

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

**Zacks Quick Stop,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0204718**

**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 decision by the Retailer Operations Division (Retailer Operations) to deny the application of Zacks Quick Stop (Appellant) to participate in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed.

**ISSUE**

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

**CASE CHRONOLOGY**

FNS received a SNAP application from Appellant October 2, 2017. FNS contracted staff conducted an onsite store visit on October 26, 2017. A proof of inventory letter dated November 6, 2017, was sent to Appellant. The owner provided a response which was reviewed. By letter dated November 22, 2017, Retailer Operations informed the owner that the application of Appellant to participate as a SNAP authorized retailer was denied. Appellant did not meet the eligibility requirements as set forth in Section 278.1(b)(1) of the SNAP regulations. Retailer Operations determined that Appellant did not offer for sale a variety of foods in sufficient quantities on a continuous basis because it carried too few items in the dairy staple food category and did not meet Criterion A. Retailer Operations also determined that the firm failed to meet Criterion B because its staple food sales comprise 50 percent or less of the total annual gross retail sales of the firm. This was based on the application information and the store visit report.

Appellant was informed that in accordance with Section 278.1(k)(2) of the SNAP regulations a new application for the firm to participate in the SNAP could not be submitted for a period of six months from the date of the denial.

The owner requested administrative review of the determination by a letter postmarked December 1, 2017. The appeal was granted by letter dated December 7, 2017. The owner submitted additional information by letter postmarked December 26, 2017.

## **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**

7 USC § 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.”

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, 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 The participation as retail food stores...”

The regulations at 7 CFR § 271.2 define a staple food, in relevant part, as: “Food items intended for home preparation and consumption in each of the following staple food categories: . . . 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) imparts specific program requirements for retail food store participation, which states: “An establishment ... shall ... effectuate the purposes of the program if it ... 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)(A) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion A, it must: “Offer for sale and normally display in a public area, qualifying 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.”

7 CFR § 278.1 (b)(1)(ii)(C) clarifies “variety of staple foods” as meaning: “... 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, 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 ...”

7 CFR § 278.1 (b)(1)(iii) provides that in order for a retail store to qualify for authorization under Criterion B, it must: “... have more than 50 percent of ... 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 ...”

7 CFR § 278.1(k)(2) 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 . . . for a minimum period of six months from the effective date of the denial.”

### **APPELLANT’S CONTENTIONS**

All contentions were considered whether recapitulated below or not. The contentions are:

- We offer for sale on a continuous basis at least three varieties of qualifying foods in each of the four staple food groups with perishable foods in at least two categories.
- Original assessment was conducted three weeks following our opening day.
- We have since maintained three varieties of the qualifying foods in each of the four staple food groups on a continuous basis.
- Due to demographic makeup of the surrounding community, most customers will not purchase these staple items unless they are able to purchase them using their SNAP benefits.
- Most of our perishable items tend to be discarded due to lack of sales.

The owner provided photographs and some invoices to support his request. He also furnished a signed petition that stated it was inconvenient that the store did not accept SNAP.

## **ANALYSIS AND FINDINGS**

It is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of Retailer Operations, and as such it is limited to consideration of the relevant facts and circumstances 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. It is not within the scope of this review to consider actions the owner may take to qualify for participation in the SNAP subsequent to that decision, such as stocking on display in a public area the variety of staples in each of the four staple food categories on a continuous basis, or to carry perishable food in at least two of the four staple food categories.

The onsite review of Appellant's food inventory revealed insufficient stock in the dairy staple food category. The SNAP regulations at Section 278.1(b)(1)(ii) are clear that under Criterion A, a firm shall "offer for sale ...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." On the date of the store visit, Appellant did not maintain sufficient variety of qualifying staple foods on a continuous basis to be eligible to accept SNAP benefits as required by the regulations cited. Retailer Operations sent a proof of inventory letter and the reply by the owner did not offer evidence to support that Appellant stocked sufficient dairy staple foods. As such, Appellant did not meet Criteria A for eligibility.

Upon review, the owner submitted an invoice number 2011540. Retailer Operations contacted the vendor and was told that the invoice number was incorrect for that date. The invoice number corresponded to an order dated November 14, 2017, not September 26, 2017. Thus, the validity of the invoice submitted is in question and does not support Appellant's claim of stocking sufficient dairy variety to be eligible.

Based on Appellant's application and the FNS contractor photographs, Retailer Operations determined that Appellant was ineligible for authorization under Criterion B per 7 CFR § 278.1(b)(1)(iii). The record reflects that the owner's application estimated that staple foods accounted for 35% of the store's total gross retail sales. The accessory "other" food items showed an estimate of 65% of the firm's total gross retail sales, and 0% of total gross retail sales were stated to come from "other." The evidence supports that staple food sales could not reasonably comprise more than 50% of the store's total annual gross retail sales. Appellant features an abundance of ineligible items and accessory foods that do not count towards determining eligibility for authorization.

SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation at the time of application, and subsequently abides by the statute and implementing regulations. The petition submitted by the owner is not relevant. Retailer Operations is charged with determining eligibility of an applicant store. The evidence supports

that Appellant did not meet the regulatory requirements of Criterion A or Criterion B at the time the decision was rendered.

## **CONCLUSION**

After review of all the documentation in the record, the decision by Retailer Operations to deny the application of Appellant to participate in the SNAP for a period of six months from the effective date of denial is sustained. Per 7 CFR § 278.1(k)(2), Appellant may not reapply for SNAP authorization as a retail food store for a minimum period of six months from the effective date of the denial.

## **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 USC § 2023) and to Section § 279.7 of the Regulations (7 CFR § 279.7) with respect to applicable rights to a judicial review of this determination. 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'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 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.

M. Viens  
Administrative Review Officer

January 10, 2018