

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

Sportslander,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0234459

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the Office of Retailer Operations and Compliance, (Retailer Operations) properly denied the application of Sportslander (Appellant), to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took action consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it denied the authorization of Appellant to participate as a SNAP retail food store.

AUTHORITY

7 U.S.C. § 2023, and the 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

The owner completed an application for SNAP authorization. A firm visit was conducted July 28, 2020. Retailer Operations reviewed the application and onsite visit information to ascertain Appellant's eligibility to participate in the SNAP. Retailer Operations sent a letter dated August 10, 2020 requesting more information.

By letter dated August 21, 2020, the application of Appellant to participate as a retail food store in the SNAP was denied. The firm did not meet the eligibility criteria for stores as required by the regulations at 7 CFR § 278.1(b)(1). Retailer Operations' letter informed the owner that Appellant failed to meet Criterion A because it did not offer for sale a variety of staple foods in sufficient stocking units on a continuous basis in the dairy products and the bread or cereals staple food categories. The letter also states that the firm failed to meet Criterion B. A business must have more than 50% of its total gross retail sales in staple foods to be eligible for authorization under Criterion B. Appellant's eligibility under the need for access provision was also reviewed by Retailer Operations. Appellant was found not to meet the established criteria.

The owner requested administrative review by letter dated August 27, 2020. The appeal was granted by letter dated September 2, 2020. This office sent an email dated September 11, 2020 to the owner in response to her telephone call. The owner sent additional information by multiple emails dated September 23, 2020.

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 credible, relevant evidence that 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 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). Section 278.1(b)(1) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it 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.” 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 § 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.”

7 CFR § 271.2 states: “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 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) states: “(B) 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) requires that stores: (C) Offer a variety of staple foods which means different types of foods within each staple food category 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) 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(k)(2) states in part: “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 as stated, have been considered in rendering this decision whether listed or not.

- I have now processed the required items and am now requesting a reinspection of the premises.
- Attachments included in this email in reference documents sent to FNS on retailer's application, pictures showing proteins, Amino Acids/BCAA/EAA and protein cheese puffs with Nutritional Facts Label, article from FDA and the Letter of Denial.
- The question required to be answered was FNS-252 Question Number: 22c for corrections of the Sales Data and the Sales Category, which was supposedly left blank for one or more of these categories. The firm also took the liberty to also correct typo errors made on the application for number 19c and question 20c.
- It was alleged that the onsite visit done on July 28, 2020, inspection report showed more nonfood products than staple foods and gave an i.e. of supplements and T-shirts. The request from FNS was only to correct question 22c, on the application submitted online July 15, 2020, the sales percentages to accurately reflect store stock and services provided.
- A Letter of Denial dated August 20,2020 was sent to the firm on August 22, 2020, exactly one day after the request for corrections on question 22c, on the firms retailer application was faxed back to FNS Retailer Operations Division answering FNS request for corrections.
- For Criterion A it was alleged that the firm did not carry three stocking units in at least three varieties of foods in the bread or cereals, dairy product staple foods category (s).
- It is the firm's contention in support of its position that a re-visit was requested because the determining office stated that the inspector report showed that staple foods in the bread or cereal and dairy products was not sufficient to meet the requirements for Criterion A.
- However, the only request by FNS after the onsite- visit by the field agent was for the firm to correct FNS 252 form question number 22c. The Determining Office stated that question 22 in the Sales Category was left blank which the firm contents was clearly numbered 0 and not left blank on the application. The Sales Data was also whited out and gave the exact amount according to the firm's 2019 tax return.
- The additional information required to continue process the application after the on-site visit was that the inspection report showed more nonfood products (i.e. supplements and T-shirts than Staple Foods. And that the application needed corrections to the Sales Percentages to accurately reflect store stock and services.)
- The firm corrected the request and faxed to FNS to expedite the application processing. The Calling Center advised the firm to white out the form sent to the firm by FNS, since a new application form was not sent to the firm to make the FNS corrections request in the Sales Percentages and the Sales Category. The firm took the liberty to also white out question 19c to reflect the firm's number of varieties in the Meat Category and 20c was changed to yes.
- Neither had any effect on the Letter of Denial, which did not reflect its adverse action according to the questions requested after the visit.
- Corrections were made on the application, whited out to reflect more Staple Foods 40% and Accessary Foods 10% than Nonfood items 40% i.e. Supplements and T-shirts.
- The firm's rational is the T-shirts are not the firm's but instead the firm allows local vendors to hold events and showcase their local online businesses as a courtesy and helping hand to struggling and as new small businesses in the community. The firm provides a designated area and space, free of charge too local vendors.
- As for supplements, although the firm has a large section for shaker cups, proteins, amino acids and refrigerated sports energy drinks, the firm's Proteins, Amino Acids/BCAA/EAA

and sports energy drinks are majority not labeled as supplements and the firm repeats not supplements but instead are food products due to the labeling as: Nutritional Facts Label.

