

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

Uniquely Washington,

Appellant,

v.

Case Number: C0224645

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support a finding that the Retailer Operations Division (hereinafter Retailer Operations), properly denied the application of Uniquely Washington (hereinafter Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it denied the application of Appellant to participate as a SNAP retail store on November 15, 2019.

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 record shows that on October 13, 2019, Appellant submitted an application for SNAP authorization. FNS-contracted personnel conducted an onsite store visit on November 6, 2019, to determine whether or not the firm met eligibility requirements to be authorized in 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.

By letter dated November 15, 2019, the application of Appellant to participate as a retail food store in SNAP was denied because 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

Appellant that it 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 bread or cereals and dairy product 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. In addition, Appellant's eligibility under the need for access provision was reviewed by Retailer Operations. Appellant was found not to meet the established criteria.

The owner requested administrative review and the appeal request was granted by letter dated December 18, 2019. The owner submitted additional correspondence dated January 6, 2020.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means Appellant has the burden of providing relevant, credible evidence that 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 law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 USC § 2018) and implemented through regulation under 7 CFR § 278. In particular, 7 CFR § 278.1(l)(1) establishes the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

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

Appellant made the following contentions, as stated below:

- I believe that we do carry the required stock to participate in SNAP. For the breads or cereals, we carry bread, buns, English muffins, cereal, dry soup mixes which are multi-ingredient foods but are acceptable, as the main ingredient is barley and/or rice. For the dairy products, we carry milk, cheese, butter, and margarine.
- As we have very limited display space, we keep only a few units of items requiring refrigeration or freezing in the front of the store. Customers come in and request the milk, eggs, and cheeses and we get the items from the back refrigerators/freezers.
- Being able to accept the EBT cards and supply reasonably priced staple foods to the residents in Ritzville is important to us and our business.
- As with rural areas, Ritzville residents struggle to make ends meet and we are attempting to make a difference for them and our town. Being able to carry SNAP is very important for many of our residents.
- Bringing in more grocery items and EBT is in response to the small grocery store across the street that is closing, and we have many low income residents that are not able to shop out of town easily. Our base items of milk, eggs, butter, and margarine are very low priced. We do plan on expanding our base items and keeping prices down if we can qualify for SNAP

In support of its contention for qualifying under Criterion A, Appellant submitted bread/cereals and dairy products inventory and pricing information, and pictures of stock and ingredient labels.

The preceding may represent a summary of Appellant's contentions; however, in reaching a decision, consideration was given to all contentions presented, including any not specifically referenced herein.

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 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 the breads or cereals and dairy 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.

Appellant's owner contends it does meet the eligibility requirements of Criterion A and provided inventory information, photos of ingredient labels of its dry soup mixes and oatmeal, and photos of its bread, cereal, and dairy products as proof. Upon review of the store visit photos, the dry soup mix was available at the time of the visit. The ingredient label provided confirms barley is the main ingredient of the dry soup mix, and therefore Appellant does meet the required variety and stock in the breads or cereals staple food category. However, the photos provided do not depict Appellant's inventory at the time of the store visit and therefore cannot be considered. The store visit photos and report support that Appellant had insufficient dairy products, having only milk and cheese, at the time of the visit. It is not within the scope of this review to consider actions ownership may take to qualify for continued participation in SNAP subsequent to that decision, such as stocking all the variety of staples in each of the four staple food categories in the store on a continuous basis. There is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of after-the-fact or intended corrective actions. Therefore, any contentions that the store is now sufficiently stocked with necessary items do not provide any valid basis for dismissing or mitigating the adverse action imposed. Appellant provided insufficient evidence to support that Appellant met the eligibility requirements at the time the decision was rendered. The record supports that Appellant did not have sufficient varieties and/or stocking units in the dairy staple food category, and did not meet Criterion A when the determination was rendered.

Appellant's retailer application reports less than 1% of its sales are from staple foods. An evaluation of the photographs and store inventory provided from the store visit also indicate that Appellant did not receive more than 50% of its projected annual sales from the sale of staple foods. Accordingly, Retailer Operations correctly determined Appellant was not eligible for authorization under Criterion B.

The 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.

Need for Access

As Appellant failed to meet Criterion A and B, Retailer Operations did consider whether Appellant is located in an area with significantly limited access to food as required under SNAP regulation 7 CFR § 278.1(b)(6). In determining whether Appellant is located in such an area, Retailer Operations considered factors such as the distance from Applicant to the nearest currently SNAP-authorized firm and the extent of Appellant's stocking deficiencies in meeting Criterion A and Criterion B. Retailer Operations determined Appellant did not qualify for SNAP authorization under 7 CFR § 278.1(b)(6).

Some degree of inconvenience to SNAP benefit users is inherent in the failure to authorize a retailer, since the distance to the nearest SNAP-authorized firm may be longer for some SNAP benefit holders. A review of the factors and evidence considered by Retailer Operations under 7 CFR § 278.1(b)(6) supported that authorization of Appellant was not necessary for access. Therefore, the earlier determination that authorization of Appellant was not required to ensure access to food for SNAP participants, as differentiated from potential inconvenience, is sustained.

The regulations at 7 CFR § 278.1(l)(1)(iii) state, in part, "FNS shall withdraw the authorization of any firm if the firm fails to meet the requirements for eligibility under Criterion A or B . . . for the time period specified in paragraph (k)(2)" and 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 . . . for a minimum period of six months from the effective date of the denial." There is no agency discretion to impose a sanction of less than six months when a firm does not meet the eligibility requirements for authorization.

CONCLUSION

Based on a review of all of the evidence in this matter, the determination by Retailer Operations to withdraw the authorization of Appellant to participate as a retail food store in SNAP is sustained.

In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to reapply for participation as a SNAP retail food store for a minimum period of six months from the effective date of the denial, which is November 15, 2019.

General questions regarding the SNAP application process can be handled by calling the FNS Retailer Service Center at 877-823-4369. Operational questions regarding the denial should be directed to the office that initially took action against Appellant. Please contact Krimy Almodovar at (404) 562-1914 or Krimy.Almodovar@usda.gov.

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 30 days of delivery 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

May 13, 2020