

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

Shopper Stop,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>Case Number: C0192579</b>
	)	
Retailer Operations Division,	)	
	)	
Respondent.	)	
_____	)	

**FINAL AGENCY DETERMINATION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence that the Retailer Operations Division properly denied the application of Shopper Stop 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 Shopper Stop.

**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**

Shopper Stop submitted an application to participate in SNAP as a retailer on March 21, 2016. On July 6, 2016, the Appellant finally submitted all of the required documentation necessary to complete the application. According to the application, the store was opened for business under the current ownership on February 17, 2016.

On July 24, 2016, 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, the Retailer Operations Division determined that the firm did not carry a

sufficient variety of staple foods in the fruits/vegetables category or in the meat/poultry/fish category. In order for a firm to be eligible to participate in SNAP under Criterion A, it must offer for sale on a continuous basis a variety of foods in each of the four staple food categories pursuant to 7 CFR § 278.1(b)(1).

In a letter dated August 1, 2016, 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 each of the four staple food categories as required under Criterion A. Specifically, the letter stated that the Appellant failed to stock an ample variety of staple foods in the fruits/vegetables and meat/poultry/fish categories.

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 previously disclosed on its SNAP application that 30 percent of the firm's sales were derived from the sale of staple foods.

In a letter postmarked August 8, 2016, the Appellant requested an administrative review of the Retailer Operations Division's decision to deny the firm's SNAP application. The appeal was considered timely and was therefore 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 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:

- The store normally has sufficient food items. However, when the inspector came, it was on a Sunday, and at that time, the inventory was a little low because food deliveries come on Mondays or Tuesdays.
- Past SNAP redemption records from USDA will show that the store is one of the busiest in town.
- Appellant store has more grocery items than any other store in the area, which can be verified.
- The Appellant has proof through inventory purchasing receipts that it normally carries dairy and other items in good quantity. The firm has inventory receipts prior to the inspection date.
- The inspector can come and visit again between Tuesday and Saturday.

In support of these contentions, the Appellant submitted what it claimed were “all purchase receipts for last three months.”

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 summarized or specifically 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 store visit and at the time the Retailer Operations Division rendered its decision.

As noted earlier, the Appellant's SNAP application indicates that the store became operational under the current ownership on February 17, 2016. However, agency records show that SNAP benefits were accepted at that location through part of the month of July

2016. This means that the current ownership, which was not authorized to accept SNAP benefits, was very likely using the previous owner's SNAP authorization number to accept SNAP benefits, which is a violation of 7 CFR § 278.2(a). In accordance with 7 CFR §278.6(m), the current owners could be subject to a substantial fine for accepting SNAP benefits without proper authorization. However, as of the date of this review, such administrative action has not occurred and would be under the purview of the Retailer Operations Division. Therefore, this probable violation will not be considered as part of this administrative review.

On March 21, 2016, 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 Appellant also indicated on the application that 30 percent of its gross retail sales were in the sale of staple foods, with 15 percent in the sale of "other" foods such as snack foods, soft drinks, and condiments, and 55 percent in non-foods, such as gasoline, alcohol, tobacco products, lottery tickets and hot food.

On July 24, 2016, an FNS contractor conducted a store visit at the firm to verify the information contained in the Appellant's application. Based on the store visit results, the Retailer Operations Division determined that the firm's SNAP application was not accurate. According to the contractor's written record of the store visit, the Appellant firm did not carry a sufficient variety of staple foods in either the fruits/vegetables category or the meat/poultry/fish category, and was only marginally eligible in the dairy category. According to the report, the only fruits or vegetables carried by the firm were fruit juice and nuts. On the day of the visit, there were no canned fruits or vegetables or any fresh produce. In the meat/poultry/fish category, the only available items were packages of beef jerky.

