

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

The Mciver Outpost,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0253292

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the Retailer Operations Division properly denied the application of the Mciver Outpost (hereinafter “Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). Stores denied SNAP authorization are not eligible to reapply for a period of six months from the date of denial. Given that the McIver Outpost’s denial was effective on March 2, 2022, the six-month period has been served.

ISSUE

The issue accepted for review is whether 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 the Mciver Outpost.

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 SUMMARY

On January 12, 2022, the Appellant submitted an application to participate as a SNAP retailer. On the application, the Appellant reported that approximately 20% of its gross retail sales were from the sale of staple foods. The Appellant also reported that the firm carried at least three different varieties of foods in each of the four staple food categories, with a minimum depth of stock of three stocking units for each variety. On January 27, 2022, an FNS contractor conducted an onsite store visit to verify the firm’s reported staple food stock.

On February 18, 2022, the Retailer Operations Division sent the Appellant a request to submit any purchase invoices or receipts documenting that the store normally carried sufficient stocking units of three varieties of dairy products. The letter stated that the Appellant must submit invoices and receipts dated no more than twenty-one calendar days prior to the date of the store visit and not dated after the visit. Appellant did not respond to the letter.

In a letter dated March 1, 2022, the Retailer Operations Division denied the Appellant's SNAP application due to its failure to meet basic program eligibility requirements. The Retailer Operations Division based its denial action on observations made during the inspection, as well as information the firm provided on its SNAP application.

The Retailer Operations Division determined that the firm did not meet eligibility requirements under Criterion A or Criterion B pursuant to SNAP regulations at 7 CFR § 278.1(b)(1). The denial letter stated that the Appellant failed to meet the requirements of Criterion A because in at least one of the four staple food categories it did not offer for sale on a continuous basis a variety of foods in required minimum quantities. It also stated that the Appellant failed to meet the requirements of Criterion B because staple food sales did not comprise more than 50 percent of its total retail sales. Additionally, the letter indicated that FNS considered the firm's eligibility under the Need for Access provision of the regulations found at 7 CFR § 278.1(b)(6), but determined that the Appellant did not qualify for SNAP under this provision.

As a result of the Retailer Operations Division finding the Appellant ineligible for participation under both Criteria A and B, and finding the Appellant ineligible under the Need for Access provision, the Retailer Operations Division denied the Appellant's SNAP application for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In an email dated March 2, 2022, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request was 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 that 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) 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)(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.... 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 § 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 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 (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...

7 CFR § 271.2 defines *staple food* as:

...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

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2020-04 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>.

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, 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

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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 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) 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(b)(6) states:

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

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application process as described in paragraph (a) of this section.

APPELLANT'S CONTENTIONS

The Appellant made the following contentions in its request for administrative review, summarized in relevant part:

- The store periodically closed its doors during January 2022 because of COVID-19's effect on staffing levels and the store's ability to keep products on the shelves and readily available.
- At the time of the store visit, the store had a brief lapse when the store did not bring items from the restaurant to stock the store's shelves.

In support of its administrative review request, the Appellant submitted two inventory purchase invoices.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final decision, this review gave full attention to all contentions submitted, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or invalidate the denial determination made by the Retailer Operations Division. This review is limited to consideration of the relevant facts as they existed at the time of the agency's determination. As described in regulations cited earlier, a firm must meet either Criterion A or Criterion B to be eligible for SNAP participation. For a firm to be eligible under Criterion A, it must offer for sale on a continuous basis at least three different varieties of food in each of the four staple food categories with a minimum depth of stock of three stocking units for each variety.

After reviewing the inspector's store visit report and photographs as well as evaluating the Appellant's contentions, this review determines that the Mciver Outpost does not carry sufficient staple food inventory to be eligible for SNAP authorization. Specifically, the firm is deficient in the dairy products staple food category. According to the Retailer Operations Division, the store had adequate stocking units of only one dairy product variety: milk. Appellant did not have sufficient stocking units in two additional dairy products varieties. Appellant had only two stocking units of butter, one stocking unit of sour cream, and one stocking unit of cheese. This review finds that the store visit report shows staple food items not accounted for by the Retailer Operations Division, including sufficient units of cheese and one stocking unit of butter substitute. Including these items, Appellant had sufficient stocking units of milk and cheese, but still falls short of having three stocking units of a third dairy product variety.

