

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

R & M Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0222571

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny the application of R & M Mart (hereinafter Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, in its administration of SNAP, when it denied the application by letter dated August 29, 2019.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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

Appellant applied to participate as a SNAP retailer in an application received on June 18, 2019. According to the firm’s application, the store opened for business on June 1, 2019.

On July 22, 2019, the Appellant firm was visited by an FNS contractor in an effort to determine whether or not the firm met eligibility requirements to be authorized in SNAP. During this visit, the contractor took photos of the store and its inventory, spoke with store personnel, and completed a written report detailing its observations.

After reviewing Appellant's application and evaluating the store visit report and photos, the Retailer Operations Division determined that the firm did not carry a sufficient quantity or variety of staple foods to be eligible for SNAP participation under Criterion A or Criterion B. This determination was made in accordance with SNAP regulations at 7 CFR § 278.1(b)(1). According to the contractor's written record, the firm had insufficient inventory in the dairy staple food category, making it ineligible under Criterion A. Additionally, both the application and the store visit report indicated that the firm was not eligible under Criterion B.

The Retailer Operations Division sent a proof of inventory letter to Appellant on July 25, 2019, requesting that the firm submit any purchase invoices or receipts documenting that it normally carried three varieties in the dairy staple food category in sufficient stocking units. The letter stated that the invoices or receipts had to be dated no more than 21 days prior to the date of the store visit and not after the store visit. Appellant submitted six invoices and receipts of which only three were dated within the specified timeframe. Two were dated more than 21 days before the store visit, and one was dated after the store visit. Of the remaining three that were dated within the specified timeframe, two had no dairy staple food items and one contained only milk which had already been identified as a dairy staple food variety during the store visit.

In a letter dated August 29, 2019, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not offer for sale on a continuous basis a variety of staple foods in the four staple food categories as required for authorization under Criterion A. The letter also informed Appellant that it did not have more than 50 percent of its total gross retail sales in staple food sales as required for authorization under Criterion B. Additionally, the letter stated 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, Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

By letter dated September 9, 2019, Appellant, through counsel, appealed the Retailer Operations Division's decision and requested an administrative review of this determination. The appeal was granted. Counsel also submitted a Freedom of Information Act (FOIA) request via email to USDA FNS on October 21, 2019. USDA FNS responded to this request in a letter dated November 13, 2019, that was emailed to counsel on November 18, 2019. Subsequent correspondence dated December 9, 2019, was received from Appellant.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Section 278.1(b)(1) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 states that Retail Food Store means: “An establishment ... 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 seven 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 accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in: Food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.”

7 CFR § 271.2 defines staple food 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) states: “(A) An establishment or house-to-house trade route shall normally be considered to have food business of a nature and extent that 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 as defined in § 271.2 of this chapter, including perishable foods in at least three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).”

7 CFR § 278.1(b)(1)(ii) provides that for a retail store to qualify for authorization under Criterion A, a firm shall: 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 seven 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 three 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. Failure to provide verifying information related to stock when requested may result in denial or withdrawal of authorization. Failure to cooperate with store visits shall result in the denial or withdrawal of authorization.

NOTE: Full implementation of the definition of variety and stocking requirements cited above was delayed by the Consolidated Appropriations Act of 2017. Therefore, the three paragraphs below reflect the definition and stocking requirements as currently implemented.

7 CFR § 278.1(b)(1)(ii)(A) as currently implemented defines continuous basis under Criterion A as offering 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 qualifying staple variety on any given day of operation.

7 CFR § 278.1(b)(1)(ii)(B) as currently implemented: 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.

7 CFR § 278.1(b)(1)(ii)(C) as currently implemented: 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) provides that for firms to qualify for authorization 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) deals with the 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.”

7 CFR § 278.1(k)(2) states in part: “FNS shall deny the application of any firm if it determines that 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.”