Based on this information and after reviewing the Retailer Operations Division's assessment of the store visit, this review agrees that the Appellant firm carried a sufficient variety of staple foods in the dairy and breads/cereals categories, but fell short in the fruits/vegetables and meat/poultry/fish categories. In order to qualify under Criterion A, the firm must carry at least three varieties of food in each of the four staple food categories.

This review also agrees with the Retailer Operations Division that the Appellant does not meet SNAP eligibility under Criterion B. In order to be eligible under this criterion, the sale of staple foods must comprise at least 50 percent of the firm's total sales. In this case, the Appellant disclosed on its SNAP application that only 30 percent of its sales were derived from the sale of staple foods. In reviewing the store visit report and photos, and considering that the firm sells gasoline, alcohol, tobacco products, lottery tickets, hot food, and other household merchandise, it is the position of this review that even 30 percent is likely much higher than the actual percentage of staple food sales. Based on this evidence, the Appellant firm is not eligible for SNAP participation under Criterion B.

## Low Inventory on Day of Store Visit

The Appellant has argued that the day of the contractor's store visit was a Sunday, and that the store was "a little low" on inventory. As a result, the contractor did not get a true picture of the firm's staple food stock. The Appellant argues that its food deliveries happen on Mondays or Tuesdays, and requests that FNS make another store visit, this time between Tuesday and Saturday.

Additionally, the Appellant argues that the store is one of the busiest in town and that past SNAP redemption records will reflect that. The Appellant further argues that Shopper Stop has more grocery items than any other store in the area, and claims that this can be verified.

Finally, the Appellant contends that its inventory purchase records will prove that it normally carries "dairy and other items in good quantity." In support of these contentions, the Appellant submitted what it claimed were all of the firm's purchase receipts for the prior three months. This review confirms that as part of its administrative review request, the Appellant submitted two large envelopes filled with what appears to be several hundred inventory purchase receipts.

As stated earlier, the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division, which means that this review may only consider the relevant facts and circumstances as they existed at the time of the store visit and at the time that the Retailer Operations Division rendered its decision.

SNAP regulations at 7 CFR § 278.1(b)(1)(i) and (ii) state that a firm's eligibility under Criterion A is determined by the availability of qualifying staple food offered for sale "on a continuous basis," and "on any given day of operation." On any given day, the firm must carry no fewer than three different varieties of food items in each of the four staple food categories. Therefore, Shopper Stop's SNAP eligibility cannot be determined by its available inventory between Tuesday and Saturday only. If the store is open on Sunday and Monday, it must carry a sufficient variety of staple foods on those days as well. Therefore, the Appellant's claim that its inventory was low only on the day of the store visit does not provide a valid basis for reversing the Retailer Operations Division's decision.

With regard to the Appellant's claim that its store is one of the busiest in town and that it has more grocery items than any other store in the area, it should be noted that located within two miles of Shopper Stop are a superstore and a supermarket, both of which undoubtedly have much larger variety and significantly more SNAP redemptions than Shopper Stop. However, even if the Appellant's claims were true, they would have no bearing on the firm's eligibility for SNAP authorization. A store may only accept SNAP benefits if it meets the required criteria for authorization as outlined in 7 CFR § 278.1.

As for the contention that the Appellant's inventory records prove that it normally carries all of the required items for SNAP eligibility, this argument has no impact on the denial determination. Agency policy states that if a firm is short in one staple food category on the day of the store visit, it may give the firm an opportunity to prove that it normally carries a sufficient number of food items in that one category. Such proof could include inventory records dated prior to the store visit. 7 U.S.C. 2018 (b)(7)(e)

When a firm is lacking inventory in multiple staple food categories, it is clear that the firm does not carry “on a continuous basis” or “on any given day of operation” a variety of staple foods in each category.

**7 U.S.C. 2018 (b)(7)(e)**

### **CONCLUSION**

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 Shopper Stop 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 August 1, 2016, 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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

/S/

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JON YORGASON  
ADMINISTRATIVE REVIEW OFFICER

\_\_\_\_\_  
November 9, 2016

DATE