

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

Snookies Convenience Store,

Appellant,

v.

Case Number: C0202367

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 Snookies Convenience Store (hereinafter “Appellant”) to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly withdrawn by the Retailer Operations Division, Retailer Operations Branch (hereinafter “ROD Office”).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 September 24, 1991 Appellant was granted authorization to participate in the SNAP. An inspection of Appellant’s staple food inventory was conducted on July 27, 2017, as part of the reauthorization process; Appellant was subsequently advised of the Department's decision to withdraw the firm’s authorization to participate in the SNAP in a letter dated August 24, 2017. The regulatory bases given for that denial were 7 C.F.R. § 278.1(b)(1)

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 The firm was instructed that its authorization would be withdrawn unless the firm timely requested an administrative review of the decision, in which case the decision would be held in abeyance pending the outcome of the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 August 25, 2017, 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) states, 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.

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(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 August 25, 2017, and in subsequent correspondence, it was argued that:

Appellant believes that the withdrawal decision was in error, because the inspector didn't know that the ice cream from the broken freezer had been moved into the icebox after the freezer had ceased functioning. Appellant provides invoices/product purchases receipts in support thereof.

ANALYSIS AND FINDINGS

The record reflects that a contracted store visit of Appellant's firm was conducted on July 27, 2017. 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 breads and cereals category, in the fruits and vegetables category and in the meats/poultry/fish category, but had an inadequate stock of staple food in the dairy category, thus failing to qualify under Criterion A. The ROD Office duly requested additional information in the form of product purchase receipts/invoices in order to demonstrate that the firm normally stocked an adequate variety of staple foods in the dairy category. No invoices/receipts were provided.

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 tobacco products, alcohol, automotive supplies, paper goods, cleaning products, pet food, incense, and other non-food products. The store visit further corroborated that staple food sales could not have reasonably exceeded 50% of gross sales. As staple food sales must comprise more than 50 percent of a firm's gross retail sales, the store was ineligible for authorization under Criterion B. It is noted for the record the firms' most recent application for reauthorization (FNS – 252R, signed by Appellant on April 20, 2017) indicated that the firm's staple food sales comprised 20% of gross sales.

Regarding Appellant's contentions above, it is acknowledged that extenuating circumstances may have contributed to the level and composition of staple food inventory observed at the firm on the day of the store visit; however, there is no provision in the statute, regulation or agency policy which allows such considerations to warrant a reversal of a withdrawal decision correctly made. Additionally, as noted above, 7 C.F.R. § 278.1(l)(1)(iii) clearly provides 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.

Appellant provided five product purchase invoices; three were dated in February 2017 and one was dated in March 2017. These invoices were dated from four to five months prior to the store visit. While invoices must reflect purchases prior to the store visit, the invoices must demonstrate that the firm normally stocked the inventory in question. The invoices do not appear to so demonstrate, as ice cream products typically do not have a four to five month shelf life; moreover, if ice cream were normally stocked at the firm, more recent invoices would have been provided in support of the request. Appellant was free to provide such receipts/invoices in support of both the ROD Office's request for more information and of Appellant's review request. The fifth invoice reflected the purchase of milk, which the store visit had already confirmed.

Thus the information provided by Appellant comports with the SNAP Office's assessment that the firm failed to qualify under Criterion A. The authorization of a store to participate in SNAP

must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived. The SNAP regulations (in effect at the time of the withdrawal decision) at §278.1(b)(1)(ii) are clear (with emphasis added) that, under Criterion A, a firm shall “offer for sale ... 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.” The store was deficient in one of the four staple food categories on the day of the visit, and, therefore, did not offer qualifying staple foods on a **continuous** basis. Additionally, the record reflects that the firm’s staple food sales could not have reasonably exceeded 50% of gross sales; Appellant provides no information/documentation indicating otherwise.

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, 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

March 26, 2018