The Appellant submitted two inventory purchase invoices with its administrative review request to demonstrate that it carried sufficient stock. To demonstrate inventory at the time of the store visit, inventory purchase receipts must be dated no more than 21 calendar days prior to the date

of the store visit, and may not be dated on, or after, the visit. The two inventory purchase invoices were dated within this timeframe but were addressed to a different business at a different street address. Presumably, this other business is the adjacent restaurant the Appellant referred to in its contentions, in which it claims to share inventory. However, without the Appellant's store name and address on the invoice, there is no evidence that these items are intended for Appellant's inventory. To note, the inventory purchase receipts show additional purchases of items that count as milk, which Appellant has already been credited for. The only other dairy product that the Appellant claims to have purchased for the store is butter, but the butter is a different brand than the two stocking units of butter that Appellant has in inventory in the store. Also, the store cooler shelves are labelled with the brand of butter. The label matched the two stocking units of butter that were in inventory, but not the brand on the inventory invoice. This calls into question whether the butter shown on the invoice was in fact intended for the Appellant's store. Accordingly, the Appellant is still short of meeting inventory requirements in the dairy products staple food category.

The Appellant contends that COVID-19 affected the store's ability to keep its doors open and its shelves adequately stocked. While this review sympathizes with the impact COVID-19 has had on the store, it is not a valid basis for reversing a denial determination under SNAP regulations. SNAP regulations require that a firm continuously maintain sufficient staple food inventory to remain eligible for program participation (see 7 CFR § 278.1(b)(1)(i) and (ii)). A firm that does not maintain proper inventory at all times does not effectuate the purposes of the program and cannot remain authorized.

After considering all available evidence in this case, this review finds that the Mciver Outpost was deficient in its staple food inventory on the day the inspector visited the store (or as stated in the regulations, "on any given day of operation"), and the Appellant's contentions are inadequate to prove otherwise. With deficiencies in the dairy products staple food category, the firm does not have the necessary variety of staple foods and is not eligible for SNAP authorization under Criterion A. The firm is also not eligible for authorization under Criterion B, as the sale of staple foods does not exceed 50 percent of the firm's total retail sales. According to the Appellant's SNAP application, just 20% of its sales come from the sale of staple foods.

Because deficiencies in Criterion A and Criterion B exist at the Mciver Outpost, this review finds that the Retailer Operations Division's application denial was appropriate and fully conforms to regulations at 7 CFR § 278.1(b)(1) and (k)(2).

Need for Access

SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider authorizing a firm which fails to meet Criterion A or B as long as it is located in an area with significantly limited access to food and provided that it meets all other eligibility requirements. This Need for Access evaluation considers factors such as distance to the nearest SNAP-authorized retail store, transportation options, extent of the firm's stocking deficiencies, and whether the firm furthers the purposes of the program.

As for the Mciver Outpost, the record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the firm is not located in an area with significantly limited access to food and thus, does not qualify for SNAP authorization under this provision. After reviewing the agency's record, this review agrees that authorization under this provision is not appropriate.

CONCLUSION

Based on a preponderance of the evidence, this review finds that the Appellant firm, the Mciver Outpost, does not meet eligibility requirements under Criterion A or B as outlined in regulations at 7 CFR § 278.1(b)(1). Additionally, the Appellant's contentions are not sufficient to show that the denial decision should be reversed. Accordingly, the Retailer Operations Division's determination to deny the Mciver Outpost's application to participate as a retailer in SNAP is sustained.

In accordance with 7 CFR § 278.1(k)(2), stores denied SNAP authorization are not eligible to reapply for a period of six months from the effective date of denial. Given that the Mciver Outpost's denial was effective March 2, 2022, the six-month period has been served and the firm may reapply immediately.

ELIZABETH ALLEN
Administrative Review Officer

February 27, 2023