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The store is 2,500 SF and stocks a variety of basic grocery foods, including, but not limited to, candies, chips, canned meat, bakery cakes, canned vegetables, bread products, milk, eggs, beans, coffee, tea, sugar, flour, cereals, and other items;
- Importantly, the store is located in a fairly remote area, surrounded largely by Camp Creek, a large stream, and woods. Furthermore, the store is located in an economically depressed area, surrounded by government developments/housing units, including the Milledgeville Housing Authority. These residents, many of which, upon information and belief, are SNAP recipients, regularly purchase their groceries from the Appellants’ store;
- The FNS web site shows there is only one SNAP retail store within a one mile radius of Appellant’s location which is a dollar store and thus not applicable for comparison with the large variety and quantity of staple food items maintained at Appellant’s store. There are no stores located within a reasonably close proximity to Appellant’s store that are comparable to the convenient location, the operational hours, or the quantity and quality of the assortments of foods sold at the store. As such, it is the Appellant’s position that there are no other SNAP retailers located within a one mile radius of Appellant’s store with a comparable inventory to that which is maintained by Appellant’s store. Therefore, should Appellant’s store be unable to accept SNAP benefits, the surrounding SNAP households would be gravely burdened as no other alternative SNAP retailers exist;

- It is Appellant’s position that FNS erroneously withdrew Appellant’s application, as it satisfies the inventory requirements for dairy products under Criterion A. The August 29, 2019 withdrawal [sic] letter stated that Appellant’s store was deficient in the dairy staple food category and, as such, failed to satisfy the inventory requirements in Criterion A based upon the July 22, 2019, store visit. The FNS determination is erroneous as the FNS contractor who conducted the store visit failed to include or properly categorize all of the dairy products stocked at the store in the survey. The store survey noted: 20 plus units of cheese, six units of milk, and two units of butter substitute. This survey is incomplete, as evidenced by the photographs submitted with said survey as well as the store’s attached vendor invoices. Specifically, the contractor failed to note:
 - Milk, whole milk and 2% (see vendor invoices attached);
 - Cheddar Cheese Singles, 3 units, (see vendor invoice from Walmart dated July 18, 2019) and captured on page two of the FOIA response;
 - Cream Cheese, captured on page two of the FOIA response;
 - Imperial Vegetable Oil Spread, soybean based, captured on page two of the FOIA response;
 - Nestle Carnation Evaporated Canned Milk, captured on page six of the FOIA response; and,
 - Meadow Gold, Sweetened Condensed Canned Milk, captured on page six of the FOIA response;
- The FNS contractor photos taken during the store visit and the vendor invoices submitted support a finding that Appellant’s store satisfies the dairy requirements under Criterion A – i.e. three (3) varieties of dairy products with at least three (3) stocking units in each. Specifically, the store stocked the following dairy products: milk; two kinds of canned milk; soy based spread; sliced Cheddar cheese; and cream cheese. Thus, based upon the above evidence, Appellant clearly satisfies the dairy requirements in Criterion A;
- Where a retailer does not meet all of the requirements for SNAP authorization, i.e. Criterion A or B, the Department may consider the following “access” factors in order to determine whether the retailer should be granted a “need for access” exception: (1) the area where the firm is located; (2) the distance to the nearest SNAP retailer; (3) transportation options; (4) the extent of the retailer’s stocking deficiencies in meeting either Criterion A or B; and (5) whether the retailer furthers the purposes of SNAP. See 7 CFR § 278.1(b)(6); and,
- Approximately 12 percent of the local households in Appellant’s district receive SNAP benefits. The store is located in a remote, economically depressed area, surrounded by a lake and woods, with limited modes of public transportation options. The store carries a large variety of staple food items, and, pursuant to the withdrawal letters and the store visit report, the only stocking deficiency was within one of the four categories – dairy, in that the store was found to be deficient with regard to the dairy product stocking requirements. However, as demonstrated above, the store does in fact stock the requisite variety and quantity of dairy products in satisfaction of Criterion A. Furthermore, as explained above, the Appellant’s Store cannot be easily substituted by the other stores in the immediate vicinity, as there are none. Should the store be unable to accept EBT benefits, its’ SNAP customers would be gravely burdened and endure hardship as there are no other authorized SNAP retailers within a one mile radius except for a dollar store which is an inadequate alternative to the Appellant’s Store for the purpose of providing

the local SNAP participants with staple food items. Therefore, in the event that the Appellant is found to have stock deficiencies in meeting Criterion A, it is respectfully requested that the Appellant be issued a “need for access” authorization exception pursuant to 7 CFR § 278.1(b)(6).

Appellant submitted SNAP demographic data from the FNS Profile of SNAP Households in Georgia Congressional District 10 and survey results from a 2016 study conducted by Store News as well as 29 invoices and receipts for inventory purchases in support of these contentions.

