

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

**Sunnyside Drug Co.,**

**Appellant,**

**v.**

**Case Number: C0209211**

**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 there is sufficient evidence to support a finding that the Retailer Operations Division properly withdrew the authorization of Sunnyside Drug Co. to participate 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 Code of Regulations (CFR) Part 278 in its administration of the SNAP, when it withdrew the authorization of Sunnyside Drug Co. as a SNAP retail store on May 7, 2018.

**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**

FNS regulations require that SNAP retail stores be reauthorized on a set schedule. As part of this process, store owners must complete a reauthorization application and an onsite visit by an FNS contractor is then conducted to determine the Appellant’s continued eligibility to participate as a SNAP retailer.

The record shows that the Appellant signed an application for reauthorization on April 24, 2018. On May 1, 2018, the Appellant business was visited by an FNS contractor in an effort to

determine whether or not the firm met eligibility requirements to be reauthorized in the 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.

The Retailer Operations Division determined that the business 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 products and the meats, poultry, or fish staple food categories making the business ineligible under Criterion A. Additionally, both the application and the store visit report indicated that Sunnyside Drug Co. was not eligible under Criterion B.

In a letter dated May 7, 2018, the Retailer Operations Division informed the 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 the 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.

In a letter postmarked May 14, 2018, the Appellant appealed the Retailer Operations Division's decision and requested an administrative review of this determination. FNS granted the Appellant's request for administrative review by letter dated May 22, 2018 and implementation of the withdrawal was held in abeyance pending completion of this review.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions 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 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, 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) further stipulates, 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 with a 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.

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(b)(6) states, in part,

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 or B, so long as the applicant firm meets all other SNAP authorization requirements.

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 the Appellant's request for administrative review postmarked May 14, 2018, it was argued that:

- Sunnyside Drug Co. has been carrying a sufficient stock of staple foods as is required by the SNAP.
- With regard to dairy products, the store stocks butter, milk, and Muscle Milk®, Ensure®, Glucerna® or Boost®. However, after checking the Nutrition Facts labels, the Appellant found that dairy was not the first ingredient listed for some of these foods.
- With regard to meats, the store stocks chicken chili in a can. Chicken stock is the first ingredient listed on the Nutrition Facts label so this food item should qualify under the meats, poultry, or fish staple food category. Sunnyside Drug Co. also stocks Lunchables® which ham or turkey is the first ingredient on the Nutrition Facts label. At the time of the store visit, the Appellant had used the last three cans of tuna to make tuna fish salad for the deli portion of the store.
- The reviewer visited the store in the morning. In the afternoon, the Appellant brought milk, tuna, and other food items to the store.
- With regard to Criterion B, some of the percentages provided on the SNAP application were estimated. Some of the food items stocked in the store do not match up easily with the staple food categories listed on the SNAP application.
- This is the first time in the history of Sunnyside Drug Co. that it has been cited for SNAP violations.
- A SNAP authorization withdrawal will impose a hardship on area customers as Denver's largest housing project is located across the street from Sunnyside Drug Co.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

## ANALYSIS AND FINDINGS

### Criterion A

With regards to the Appellant's contentions, 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 participation in the SNAP subsequent to that decision, such as stocking all the varieties of staples in each of the four staple food categories in the store on a continuous basis or promising to do so if approved. 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.

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 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. A store visit was conducted by an FNS contracted Reviewer on May 1, 2018. According to the Reviewer's written record and photos taken of the store's stock, the firm had insufficient inventory in the dairy products and the meats, poultry, or fish staple food categories, making the business ineligible under Criterion A. It is important to note that with regard to multi-ingredient foods such as canned chicken chili, the food is assigned to the staple food category of the first listed ingredient on the item's Nutrition Facts label or it is classified as an accessory food. However, if the first listed ingredient on the Nutrition Facts label is water, broth, or **stock**, then the second listed ingredient is considered.

SNAP authorization is dependent solely upon whether the firm meets the eligibility requirements for participation at the time of the reauthorization application, and subsequently abides by the statute and implementing regulations. The evidence supports that Sunnyside Drug Co. did not meet the regulatory requirements of Criterion A at the time that the withdrawal decision was rendered. Therefore, the Retailer Operations Division correctly concluded that Sunnyside Drug Co. did not meet Criterion A because the store did not offer "qualifying staple foods on a continuous basis".

### Criterion B

With regard to Criterion B, the Appellant contends that some of the percentages provided on the SNAP application were estimated. Some of the food items stocked in the store do not match up easily with the staple food categories listed on the SNAP application.

An evaluation of the percentages of staple food sales reported on the Appellant's SNAP Retailer Reauthorization Application which it signed on April 24, 2018, as well as the photographs and

store inventory information provided from the store visit indicate that Sunnyside Drug Co. did not receive more than 50 percent of its projected annual sales from the sale of staple foods. The Appellant did not provide FNS with any evidence or documentation that validates that more than 50 percent of Sunnyside Drug Co.'s projected annual sales come from the sale of staple foods. Accordingly, the Retailer Operations Division correctly determined that Sunnyside Drug Co. was not eligible for SNAP authorization under Criterion B.

### **First Time Violator**

The Appellant contends that this is the first time in the history of Sunnyside Drug Co. that it has been cited for SNAP violations. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges. As such, Sunnyside Drug Co.'s compliance history is not a relevant consideration in the present case.

### **Customer Hardship**

The Appellant contends that a SNAP authorization withdrawal will impose a hardship on area customers as Denver's largest housing project is located across the street from Sunnyside Drug Co. However, there are no provisions in the Food and Nutrition Act or SNAP regulations allowing hardship to SNAP customers as a consideration in determining eligibility for participation in the SNAP, with the exception of co-located wholesale/retail firms, which must meet a variety of additional requirements. Sunnyside Drug Co. is not a co-located wholesale/retail firm; therefore, such provisions do not apply in the present case.

### **Need for Access**

The 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 distance to the nearest SNAP authorized firm, transportation options, the extent of the Appellant's stocking deficiencies, 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 Sunnyside Drug Co. to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation in the SNAP for a minimum period of six months from the effective date of the withdrawal.

## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act (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 Freedom of Information Act, FNS is 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.

LORIE L. CONNEEN  
Administrative Review Officer

August 15, 2018