- FDA's decision to allow milk products utilizing high-quality protein concentrates to be labelled as 'high protein milk' is a positive step for greater flexibility and continued innovation in the dairy industry. This sort of flexibility allows the industry to provide the American public with more nutritious, high-quality dairy products.
- The whey protein concentrates are according to the FDA ruling, a high protein in the dairy category as a milk product and those proteins with casein are a cheese product. The firm carried both at the time of the on-site visit. The firm's Nutritional Facts Labels are to bring education and awareness to our communities' vulnerable and underserved populations, healthy alternatives for both adults and children.
- The store layout as having more Staple Foods than Nonfood items. It is the firm's rational that at the time of the on-site visit, one of the larger refrigerators was not in service due to the firm waiting for a work order from the company that maintains its operating condition and so much of the staple foods and items were not easily displayed due to the firm moving food products into two smaller refrigerators. Had this information been known by and presented to FNS by their Bakersfield local field agent's first on-site visit on July 28, 2020, it is the firm's position that there would have been no confusion as to the stores lay out, inventory, stock and services, delay of submitting as one completed package the firm's documents, it's completed inventory list and all pictures taken by the field agent had she been properly trained on what, where, how and when to submit the on-site visit of the firm's information and documents to FNS and how to submit to FNS the firm's location of the stores lay-out and had she shown that the firm did at the time of her on-site visit qualify for Criterion A having completed her on-site visit results, the second time to FNS and did show the inventory displayed at the time of her first on-site visit for that day.
- See all the pictures submitted by the field agent on two separate submissions and the firm is requesting that you, view this information as new evidence had it been known at the time of submission by the field agent, the firm would not have had an adverse action taken against its application as an authorized retailer for the SNAP program.
- The pictures in its entirety will clearly show the firm did not fail to meet the inventory requirements at the time of the second on-site visit submission by the field agent to FNS under Criterion A according to the FNS Letter of Denial for the firm failing to meet inventory requirements in the Bread or Cereal Category and the Dairy Category.
- Below is the position of the firm's inventory at the time of the onsite-visit: Three Stocking Units of Staple Foods in at least three varieties of foods in the: Bread or Cereal Category: Three Stocking Units in at least three varieties of foods for a total of nine varieties in the Bread or Cereal Category of: breakfast cereals, oatmeals, grits (for first foods for infants) and breads which shows the tortillas in the small refrigerator for a total of Three Stocking Units and nine varieties in the bread or cereal category), contrary to FNS Letter of Denial. Vegetable and Fruit Category: Three Stocking Units in at least three varieties of foods for a total of nine varieties in the Vegetable and Fruit Category of: Canned green beans, canned tomatoes, canned soups, fruit cups, apples, pears and oranges. Meat Category: Three Stocking Units in at least three varieties of foods for a total of nine varieties in the Meat Category of: Can tuna, beef jerky and Vienna sausages, in at least three varieties totaling nine varieties in meat items.

- Dairy Category: Three Stocking Units and at least three varieties of foods for a total of nine varieties in the Dairy Category of: Milk, Yogurt (shown on the pictures in the refrigerator with sports energy drinks) Cheese in the small refrigerator with apples and tortillas) and Whey Concentrated Proteins as seen in pictures, contrary to FNS Letter of Denial.
- There is also included in the pictures and on the firm's shelves continually, three Stocking Units of one variety of perishable foods in the Bread or Cereal Category and the Dairy Category which is Yogurt and Bread.
- All the firm's documents and pictures presented by the agent's second visit for the day, including her first visit be viewed as one package, although submitted to FNS according to the agent, at separate times on that day.
- It is the firm's position that the on-site visits submissions were not looked at completely due to the agent's error in submitting all the necessary information to FNS showing the firm did meet the qualifications for Criterion A.
- It is the firm's position had all the pictures been taken while the field agent did her first on-site visit and not having to come back to the firm's location approximately 30 minutes after leaving to complete her on-site visit, there would had been no confusion as to the firm's qualification in Criterion A Category and or no adverse action against the firm.
- The firm is requesting that the Administrative Review decision be based on the firm's case file containing all the information submitted by the Determining Office and the agent stating and showing that she came back to the firm's location twice on the day of her on-site visit because she needed to take pictures of the firm's Staple Foods, the inventory items and complete her inventory list on the firm's inventory in the store. She had not input the firm's correct inventory.
- All products with nutrition facts label are considered a food and not a supplement.
- The firm's position is had the agent understood her assignment before submitting some but not all of her submission requirements she would have submitted her report correctly. She would not had reassuringly, told the firm that she would be submitting an explanation to FNS of what had transpired during her on-site visit and that more information was being submitted to FNS, explaining the mishap in her first submission of the day. It is the firm's position that the field agent is the missing link in this review and that the burden of proof comes first from the Determining Office in the Retailer Operations Division and that the agent shall be contacted and she shall explain her technical error and failure to submit her on-site visit as one package to FNS. It is the firm's position that the information furnished by that office must establish a prime facie case, which standing on its own must justify sufficiently the adverse action taken against the firm.
- It is the firm's position that it has had the burden of presenting substantial evidence to refute the findings or conclusions of the Determining Office and is therefore asking the Review Officer to provide the Determining Office with the information not previously available to FNS in order to determine eligibility of the firm meeting the qualification for authorization as a SNAP participant under Criterion A, in her judgment and experience, not taking sides or showing favor to either the Firm or the Determining Office, which might have resulted in a different action other than the adverse action from the one imposed by FNS had that information been previously made available to them.
- The firm's position is that the action under review be reversed and a re-inspection be granted the firm and by appointment is being requested by the firm, due to the Covid 19 Pandemic. The Pandemic has caused the firm to alter its store hours of operations to:

