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

A-one Mccutchenville Food And Gas Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0277176

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 the decision of the Retailer Operations Division to deny the application of A-one Mccutchenville Food And Gas Mart (hereinafter "A-one Mccutchenville Food And Gas Mart" or "Appellant") to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for six months from the effective date of the denial decision.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b) and 7 CFR § 278.1(k), when it denied the application of the Appellant to participate as an authorized SNAP retailer.

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 applied to participate in the SNAP as an authorized retailer in an application that was signed on August 25, 2023. In a letter of October 10, 2023, the Retailer Operations Division informed the Appellant that its inventory of staple foods was marginal, and requested invoices/receipts to verify that the store carried at least three stocking units of three different varieties of foods in the dairy products staple food category. The Appellant was informed that it had 10 days,

from receipt of the letter, to provide the requested documentation. The record reflects that the Retailer Operations Division did not receive a response from the Appellant to the proof of inventory letter within the 10 day required timeframe.

In a letter dated November 8, 2023, the Retailer Operations Division denied the application of the Appellant to participate as an authorized retailer in the SNAP. This denial action was based on evidence obtained during a store visit on September 18, 2023, as well as information provided on the firm's retailer application.

The Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations. The denial letter states "In order for a firm to be eligible to participate in the SNAP, it must offer for sale staple foods intended for home preparation and consumption and meet either Criterion A or B, as set forth in Section 278.1(b)(1) of the SNAP regulations. Under Criterion A, a firm must offer for sale, on a continuous basis, a minimum of three stocking units of three varieties of foods in each of four staple food categories, including three stocking units of one variety of perishable foods in at least two of those categories. The four staple food categories are: 1) bread or cereals; 2) dairy products; 3) vegetables or fruits; and 4) meat, poultry, or fish. Under Criterion B, a firm must have more than 50 percent of its total gross retail sales in staple foods." The Appellant failed to meet the requirements of Criterion A because it did not offer for sale on a continuous basis a variety of foods in the dairy products staple food category. Also, the Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its total gross retail sales.

The denial letter also states that the Retailer Operations Division considered the Appellant's eligibility under the Need for Access provision at Section 278.1(b)(6) of the SNAP regulations. However, the Appellant did not qualify for SNAP authorization under this provision.

As the firm failed to meet either eligibility criterion for approval, the Appellant was informed that the firm could not submit a new application to participate in the SNAP for a period of six months as provided in § 278.1(k)(2).

In an email correspondence of November 20, 2023, 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 November 21, 2023. By letter of November 28, 2023, the Appellant was provided with the name of the Administrative Review Officer assigned to the case as well as a due date of December 19, 2023 to provide any additional information or arguments in support of the request for administrative review. By email correspondences of December 3, 2023, the Appellant submitted additional information in support of the request for administrative 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 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) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in the SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k) 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, in part, as:

> 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 qualifying staple food items on a continuous basis, evidenced by having 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 food variety, including at least one variety of 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 stock keeping units, or other inventory or accounting record keeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter …..

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

> ... 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. 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 foods 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)(A) reads, in part,

> An establishment...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...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 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 minimum 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. 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. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit...
>
> (B) Offer for sale perishable staple food items in at least two 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; 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, and similar unprocessed food items, such as, but not limited to different varieties of applies, 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 FNS.

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.

7 CFR § 278.1(b)(6) states, in part:

> 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. In determining whether an applicant is located in such an area, FNS may consider access factors such as, but not limited to, the distance from the applicant firm to the nearest currently SNAP authorized firm and transportation options. In determining whether to authorize an applicant despite its failure to meet Criterion A and Criterion B, FNS will also consider factors such as, but not limited to, the extent of the applicant firm's stocking deficiencies in meeting Criterion A and Criterion B and whether the store furthers the purposes of the Program. Such considerations will be conducted during the application process ….

