

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

Speedy Gas N Shop,

Appellant,

v.

Case Number: C0210863

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The United States Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division (Retailer Operations) to withdraw the authorization of Speedy Gas N Shop (Appellant) to participate as a retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for SNAP authorization for a period of six months.

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278.1(b)(1), in its administration of the SNAP when it withdrew the authorization of Appellant to participate as a SNAP retailer.

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. As part of this process, the Appellant submitted an online reauthorization form (FNS-252-R) on April 2, 2018. The FNS-252-R documented that one percent of the firm's gross retail sales were in staple foods, three percent were in accessory food items, and nine percent were in hot foods and cold prepared food sales. The Appellant reported that 87% of its gross retail sales were in non-food items (primarily gasoline, lottery, tobacco, and alcohol sales). The FNS-252-R documents that it had the following staple food varieties and stocking units:

- Two varieties in the Breads/Cereals staple food category, consisting of at least three stocking units.
- Two varieties in the Dairy staple food category, consisting of at least three stocking units.
- Three varieties in the Meat/Poultry/Fish staple food category, consisting of at least three stocking units.
- Zero varieties and zero stocking units in the Vegetables/Fruits staple food category.

A FNS-contractor conducted an onsite visit on April 7, 2018, to document the Appellant's food inventory to determine its eligibility to continue to participate in the SNAP. As a result, Appellant was insufficiently stocked in the Dairy and Meat/Poultry Fish staple food categories.

By letter dated June 25, 2018, Retailer Operations withdrew the authorization of Appellant to participate in the SNAP because the firm did not meet the eligibility criteria as enunciated in the regulations.

The owner requested administrative review of the determination by letter dated July 1, 2018. The appeal was granted by letter dated July 19, 2018.

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 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) provides the authority upon which FNS shall withdraw the SNAP authorization of any firm if it fails to maintain established eligibility criteria.

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. 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 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 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) states 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)(ii)(C) states that in order to qualify under Criterion A firms shall: “Offer a variety of staple foods which means different types of foods within each 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)(1)(iv) states: “Ineligible firms: Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization and authorized firms will be withdrawn from program participation. Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, 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 sales in foods cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout, 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 CFR § 278.1(l)(1) Withdrawing authorization states: “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) deals with denying authorization and states FNS shall deny the application of any firm if it determines that 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.

APPELLANT'S CONTENTIONS

All contentions have been considered in rendering this decision and appear below, exactly as written by the owner:

- first the staple food category, where I carried all the different categories but I did not have the exact number of units needed, even I have one unit or so. That means that a customer came in and bought some items.
- Criteria B claiming that the store sale of staple food is less than 50 percent of gross sale, that information is not based on any real data or communicating with my accounting department.
- Criteria M I am not sure I understand this reason. But I am really willing to adjust my business to the requested needs to this criteria when explained to me.
- there are many SNAP customers that depend on getting their food needs on this store. Older ladies, handicapped customers that are within walking distance from where they live.

ANALYSIS AND FINDINGS

The reauthorization process is to ensure that authorized retailers continue to meet the eligibility criteria for SNAP authorization. The purpose of this review is to validate or to invalidate the decision of Retailer Operations. Thus, this review is limited to consideration of the relevant facts at the time Retailer Operations rendered its decision. 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.

In order for a firm to be eligible under Criterion A, it must 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. The onsite visit report and photographs support by a preponderance of the evidence that Appellant did not meet Criterion A on the day of the store visit. The Appellant was deficient in required stocking units in both the Dairy and Meat/Poultry/Fish staple food categories. The owner stated that a customer came in and bought some items; however, no evidence to support this contention was provided.

Appellant did not meet Criterion B; it did not have more than 50 percent of its total gross retail sales in staple foods. The owner stated that this information was not based on any real data or communication with Appellant's accounting department. The owner's own reauthorization application, documents Appellant's staple food sales at only one percent of its total gross retail sales. Based on a preponderance of the evidence, Retailer Operations properly determined that Appellant was ineligible under Criterion B.

SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether or not the Appellant 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. Retailer Operations conducted a Need for Access evaluation and determined that Appellant did not

qualify for SNAP authorization under this provision. This review finds that the Need for Access provision was properly applied.

CONCLUSION

Based on a review of all the evidence in this matter, the decision by Retailer Operations to withdraw the authorization of Appellant because the firm did not meet the eligibility requirements of a retail food store as set forth in § 278.1(b)(1) of the SNAP regulations is sustained. Appellant shall not be eligible to submit a new application for authorization in the SNAP for a minimum period of six months from the effective date of the withdrawal. Please call 877-823-4369 with any general SNAP application questions.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to 7 CFR § 279.7 of the regulations with respect to applicable rights 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 Appellant's owner resides or is 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 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

September 12, 2018