

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

**Mt. Sterling Shell,**

**Appellant,**

**v.**

**Case Number: C0214462**

**Retailer Operations Division,**

**Respondent.**

**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 Mt. Sterling Shell (hereinafter “Appellant”) 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 Mt. Sterling Shell.

**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**

In a letter dated November 14, 2018, the Retailer Operations Division denied the Appellant’s SNAP application due to its failure to meet basic Program eligibility requirements. This denial action was based on observations made during an October 8, 2018, contractor store visit as well as information provided on the firm’s September 21, 2018, SNAP application.

The Retailer Operations Division determined that the firm did not meet eligibility under Criterion A or Criterion B pursuant to SNAP regulations at 7 CFR § 278.1(b)(1). The denial letter stated 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 required minimum quantities in at least one of the four staple food categories. 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 does not qualify for SNAP under this provision.

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

In a letter postmarked November 27, 2018, the Appellant requested an administrative review of the Retailer Operations Division's decision. 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]*\*

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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>.

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 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:

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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 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

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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>.

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 as described in paragraph (a) of this section.

### **APPELLANT'S CONTENTIONS**

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

- The main reason the Appellant was deficient in the dairy category was its misunderstanding of SNAP eligibility requirements. The Appellant understood that it needed to keep three different varieties in each of the four staple food categories, but did not realize that it needed a minimum depth of stock in each.
- Appellant apologizes for the honest mistake and requests another opportunity to comply.
- The firm has since corrected the deficiency and now maintains an adequate stock and number of varieties in each of the staple food categories.
- The firm has a significant number of customers who depend on SNAP and who have limited access to staple food. If the Appellant is not able to provide these customers with a place to spend their benefits, it will hurt their access to staple foods.
- Appellant requests another store visit and a new determination based on the outcome of the new inspection.

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

### **ANALYSIS AND FINDINGS**

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the November 14, 2018, denial determination made by 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 contractor's store visit and at the time the Retailer Operations Division rendered its decision.

After reviewing the contractor's store visit report and photographs as well as evaluating the contentions submitted by the Appellant, it is the determination of this review that the Appellant firm does not carry, on a continuous basis, sufficient staple food inventory in the dairy category to be eligible for SNAP participation.

According to the agency's record, the only varieties of dairy products in sufficient quantities on the day of the contractor's visit to Mt. Sterling Shell were milk and cheese. In order for a firm to be eligible under Criterion A, 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.

On October 30, 2018, the Retailer Operations Division sent the Appellant a letter stating that the firm was lacking sufficient staple food inventory in the dairy category. The letter gave the firm an opportunity to provide invoices or receipts as evidence that the store normally carried at least three stocking units of three different varieties of dairy products. The letter stated that the invoices or receipts must be dated no more than 21 calendar days prior to the October 8, 2018, store visit and may not be dated after the store visit.

In response to this request, the Appellant contacted the Retailer Operations Division by telephone on November 5, 2018, and confirmed the staple food inventory as noted by the store visit contractor. The Appellant indicated that besides milk and cheese, the firm had ordered only one unit of yogurt and two units of sour cream, falling short of the required three units for each variety of dairy.

After reviewing all evidence in this case, it is clear to this review that the firm was lacking in the dairy category on the day of the store visit and no evidence has been provided to prove otherwise. With only milk and cheese in sufficient quantities in the dairy category, the firm does not have a sufficient variety of staple foods and is not eligible for SNAP authorization under Criterion A. The firm is also not eligible for SNAP participation under Criterion B, as the sale of staple foods does not exceed 50 percent of the firm's gross retail sales. According to the Appellant's SNAP application, just 3 percent of its total sales come from the sale of staple foods.

Because deficiencies in Criterion A and Criterion B clearly exist at the Appellant store, it is the finding of this review that the application denial was appropriate and fully conforms to regulations at 7 CFR § 278.1(b)(1) and (k)(2).

### **Remedial Actions Taken**

The Appellant has argued that its deficiency in the dairy category was due to a misunderstanding of program eligibility requirements. The Appellant apologizes for this mistake and requests another opportunity to prove its eligibility. In conjunction with this request, the Appellant has requested a second store visit and requests that FNS make a new eligibility determination based on this supplemental inspection. The Appellant claims that the deficiency in the dairy category has been corrected and the store now maintains a sufficient inventory in each of the staple food categories.

With regard to these contentions, it must be restated that this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the contractor's store visit and at the time that the Retailer Operations Division rendered its denial decision. It is not the authority of this review to consider subsequent remedial actions that have been or will be taken so that a store may begin to comply with program requirements. There are no provisions in the SNAP regulations for a reversal of an application denial on the basis of alleged or planned corrective actions implemented subsequent to the finding of a firm's ineligibility.

Therefore, the Appellant's contentions that the store has made improvements to its staple food inventory and that it will properly maintain that inventory do not provide a valid basis for reversing the Retailer Operations Division's denial determination.

With regard to the Appellant's request for re-inspection, such a request cannot be granted. An unannounced store visit prior to a firm's SNAP authorization is conducted with the intent of discovering conditions at the store on any given day of operation. A re-inspection at this stage could result in artificially-inflated inventory quantities in an effort to demonstrate Program eligibility.

### **Need for Access**

The Appellant contends that the firm has many customers who depend on SNAP and who have limited access to staple food. The Appellant argues that if it is not able to provide these customers with a place to use their benefits, it will hurt their access to staple foods.

When a firm fails to meet Criterion A or B, SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider authorizing the firm if it is located in an area with significantly limited access to food provided that it meets all other eligibility requirements. This Need for Access evaluation considers 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 firm furthers the purposes of the program.

As for Mt. Sterling Shell, the record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the firm did not qualify for SNAP authorization under this provision. As part of this administrative review, this office has examined the agency's Need for Access evaluation. After a review of all available evidence in this case, this review finds that Need for Access was fully and properly considered in this case and that authorization under this provision is not appropriate.

### **CONCLUSION**

Based on the analysis above, it is the determination of this review that the Appellant firm, Mt. Sterling Shell, does not meet eligibility requirements under Criterion A or B as outlined in regulations at 7 CFR § 278.1(b)(1). Additionally, the contentions presented by the Appellant are not sufficient to show that the denial decision should be reversed. Accordingly, the decision by the Retailer Operations Division to deny the application of Mt. Sterling Shell 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 November 14, 2018, 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, 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.

JON YORGASON  
Administrative Review Officer

February 12, 2019