ANALYSIS AND FINDINGS

With regards to Appellant’s contention listed above, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. It is not within the scope of this review to consider actions ownership may take to qualify for participation in the SNAP subsequent to that decision, such as stocking all the variety of staples in each of the four staple food categories on a continuous basis, planning to do so once SNAP authorized, or increasing staple food stock in order to qualify under Criterion B. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact or intended corrective actions. The authorization of a store to participate in the SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived. Therefore, any contentions that the store is now or will be sufficiently stocked with necessary items do not provide any valid basis for dismissing or mitigating the adverse action imposed.

As noted above, in order for a firm to be eligible for SNAP participation, it must qualify under either Criterion A or Criterion B, as described in 7 CFR § 278.1(b)(1). Under Criterion A, a firm must offer for sale, on a continuous basis, 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 food variety, and at least one variety of perishable foods in at least two staple food categories. Under Criterion B, a firm must have more than 50 percent of its total gross retail sales in the sale of staple food. Stores that do not meet required stocking standards are not eligible to be SNAP retailers. That a store may have been SNAP authorized under a previous owner provides no guarantee that store inventory meets required stocking standards.

A store visit was conducted by an FNS contracted reviewer on July 22, 2019. According to the contractor’s written record, the firm had insufficient inventory in the dairy staple food category making the firm ineligible under Criterion A. Therefore, the Retailer Operations Division correctly concluded Appellant did not meet Criterion A because the store did not offer “qualifying staple foods on a continuous basis”.

Ownership’s SNAP retailer application received on June 18, 2019, shows that staple foods amounted to 20 percent of gross annual sales showing that the Appellant firm did not derive more than 50 percent of its projected annual sales from the sale of staple foods on the date of the store visit. Accordingly, the Retailer Operations Division correctly determined Appellant was not eligible for authorization under Criterion B.

A full review of the store visit materials from the July 22, 2019, store visit does not indicate any material departure from the documentation as presented. A review of the store visit documentation indicates that Appellant was deficient in the dairy staple food category. Therefore, Appellant does not meet Criterion A. Appellant also does not meet Criterion B because information obtained from the store visit confirms that staple food sales comprise 50 percent or less of annual gross retail sales.

Regarding Appellant's contentions, a review of the invoices and receipts submitted in response to the FNS proof of inventory request and during the administrative review process shows that the vast majority contain no dairy products of any kind let alone provide evidence of a third variety of dairy products that can be added to the milk and cheese varieties that were present during the store visit. While a very limited number of the invoices and receipts provided do show purchases of dairy products (milk and chip dip) and the store visit photos also show different types of milk (whole and canned) and different types of cheese (singles, cream cheese, and chip dip), the milk and cheese items only count as two varieties of dairy products while the minimum regulatory requirement for Criterion A is three varieties. For example, Swiss cheese and cheddar cheese are not each considered discrete varieties, as they are both considered cheese. Although the store visit photos also show two packages of margarine, the minimum depth of stock is three units in order for a staple food product to count as a variety. The demographic data and the survey results submitted by Appellant are without merit as they have no bearing on the matter under review.

When store ownership signed the certification page of the SNAP retailer application to begin operating as a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. SNAP rules and regulations require SNAP retailers to meet required stocking requirements for staple foods on a continuous basis; however, the FNS store visit determined that the store was deficient in the dairy staple food category and therefore did not meet the stocking requirements. Stores that do not meet stocking requirements are not eligible to be SNAP retailers. Adding staple food stock after the store visit does not change the fact that the business was deficient at the time of the visit and has no impact on the Retailer Operations Division determination to deny Appellant's SNAP retailer application. Information on staple food stocking requirements may be found on the FNS SNAP retailer web site, the same site that contains the online SNAP retailer application.

Need for Access

SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether or not the Appellant firm is located in an area with significantly limited access to food when the firm fails to meet Criterion A or Criterion B as long as it meets all other eligibility requirements. This Need for Access evaluation also considers other factors, such as the extent of Appellant's stocking deficiencies, distance to the nearest SNAP authorized firm, transportation options, and whether or not the Appellant firm furthers the purposes of the program.

The record indicates that the Retailer Operations Division conducted a Need for Access evaluation and determined that the Appellant firm did not qualify for SNAP authorization under

this provision. After a review of all available evidence in this case, this review agrees that authorization under the Need for Access provision is not appropriate in this case.

CONCLUSION

After a review of the pertinent documentation, and based on the discussion above, the initial decision by Retailer Operations Division to deny the application of Appellant to participate as a retailer in SNAP is sustained.

In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from the effective date of the denial. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

December 31, 2019