Monday-Friday 2:30PM-7:00PM, Saturday 10:00AM-2:30PM, Closed on Sunday and will continue these hours of operations for public safety until the end of this pandemic. At that time the firm will go back to its normal hours of operations as submitted on its original retailer's application.

ANALYSIS AND FINDINGS

This review is to validate or to invalidate the determination by Retailer Operations; as such it is limited to consideration of the relevant facts at the time of the 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. The onsite review of Appellant's food inventory revealed insufficient varieties and stocking units in two staple food categories. The SNAP regulations at Section 278.1(b)(1)(ii)(A) under Criterion A as currently implemented, require a firm shall offer for sale and normally display in a public area, 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, and at least one variety of perishable foods in at least three staple food categories.

The firm onsite photos and inventory survey indicate the firm is 700 square feet with minimal shelving space for groceries. The space displayed non-food items such as t-shirts, a couch and an exercise bike. The firm visit inventory indicated that Appellant was deficient in the bread/cereal staple food category by two stocking units, and deficient in the dairy category by one variety and three stocking units. The report shows that the firm was primarily selling supplements. There is nothing in the record to support that the contractor left the business then returned for a second time. The report appears to reflect a single onsite visit. While the owner requested a telephone contact prior to an onsite eligibility visit, FNS does not contact applicant prior to the onsite visit. The record more supports that Appellant did not meet Criterion A at that time of the denial decision.

Based on the record, Retailer Operations determined that Appellant was also ineligible for authorization under Criterion B per 7 CFR § 278.1 (b)(1)(iii). The owner initially estimated that Appellant's staple food sales were 80% of total retail sales, however this estimate was not supported by the photos and the onsite store inventory report. Retailer Operations sent the owner a letter regarding the estimate. The owner provided a fax dated August 20, 2020, to reflect staple food sales at 50% of total retailer sales. No evidence was provided by the owner to support that figure. Retailer Operations determined that Appellant did not meet Criterion B at the time of the denial. As noted in the regulations, firms must have more than 50 percent of their total gross retail sales in staple food sales.

The photos depict that the establishment primarily sells supplements, tee shirts, and sport nutrition items related to body building. As such, it appears that this firm does not meet the regulatory definition of a retail food store. An establishment that includes separate businesses that operate under one roof and have commonalities such as: a single management structure, shared space, logistics, bank accounts, employees, and inventory, is considered to be a single entity. The different businesses cannot be evaluated separately; they are one establishment and

the entire nature and scope of the businesses, must be taken into account when evaluating it for program eligibility. The body building business appears to have included several shelves of food items in an attempt to become authorized as a retail food store. On review it appears that this firm does not meet the very definition of a retail food store. Retailer Operations properly accessed the firm for need for access as per the regulations at 7 CFR § 278.1(b)(6), and found that it did not qualify. SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application. The preponderance of the evidence supports that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the denial decision was rendered.

CONCLUSION

Based on a review of the evidence, the determination by Retailer Operations to deny the authorization of Appellant to participate as a SNAP retailer is sustained. The firm did not meet the requirements of a retail food store as set forth in Sections 278.1(b)(1) and 278.1(b)(6) of the SNAP regulations. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived.

In accordance with 7 CFR § 278.1(k)(2), the owner will not be eligible to reapply for participation as a retail food store in the SNAP for a minimum period of six months from the effective date of the denial. The effective date is 30 days after the date of delivery of this decision. General questions regarding the application process can be handled by contacting 877-823-4369. Operational questions regarding the denial should be directed to the office that initially took the action to deny Appellant. Please contact Peter Hein at (213) 330-2460.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, and to the regulations at 7 CFR § 279.7 with respect to the applicable right to judicial review of this decision. 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 thirty (30) days of delivery of this Final Agency 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

October 28, 2020