

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

**Neelkanth Food Mart,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0223982**

**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 Neelkanth Food Mart (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 Neelkanth Food Mart.

**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 September 3, 2019, and sent to the firm on September 4, 2019, 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 a contractor’s store inspection on August 18, 2019, as well as information provided on the firm’s August 2, 2019, 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 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 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 September 12, 2019, the Appellant, through counsel, 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]\* different varieties of food items in each of the four staple food categories with a minimum depth of stock of 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>.

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:

(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

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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>.

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 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.

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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>.

## **APPELLANT'S CONTENTIONS**

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

- Appellant believes there are compelling reasons to warrant reconsideration of the denial decision.
- Appellant opened the store on July 30, 2019, and submitted its SNAP application on August 2, 2019. Appellant knew that the success of the market would necessitate participation in SNAP since the store is located in an economically depressed area. On August 4, 2019, the store was robbed at gunpoint. The thieves took cash, tobacco products and other items. A police report provided by the Appellant confirms this incident.
- The store was visited by an FNS contractor on August 18, 2019, and was later asked to produce invoices or receipts of dairy products purchased no more than 21 days prior to the date of the store visit. It was then that the Appellant realized that the robbers took the box of receipts which were near the cash register. The firm's inability to provide the required receipts was beyond the Appellant's control.
- As part of its request for review, the Appellant is submitting copies of current receipts which demonstrate that the firm is selling the necessary items to be eligible for participation under Criterion A.
- The store is located in an area with few grocery or food stores, and persons living in this area have limited access to dairy products and fresh foods. The residents have stated to the Appellant that since the store has opened, they now have easier access to dairy products and fresh foods.
- The six-month delay until the firm is able to reapply for authorization will negatively impact the store such that it may not be able to remain in business because the vast majority of customers participate in SNAP. A closure of the market would be a loss to the community.

In support of its contentions, the Appellant submitted a copy of the August 4, 2019, police report of the robbery noted above. The Appellant also submitted seven inventory purchase receipts. Of the seven receipts, five were dated after the date of the contractor's store visit and one was undated. The remaining receipt was dated August 3, 2019, but did not list any dairy items.

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**

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 contractor's visit to the store.

After reviewing the store visit report and photographs as well as evaluating the contentions and evidence submitted by the Appellant, it is the determination of this review that Neelkanth Food Mart does not carry, on a continuous basis, sufficient staple food inventory to be eligible for SNAP authorization. Specifically, the firm is deficient in the dairy category. On the day of the contractor's visit, the only dairy varieties in the store in sufficient quantities were milk and a butter substitute (margarine). 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. In this case, the firm was deficient in one dairy variety.

On August 21, 2019, the Retailer Operations Division sent the Appellant a letter stating that the firm was lacking dairy inventory. The letter gave the firm an opportunity to provide invoices or receipts as evidence that the store normally carried appropriate varieties and quantities of dairy products. The letter stated that the invoices or receipts must be dated no more than 21 calendar days prior to the August 18, 2019, store visit and may not be dated on or after the date of the store visit. The record shows that in response to this request, the Appellant submitted one inventory purchase receipt dated August 26, 2019, which is eight days after the store visit. The Appellant also submitted a letter indicating that the store was robbed on August 4, 2019, and stating that the robbers took "my invoice, money and more." The Appellant also submitted Page 1 of the police report of the incident.

In its request for administrative review, the Appellant submitted several more receipts, most of which were also dated after the contractor's visit to the store, and thus cannot be considered. One receipt was cut off at the bottom, so the date of the receipt is unknown. Just one receipt – dated August 3, 2019 – falls within the required 21-day timeframe noted above, but it does not list any dairy items and thus has no bearing on this matter.

The agency's August 21 letter explicitly states that receipts dated more than 21 calendar days prior to the store visit or on or after the date of the store visit cannot be accepted. Accordingly, the Appellant's documentation cannot be considered by this review because it does not provide an accurate depiction of store conditions and inventory as of the date of the contractor's visit.

The Appellant contends that the robbers took a box of the Appellant's receipts at the time of the robbery, resulting in the Appellant being unable to provide the requested inventory documentation. While this review sympathizes with the Appellant for suffering a traumatic experience, it should be noted that there is no evidence that the robbers took any receipts. The police report makes no mention of anything being taken beyond cash and tobacco products. Furthermore, the robbery took place on August 4, 2019, which is two weeks before the contractor arrived to conduct the inspection. Two weeks is ample time to ensure that the store is sufficiently stocked with the necessary food items for SNAP eligibility. The Appellant's arguments regarding the stealing of receipts suggest that the firm made no dairy inventory purchases for at least a three-week period between August 4 and August 26, which is the inventory receipt date closest to the date of the contractor's visit. By all indications, the purchase of dairy inventory was not a regular practice of the firm until after it received the agency's August 21 letter requesting proof of inventory.

With the submission of recent inventory purchase receipts (dated between August 26, 2019, and September 10, 2019), the Appellant contends that the store is now demonstrating that it carries sufficient staple food inventory for program eligibility under Criterion A. However, it must be restated that this review is limited to consideration of the facts as they existed at the time of the contractor's visit to the store. It is not the authority of this review to consider subsequent remedial actions, such as purchasing additional inventory, 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 reversal of a denial determination on the basis of corrective actions taken after the finding of a firm's ineligibility.

After considering all available evidence in this case, it is clear to this review that Neelkanth Food Mart was deficient in its staple food inventory on the day the contractor visited the store (or as stated in the regulations, "on any given day of operation"), and no evidence has been provided to prove otherwise. With just two varieties of food 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 total retail sales. According to the Appellant's SNAP application, just 25 percent of its 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) and (k)(2).

#### **Hardship to SNAP Households / Need for Access**

The Appellant contends that the store is located in an area with few grocery stores, and that residents living nearby have limited access to dairy products and fresh foods. This claim implies that customers in the area will experience hardship if the firm's application denial is upheld.

With regard to this contention, it is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store is not authorized to accept SNAP benefits and households are forced to shop elsewhere. To address such situations, 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 or not the firm furthers the purposes of the program.

As for Neelkanth Food Mart, the record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the firm does not qualify for SNAP authorization under this provision. After an analysis of all available evidence in this case, this review finds that Need for Access was fully and properly considered and that authorization under this provision is not appropriate.

As for the Appellant's claim that the firm itself will suffer economically if it is not authorized to accept SNAP, such a contention has no bearing in this matter. Financial hardship to the firm's ownership or to the store itself is not a consideration under the regulations.

### **CONCLUSION**

Based on the analysis above, it is the determination of this review that the Appellant firm, Neelkanth Food Mart, does not meet eligibility requirements under Criterion A or B as outlined in regulations at 7 CFR § 278.1(b)(1). Additionally, the contentions and evidence 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 Neelkanth Food Mart 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 September 4, 2019, 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

January 8, 2020