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

Cheese and Jam York LLC, **Appellant,** **v.** **Retailer Operations Division,** **Respondent.**	**Case Number: C0277114**

FINAL AGENCY DECISION

The United States Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the Retailer Operations Division's decision to deny the application of Cheese and Jam York LLC (Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). 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)(1) and § 278.1(k)(2) in its administration of the SNAP when it denied the application of Cheese and Jam York LLC to participate as an authorized SNAP retailer.

AUTHORITY

7 USC § 2023 and the 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

In a letter dated June 1, 2023, the Retailer Operations Division informed ownership that the application of Cheese and Jam York LLC to participate as an authorized retailer in SNAP was denied because Appellant did not meet the eligibility requirements set forth in Section

278.1(b)(1) of the SNAP regulations. Based on the May 25, 2023, FNS contracted store visit, the Retailer Operations Division determined that Cheese and Jam York LLC failed to meet the definition and requirements of a retail store. Appellant did not offer for sale a variety of foods in sufficient quantities on a continuous basis because it carried too few items the dairy staple food category, the bread or cereal staple food category, the vegetables or fruit staple food category, and the meat, poultry, or fish staple food category. The store also failed to meet Criterion B because the store's staple food sales did not comprise more than 50 percent of its annual gross retail sales.

By e-mail sent on November 14, 2023, ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted.

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 USC § 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 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 variety, including at least one variety of perishable foods in at least [two*] such categories

*As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion.

(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) …

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 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)(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:

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* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion.

(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 the 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:

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion.

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

Appellant made the following summarized contentions in its administrative review request e-mailed on November 14, 2023, in relevant part:

- The store visit occurred on the first day of opening.
- The owner did not get a notification to prepare.
- The owner disagrees with the decision.

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

ANALYSIS AND FINDINGS

The record reflects that ownership submitted an application to participate as a SNAP retailer on September 21, 2023, wherein it estimated that staple foods accounted for 0 percent of total gross retail sales. The accessory "other" food items also showed an estimate of 0 percent of the firm's total gross retail sales. The owner also estimated 0 percent of its sales come from hot food, and 100 percent prepared cold foods. A review of Appellant's food inventory was conducted by FNS contracted staff as a routine part of the authorization process on November 4, 2023. The store visit report showed that the store was deficient in each of the four staple food categories.

Criterion A

Federal regulations at 7 CFR § 278.1(b)(1)(ii) state that to qualify for SNAP authorization under Criterion A, a firm it 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 variety. This means that retail stores must have qualifying staple food items displayed in a public area on a continuous basis at the time of the store visit to qualify for SNAP authorization under Criterion A. On the day of the store visit the firm had no staple food items in any of the fours staple food categories.

Appellant explains that the store visit occurred on the day the store opened for business. The record shows that Appellant applied for SNAP authorization on September 21, 2023. The record shows that store visit occurred on November 4, 2023, more than six weeks after the submittal of the store's application for authorization. Appellant also argues that the store was not notified of the pending store visit. However, the store visits are always unannounced to accurately determine the store's eligibility for authorization.

The purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the denial action. Based on the evidence, Appellant did not carry sufficient staple food inventory as required under Criterion A on the day of the store visit. The photographs from the store visit show store that primarily sells prepared food items.

Criterion B

In the event of a firm's failure to meet the requirements of eligibility under Criterion A, federal regulations require that the firm's eligibility also be evaluated under Criterion B. To qualify for authorization under Criterion B, more than 50 percent of a retail store's total annual gross retail sales must come from the sale of staple foods. Based on the FNS store visit photographs and the application, the Retailer Operations Division determined that Appellant was also ineligible for authorization under Criterion B according to 7 CFR § 278.l(b)(1)(iii). There were no staple food items available on the day of the store visit. The evidence supports that Retailer Operations Division correctly determined that Appellant was not eligible under Criterion B.

CONCLUSION

The Retailer Operations Division's decision to deny the SNAP application of Cheese and Jam York LLC is sustained. Appellant is not eligible to submit a new application for SNAP authorization until six months after November 6, 2023, the effective date of the denial decision.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 a complaint is filed, it must be filed within 30 days of delivery of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

Mary Kate Karagiorgos January 19, 2024
ADMINISTRATIVE REVIEW OFFICER