

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review  
Alexandria, VA 22302**

**Tornado Station,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0203965**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the Retailer Operations Division properly denied the application of Tornado Station to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of denial.

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it denied the retailer application of Tornado Station.

**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**

The Appellant firm, Tornado Station, originally applied to participate as a retailer in SNAP on September 18, 2017. According to the application, the store was opened for business under the current ownership on August 29, 2017.

On October 14, 2017, a store visit was conducted by an FNS contractor to determine whether or not the firm met eligibility requirements to be authorized in SNAP. After reviewing the store visit report and photographs, the Retailer Operations Division determined that the firm did not carry a sufficient variety of staple foods in two of the four staple food categories in order to be eligible to participate in SNAP under Criterion A. According to regulations at 7 CFR § 278.1(b)(1), a firm must offer for sale on a continuous basis a variety of foods in each of the four staple food categories. According to the contractor's written record of the store visit, the firm carried an insufficient variety of food in both the dairy and meat/poultry/ fish staple food categories on the day of the visit.

In a letter dated October 27, 2017 and sent on October 30, 2017, the Retailer Operations Division informed the Appellant that its SNAP application was denied because it did not offer for sale on a continuous basis a variety of foods in all four staple food categories as required under Criterion A.

The Retailer Operations Division also informed the firm that it did not meet the eligibility requirements of Criterion B because the store did not have more than 50 percent of its gross retail sales in the sale of staple foods. The Appellant had previously disclosed on its SNAP application that 55 percent of the firm's sales were derived from the sale of staple foods. But after analyzing the store visit report and considering the large amount of nonfoods and non-staple foods available at the store, the Retailer Operations Division concluded that it was very unlikely that the firm's staple food sales exceeded 50 percent of its gross retail sales. Therefore, the firm was not eligible for participation under Criterion B.

As a result of being found ineligible for participation under both Criteria A and B, the Appellant was informed that its SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter postmarked November 4, 2017, the Appellant requested an administrative review of the Retailer Operations Division's decision. The request was granted.

## **STANDARD OF REVIEW**

In an appeal of adverse action, such as an application denial, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 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(k) establishes the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility requirements.

7 CFR § 278.1(k)(2) reads, in relevant part:

*FNS shall deny the application of any firm if it determines that:*

*(2) 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 ....*

7 CFR § 271.2 defines a *retail food store* as:

*(1) 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)** 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 inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter... [Emphasis added.]*

7 CFR § 271.2 defines *staple food*, in part, as:

*... food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products.... Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm.*

7 CFR § 278.1(b)(1)(i) states, in part:

*An establishment ... shall ... 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 ... including perishable foods in at least two of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment ... in staple foods (Criterion B).*

7 CFR § 278.1(b)(1)(ii) states, in part:

*In order to qualify under [Criterion A] firms shall:*

- (A) Offer for sale ... qualifying staple food items on a continuous basis ... on any given day of operation, no fewer than three different varieties of food items in each of the four staple food categories...[emphasis added]
- (B) Offer for sale perishable staple food items in at least two staple food items. 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; and
- (C) Offer a variety of staple foods which means different types of foods, 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...shall not each be considered as more than one staple food variety for the purpose of determining variety...

7 CFR § 278.1(b)(1)(iii) states, in part:

*In order to qualify 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....*

7 CFR § 278.1(k)(2) states, in part:

*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**

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- During the contractor's store visit, the inspector could not use the camera properly and had to ask for assistance from people inside the store.
- The store offers for sale sufficient quantities on a continuous basis in each of the four staple food categories, including perishable foods.
- The firm keeps larger amounts of stock in the back coolers and it constantly fills up coolers in the store.

In support of these contentions, Appellant provided 13 undated color photographs, including a few that specifically show dairy and meat/poultry/fish products.

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

## ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the contractor's store visit and at the time the Retailer Operations Division rendered its decision.