APPELLANT'S CONTENTIONS

In the request for administrative review and in subsequent correspondences, the Appellant stated the following summarized contentions, in relevant part:

- The Appellant requests reconsideration of the authorization denial determination.
- The Appellant believes that the store meets the requirements for SNAP participation under Criterion A.
- The Appellant was unable to provide inventory purchase receipts for dairy products from a month ago as the system only provides receipts up to two weeks prior.
- The Appellant has monthly sales receipts that mention dairy sales.
- The Appellant believes that the store visit reviewer missed the back cooler and the dairy products stocked there including eggs, milk, butter, cheese, etc.
- The Appellant requests another store visit to check its compliance with the SNAP authorization requirements.
- The Appellant gets a lot of customers coming into the store asking if the store accepts SNAP benefits; therefore, it is very important for the business to grow.

In support of these contentions, the Appellant submitted the following information for review:

- Tax Report by Register for period October 30, 2023-November 30, 2023;
- DCR Statistical Report for period October 30, 2023-November 30, 2023;
- Department Report All Cashiers for period October 30, 2023-November 30, 2023;

- Photos of current food stock; and
- Inventory purchase receipts/invoices (8 total).

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

ANALYSIS AND FINDINGS

Criterion A

With regard to the Appellant's contentions with respect to Criterion A, 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.

The review of the Appellant's food inventory revealed insufficient stock in the dairy products staple food category. At the time of the store visit of September 18, 2023, A-one Mccutchenville Food And Gas Mart did not meet Criterion A as it did not carry three stocking units in at least three varieties of foods in the dairy products staple food category stocking 2 units of butter, 10 units of milk, 2 units of cheese, and 4 units of yogurt. The evidence supports that the Appellant did not meet the regulatory requirements of Criterion A at the time that the denial decision was rendered.

In support of the request for administrative review, the Appellant submitted for review a total of eight (8) receipts/invoices for food purchases. 5 U.S.C. § 552 (b)(7)(E). Therefore, the receipts/invoices do not validate that A-one Mccutchenville Food And Gas Mart carried a minimum of three stocking units in at least three varieties of foods in the dairy products staple food category **at the time that the denial action** was rendered. The submitted food stock photos, Tax Report by Register for period October 30, 2023-November 30, 2023, DCR Statistical Report for period October 30, 2023-November 30, 2023, and Department Report All Cashiers for period October 30, 2023-November 30, 2023 are current and cannot be used to assess inventory of required items at the time that the denial action was rendered.

Therefore, the Retailer Operations Division correctly concluded that A-one Mccutchenville Food And Gas Mart did not meet Criterion A because the store did not offer "qualifying staple foods on a continuous basis".

As to the Appellant's request for another store visit to check its compliance with the SNAP authorization requirements, it should be noted that follow-up visits are not conducted at a retailer's request. Store visits are intentionally unannounced in an effort to determine a store's inventory and physical characteristics on any given day of operation and at any time during the store's operating

hours. This helps prevent firms from artificially inflating its inventory for purposes of SNAP authorization.

With regard to the Appellant's contentions that a SNAP authorization denial would impose a hardship on area SNAP customers as well as a financial hardship on the Appellant, unfortunately these contentions do not provide a valid basis for reversal of the Retailer Operations Division's denial determination. A store may only accept SNAP benefits if it currently meets the minimum eligibility criteria for authorization. As stated previously, the Appellant firm was denied authorization because it was determined that the business did not meet the definition and requirements of a retail food store as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations.

Criterion B

An evaluation of the percentages of staple food sales reported on the Appellant's SNAP Retailer Application which was signed on August 25, 2023, as well as the photographs and store inventory information provided from the store visit indicate that A-one Mccutchenville Food And Gas Mart did not receive more than 50 percent of its projected total gross retail sales from the sale of staple foods. Accordingly, the Retailer Operations Division correctly determined that A-one Mccutchenville Food And Gas Mart was not eligible for SNAP authorization under Criterion B.

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 deny the application of A-one Mccutchenville Food And Gas Mart 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 SNAP authorization for a minimum period of six months from November 8, 2023, the effective date of the denial.

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 delivery 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

January 16, 2024