

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

SKS Minimart Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0219864

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 SKS Minimart Inc. (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 SKS Minimart Inc.

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 July 11, 2019, and delivered to the firm on July 15, 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 June 30, 2019, store inspection by an FNS contractor as well as information provided on the firm’s May 31, 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 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 July 22, 2019, 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]** different varieties of food items in each of the four staple food categories with a minimum depth of stock of three

* 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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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.

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

- On the day of the store inspection, the store was out of stock in a few items in the dairy category. This was due to sales of the products. The next day, the items were restocked when an inventory delivery arrived.
- The firm's dairy selection includes milk, butter, cheese, and eggs.
- The store is a new location and there were no prior sales to judge stocking levels by. As the firm continues to operate, all inventory is evaluated and adjusted to meet the demands of the store's customer base.
- The firm now stocks a larger number of each item in an effort to meet program requirements and to provide its customers with the selection they need.
- Regarding Criterion B, the firm's sales figures on its SNAP application were estimates as there were no previous sales to judge by. Due to fuel prices, the firm felt that at the opening of the business, fuel would be the greater percentage of sales. However, since opening, the firm anticipates the percentages being more in line with SNAP levels.
- Appellant welcomes another inspection to verify its expanded stock levels.
- Appellant anticipated that its fuel pumps would be installed and operational by opening day. However, fuel is not yet operational. Thus, the firm's estimated sales percentages were wrong and are in compliance with SNAP program levels.
- Since the store opened in May 2019, the community has been requesting that it accept SNAP benefits due to the store being located in a rural location.

In support of its contentions, the Appellant submitted four pages of inventory invoices and receipts. It also submitted store financial records for the months of May, June, and July 2019.

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 and at the time the Retailer Operations Division rendered its decision.

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 SKS Minimart Inc. 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. According to the agency's record, the only dairy variety in sufficient quantities in the store on the day of the contractor's visit was milk. 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 two dairy varieties.

The Appellant contends that the store was deficient in the dairy category on the day of the inspection because its inventory had been sold. The Appellant states that a dairy delivery was made to the store the next day and claims that it has now expanded its inventory to ensure that the firm meets eligibility requirements. The Appellant further encourages FNS to conduct another store visit to confirm its inventory levels.

With regard to these contentions, it must be made clear that in order for a firm to be authorized in SNAP it must stock sufficient staple food inventory on a continuous basis, regardless of when inventory deliveries occur. A firm that does not maintain proper inventory at all times does not effectuate the purposes of the program and cannot be authorized. As for the Appellant's claim that the store has added additional staple food inventory, 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 implemented subsequent to the finding of a firm's ineligibility.

As to the Appellant's request for re-inspection of the store, such a request cannot be considered. Unannounced store visits are conducted with the intent of discovering conditions at the store on any given day of operation. A re-inspection after a determination of ineligibility could very possibly result in artificially-inflated inventory levels.

As noted earlier, the Appellant submitted four pages of inventory receipts in an effort to demonstrate the firm's normal staple food stock. Included in these documents were two invoices from JF Johnson, Inc., a wholesale distributor, and one receipt from Walmart.

In cases where a firm is lacking staple food inventory at the time of a store visit, FNS may consider invoices and receipts as proof that the firm normally carries appropriate inventory to be eligible for authorization. However, in accordance with regulation at 7 CFR § 278.1(b)(1)(ii)(A), FNS will consider only those invoices that are dated up to 21 calendar days prior to the date of the store visit. Invoices and receipts dated on or after the date of the store visit or before the 21-day period mentioned above cannot be accepted. Unfortunately, all four pages of invoices and receipts submitted by the Appellant are dated after the contractor's June 30, 2019, visit to the store, and after the agency's denial letter, and thus cannot be considered, as they do not represent store conditions as they existed at the time of the contractor's inspection.

After considering all available evidence in this case, it is clear to this review that SKS Minimart Inc. 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 only milk 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 5 percent of its sales come from the sale of staple foods.

The Appellant has argued that its sales percentages were incorrectly estimated on its application because it assumed that its fuel pumps would be operational by the time the store opened. But since the fuel pumps are not yet working, the Appellant argues that its sales percentages "are in compliance with the SNAP program levels." To support this claim, the Appellant submitted financial statements from the months of May, June, and July 2019.

Unfortunately, the Appellant's explanation and evidence do not prove that the firm's staple food sales exceed 50 percent of its total sales. Judging by the contractor's store visit report and the Appellant's original application, this review finds it highly unlikely that staple food sales are anywhere near 50 percent. According to the firm's SNAP application, staple food sales constituted just 5 percent of its total sales. Accessory foods, such as chips, candy, snack foods, and soft drinks, were estimated to account for 20 percent of the firm's sales. Hot foods were estimated at 10 percent, cold prepared foods at 5 percent, and nonfood items at 60 percent.

Even if gasoline is excluded from the nonfood category, this category still includes household goods and merchandise, lottery tickets, alcoholic beverages, and tobacco products. When one considers these nonfood items along with the firm's sales of accessory foods, hot foods, and cold prepared foods, and compares them to the small overall inventory of staple foods, it is very likely that the firm's staple food sales are substantially lower than 50 percent of its total retail sales.

As for the financial statements provided by the Appellant, these are of little evidentiary value, as they do not identify staple food sales in relation to all other sales.

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 from the time the store opened, customers have been requesting that the firm accept SNAP benefits due to its rural location. This statement implies that customers 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, the extent of the firm's stocking deficiencies, and whether or not the firm furthers the purposes of the program.

As for SKS Minimart Inc., 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.

CONCLUSION

Based on the analysis above, it is the determination of this review that the Appellant firm, SKS Minimart Inc., 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 SKS Minimart Inc. 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 July 15, 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

September 10, 2019