On September 18, 2017, the Appellant submitted an online form FNS-252, *Supplemental Nutrition Assistance Program Application for Stores*, in which it indicated that the firm carried at least three varieties of staple foods in each of the four staple food categories. The application also estimated that 55 percent of the firm's gross retail sales were from the sale of staple foods, while 5 percent of its sales were in other foods, such as snack foods, soft drinks, and condiments. The Appellant estimated that 40 percent of its sales were from items not eligible for purchase with SNAP benefits, such as gasoline, tobacco products, and other nonfood merchandise.

After reviewing the contractor's store visit photographs and report as well as evaluating the contentions and evidence submitted by the Appellant, it is the determination of this review that on the day of the store visit, the Appellant firm did not meet SNAP eligibility requirements under either Criterion A or B. As best as can be determined by this review, the only meat item in the store on the day of the contractor's visit was a very small amount of beef jerky, and the only dairy products were milk and ice cream.

It must be emphasized that a firm must maintain a continuous and minimum inventory of staple food items in order to be eligible for participation in SNAP. If a firm does not purchase and maintain a sufficient inventory of staple foods then it does not further the purposes of the Program. As stated in regulations cited earlier, the firm must offer for sale no fewer than three different varieties of food in each of the four staple food categories on a continuous basis in order to be eligible for participation under Criterion A. "Continuous basis" includes the day of the contractor's visit to the store.

In this case, the evidence clearly shows that the Appellant firm was significantly lacking in variety in two of the four staple food categories on the day of the store visit. As a result of this deficiency, the firm is not eligible for SNAP participation under Criterion A.

The firm is also not eligible under Criterion B as the sale of staple foods almost certainly does not exceed 50 percent of the firm's total sales. As noted earlier, the Appellant indicated on its SNAP application that staple foods constitute 55 percent of the firm's gross sales. But this appears to be a significant overestimation. When gasoline, tobacco, snack foods, soda, candy, and other nonfood sales are taken into consideration, it is very unlikely that the store's staple food sales add up to anywhere near 50 percent of the firm's total revenue. Based on a review of

the store visit report, this review estimates that the firm's staple food sales are probably closer to 5 or 10 percent of the firm's gross sales. As such, Tornado Station is not eligible for participation under Criterion B. It should be noted that Criterion B is generally reserved for stores such as butcher shops or bakeries, which normally do not carry food items in all four staple food categories, but which have most of their revenue in the sale of staple food items.

### **New Inventory**

By submitting photographs showing additional staple foods on the store's shelves, including dairy and meat/poultry/fish items, the Appellant has implied that firm is now eligible for participation under Criterion A.

With regard to this contention, it must be restated that this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the contractor's store visit and at the time that the Retailer Operations Division rendered its denial decision. It is not the authority of this review to consider subsequent remedial actions that may have been taken so that a store may begin to comply with program requirements. There are no provisions in the SNAP regulations for a reversal of an application denial on the basis of alleged or planned corrective actions implemented subsequent to the finding of a firm's ineligibility.

In comparing the contractor's photographs with the undated photographs provided by the Appellant, it is very clear to this review that additional inventory was purchased by the Appellant after the contractor made its visit. However, adding food items after the initial store visit and insinuating that the store has made improvements to its staple food inventory does not mean that the store is now eligible for SNAP participation and does not prove that the store carried sufficient staple food items on a continuous basis.

Therefore, the photographs provided by the Appellant do not provide a valid basis for reversing the Retailer Operations Division's denial determination.

### **CONCLUSION**

Based on the analysis above, it is the determination of this review that the Appellant firm, Tornado Station, does not meet eligibility requirements under Criterion A or B pursuant to 7 CFR § 278.1(b)(1). The contentions presented by the Appellant are not sufficient to prove that the denial decision made by the Retailer Operations Division should be reversed. The store visit cited by the Retailer Operations Division was conducted by an FNS contractor and was thoroughly documented. A review of the report has yielded no indication of error or discrepancy. Rather the report and accompanying photographs are specific and accurate with regard to store conditions and food inventory on the day of the visit, and in all other critically pertinent details.

On the basis of the analysis above, the decision by the Retailer Operations Division to deny the application of Tornado Station to participate as a retailer in SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a

retailer in SNAP for a minimum period of six months from October 30, 2017, which is the effective date of the denial.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a 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.

JON YORGASON  
Administrative Review Officer

December 12, 2017