

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

5S Baron Station #1,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0254120

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that FNS's Retailer Operations Division properly denied the application of 5S Baron Station #1 (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 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 5S Baron Station #1.

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 April 5, 2022, and delivered to the firm on April 6, 2022, the Retailer Operations Division denied the Appellant's application to participate as a retailer in SNAP. This denial action was based on information submitted by the firm on its application dated January 31, 2022, as well as subsequent clarifying documents submitted later on. On its application, the Appellant estimated that its total weekly retail sales were 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of that amount, the Appellant estimated that 75 percent of its sales were in the sale of hot and/or cold prepared foods intended for immediate consumption or carryout. The Appellant further reported that just 5 percent of its total sales were in the sale of staple foods, while 10 percent were in the

sale of accessory foods, such as snacks, soft drinks, condiments, etc., and 10 percent in nonfoods. Subsequent actual sales data for a one-week period from February 27 to March 5, 2022 showed that the firm's hot/cold prepared food sales constituted 56 percent of its total sales.

SNAP regulations address the types of stores that are considered restaurants for purposes of determining program eligibility. The regulation at 7 CFR § 278.1(b)(1)(iv) states that firms that have more than 50 percent of their gross sales from the sale of hot and/or cold prepared foods not intended for home preparation and consumption, including food items sold for carryout, shall not qualify for SNAP participation under eligibility Criterion A or B. Hot foods include any food items cooked or heated onsite by the retailer before or after purchase. Cold prepared foods, such as freshly-made sandwiches or salads, may be eligible for purchase with SNAP benefits, but are not considered staple foods for purposes of determining Program eligibility.

Based on the firm's reported sales information, the Retailer Operations Division determined that the firm was primarily a restaurant rather than a retail food store because more than 50 percent of its gross sales were from the sale of hot and/or cold prepared foods not intended for home preparation and consumption. As a result of being found ineligible for participation in SNAP, the Appellant's application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In an e-mail dated April 13, 2022, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k)(2) reads, in relevant part:

FNS shall deny the application of any firm if it determines that:

(2) The firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B, as specified in paragraph (b)(1)(i) of this section.... Any firm that has been denied authorization on these bases shall not be eligible to submit a new application for authorization in the program for a

minimum period of six months from the effective date of the denial.

7 CFR § 271.2 defines a *retail food store* as:

(1) An establishment or house-to-house trade route that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale qualifying staple food items on a continuous basis, evidenced by having no fewer than [three]* different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety, including at least one variety of perishable foods in at least [two]* such categories (Criterion A) as set forth in § 278.1(b)(1) of this chapter, or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) as set forth in § 278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. **Entities that have more than 50 percent of their total gross retail sales in: Food cook 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....** [Emphasis added.]

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....

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

* 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>.

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)(iv) states, in part:

...Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. **In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross sales in foods 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 carryout, shall not qualify for participation as retail food stores under Criterion A or B...**
[Emphasis added.]

APPELLANT'S CONTENTIONS

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

- Appellant acknowledges the 50 percent heated foods rule, and understands why this is a concern, but wants to explain why this has been the case at the store.
- The store opened on November 27, 2021. It is a full-service convenience store with fuel service coming soon. At this point, sales are largely cooked food, but non-cooked food sales are growing every day, and when the fuel system is up and running, it will increase traffic at the store, and non-cooked food will sell even more.
- The firm has a wide variety of foods available, and more items are being added all the time. Store has a variety of produce, meats, breads and cereals, and dairy products. It also carries snacks and drinks normally found in a convenience store.
- The store is located in Adair County in Oklahoma, which has the highest poverty rate in the state. Many local residents depend on EBT for survival and many customers walk to the store. The store is the only means of products for at least five miles. Because of poverty and transportation limitations, many residents have an extra burden to travel to Westville or Stilwell to shop for food. The Appellant's goal is to lessen this burden.
- Appellant requests reconsideration of the agency's decision so that it can assist local residents in obtaining the nutritional foods they need.

* 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>.

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

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 the Retailer Operations Division rendered its decision.

The Appellant clearly estimated on its SNAP application that 75 percent of its gross retail sales were from the sale of prepared foods intended for immediate consumption or carryout (70 percent hot foods; 5 percent cold prepared foods). Subsequent actual sales information provided by the Appellant showed a smaller percentage of prepared food sales (56 percent), but the evidence clearly shows that the firm's current sales of hot and/or cold prepared foods exceeds 50 percent of its total sales.

Pursuant to SNAP regulations, a firm cannot be authorized as a SNAP retailer if more than 50 percent of its gross retail sales come from the sale of hot and/or cold prepared food not intended for home preparation or consumption, including prepared foods that are sold for carryout. In an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. This means providing relevant and compelling evidence which would show that the Retailer Operations Division's determination was incorrect. In this case, the Appellant has not submitted any documentation to prove that its earlier sales claims were inaccurate. Thus, this review finds that the firm is operating primarily as a restaurant as defined in 7 CFR § 278.1(b)(1)(iv) and is not eligible for SNAP authorization.

As to the Appellant's contention that the firm's sales percentages will change once the store begins its fuel service, such a claim has no bearing in this matter. This review is limited to consideration of the facts as they existed at the time of the agency's determination. 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 reversal of a denial determination on the basis of corrective actions taken after the finding of a firm's ineligibility. If the firm's business circumstances change, the Appellant is welcome to reapply for SNAP participation once the six-month denial period ends.

As for the Appellant's insinuation that a denial of the firm's application will result in hardship to SNAP households, this factor cannot be considered in this type of application denial. In accordance with 7 CFR § 278.1(b)(6), a Need for Access evaluation is only allowable when the firm is denied for meeting either Criterion A or B, as described in § 278.1(b)(1)(ii) and (iii).

CONCLUSION

Based on a preponderance of the evidence, it is the determination of this review that the Appellant firm is, at present, primarily a restaurant. In accordance with 7 CFR § 278.1(b)(1)(iv),

such a firm is not eligible for SNAP participation. 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 5S Baron Station #1 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 April 6, 2022, 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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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

May 24, 2022