomatoes and tomato juice, different types of rice, whole milk and skim milk, ground beef and beefsteak, or different types of apples (e.g., Empire, Jonagold, and McIntosh), shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any staple food category. Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.”

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 the 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.”

7 CFR § 278.1(l)(1) Withdrawing authorization reads in part: “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

The following may represent a 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:

- Ownership requests a review on the grounds that the firm offers a variety of staple foods. Specifically, the firm offers bananas for the fruit/vegetable category; cow’s milk and cheese for the dairy category; bread, oatmeal, cereal, rice, and flour for the bread/cereal category; and eggs, tuna, and nuts for the poultry/fish category;
- Milk, canned food, and dry foods are purchased from Hackney while fruits, vegetables, frozen foods, juices, and meats are purchased at department stores; and,
- Staple foods are purchased regularly on a weekly basis, but sometimes they run out before the next delivery.

Appellant submitted three invoices and five photos of stock in support of these contentions.

ANALYSIS AND FINDINGS

With regards to Appellant’s contentions listed above, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of the Retailer Operations Division, 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 continued participation in the SNAP subsequent to that decision, such as stocking all the variety of staples in each of the four staple food categories in the store on a continuous basis, planning to do so once SNAP authorized, or increasing staple food stock in order to qualify under Criterion B. 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. Therefore, Appellant’s contention that the store is now or will be sufficiently stocked

with necessary items does not provide any valid basis for dismissing or mitigating the adverse action imposed.

As noted above, in order for a firm to be eligible for SNAP participation, it must qualify under either Criterion A or Criterion B, as described in 7 CFR § 278.1(b)(1). Under Criterion A, a firm must offer for sale, on a continuous basis, 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 food variety, and at least one variety of perishable foods in at least two staple food categories. Under Criterion B, a firm must have more than 50 percent of its total gross retail sales in the sale of staple food.

A store visit was conducted by an FNS contracted reviewer on February 14, 2019. According to the contractor's written record, the firm had insufficient inventory in the dairy staple food category making the firm ineligible under Criterion A. Therefore, the Retailer Operations Division correctly concluded Appellant did not meet Criterion A because the store did not offer "qualifying staple foods on a continuous basis".

Appellant's SNAP retailer reauthorization application dated December 12, 2018, shows that staple foods amounted to less than one percent of gross annual sales showing that the Appellant firm did not derive more than 50 percent of its annual sales from the sale of staple foods on the date of the store visit. Accordingly, the Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B.

The authorization of a store to participate in the SNAP must be in accord with the Act, as amended, and regulations. A full review of the store visit materials from the February 14, 2019, store visit does not indicate any material departure from the documentation as presented. A review of the store visit documentation indicates that Appellant was deficient in the dairy staple food category. Therefore, Appellant does not meet Criterion A. Appellant also does not meet Criterion B because information obtained from the store visit confirms that staple food sales comprise 50 percent or less of annual gross retail sales.

A review of the five photos and the three invoices submitted by Appellant was conducted. The invoices were all dated after the store visit and therefore could not be used to verify what dairy items the firm regularly carried. Additionally, even if the invoices had been dated within 21 days prior to the store visit, they only showed purchases of milk and did not show any new varieties of dairy items that could be added to the milk variety that was in stock during the February 14, 2019, store visit. Varieties of dairy products include foods such as butter, milk from cows, almond milk, yogurt, cheese, infant formula, sour cream, etc. Different sizes (gallon, half gallon) or types (nonfat, 1%, 2%) of milk only count toward the milk variety and are not separate varieties.

When store ownership signed the certification page of the SNAP retailer application to begin operating as a SNAP retailer and again when he signed the online reauthorization application to continue operating as a SNAP retailer, he confirmed he understood and agreed to abide by program rules and regulatory provisions. SNAP rules and regulations require SNAP retailers to meet required stocking requirements for staple foods on a continuous basis; however, the FNS

store visit determined that the owner failed to adhere to this requirement and therefore was in violation of SNAP regulations. Stores that do not meet required stocking requirements are not eligible to be SNAP retailers. Intent to violate is not a required element with regards to stocking deficiencies. Information on staple food stocking requirements has previously been issued to all retail stores and may also be found on the FNS SNAP retailer web site, the same site that contains the online SNAP retailer application and reauthorization application.

Need for Access

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

The record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the 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 all of the evidence in this matter, the determination by the Retailer Operations Division to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to participate as a retailer in SNAP for a minimum period of six months from the effective date of the withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal action will become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted 10 days prior to the expiration of the six-month withdrawal period. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

June 3, 2019