

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

Golden Chicken and Meat Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0252008

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination of the Retailer Operations Division to deny the application of Golden Chicken and Meat Market (“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, when it denied the application of Golden Chicken and Meat Market to participate as an authorized SNAP retailer.

AUTHORITY

7 U.S.C. § 2023 and 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

Appellant submitted an application to become a SNAP authorized retailer on November 13, 2021. Subsequently, an FNS contractor conducted a store visit on December 27, 2021, to further assess the firm’s eligibility for authorization. In a letter dated January 14, 2022, the Retailer Operations Division denied the Appellant’s application based on information provided on the SNAP authorization application, as well as information submitted as part of the application process. The denial letter stated that the firm was determined to be primarily a restaurant, because more than 50 percent of its total gross retail sales was from “heated foods” and/or

“prepared foods.” Firms determined to be restaurants are ineligible to participate in SNAP except in certain States approved for the special restaurant programs serving elderly, disabled, and homeless populations. Appellant was also informed that the firm could not submit a new application for SNAP authorization for a period of six months from the date of denial, in accordance with SNAP regulations at 7 CFR § 278.1 (k)(2).

In a January 20, 2022, letter, Appellant requested an administrative review of the Retailer Operation Division’s denial of its SNAP application. The request for review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, such as an application denial, the appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means the 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 untrue.

CONTROLLING LAW

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

7 CFR § 278.1(k)(1) states, in part:

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

(1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section;

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)(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 retail sales in hot and/or cold prepared foods not intended for home preparation and consumption, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.** [Emphasis added.]

7 CFR § 271.2 defines a retail food store and states, in part:

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.

Section 9 of the Food and Nutrition Act of 2008, as amended, states, in part:

A retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store or concern does not meet criteria for approval . . . may not, for at least 6 months, submit a new application to participate in the program.

APPELLANT'S CONTENTIONS

Appellant's contentions regarding this matter are summarized as follows:

- Because the store is not SNAP authorized, customers have not been buying frozen or packaged cold foods because their only source of payment is SNAP benefits.
- If the store were to accept SNAP benefits, customers would buy more grocery, deli, meat, and produce products.
- During the store visit, the store had frozen meats, packaged foods to be cooked at home, and another shelf of groceries. The store also had a fridge full of dairy products. Sales of these items would be higher if the store accepted SNAP benefits.
- The store has so much to offer and its customers are waiting for it to become SNAP authorized so they can start buying more.

Appellant did not submit any additional evidence in support of these contentions on administrative review.

The preceding may represent only a summary of 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 here.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or invalidate the Retailer Operations Division's denial determination. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time the Retailer Operations Division rendered its decision.

It should be noted that on December 15, 2016, FNS published a final rule entitled "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)," at 81 Federal Register 90675, that impacted the eligibility of firms that sell heated or prepared foods. If more than 50 percent of a firm's sales come from the sale of heated or prepared foods, the firm is considered a restaurant under SNAP regulations, and therefore is ineligible for authorization. The final rule clarified that any foods cooked or heated on-site by the retailer before or after purchase, and any hot or cold prepared food not intended for home preparation or consumption, including foods consumed on the premises or sold for carryout, count toward the 50 percent threshold. This portion of the rule was implemented by FNS on October 16, 2017.

After reviewing the SNAP application and store visit report and photographs, as well as evaluating the contentions submitted by Appellant, this review finds the Retailer Operations Division properly determined that Appellant firm is primarily a restaurant and thus does not meet the definition of retail food store for purposes of SNAP authorization.

Restaurant Determination

On the SNAP authorization application, Appellant reported that 60 percent of the firm's total retail sales were in the sale of hot foods or cold foods prepared on site. The store owner confirmed this sales percentage in a telephone conversation with the Retailer Operations Division on January 14, 2022.

The store visit report and photographs are consistent with the reported sales figures. Photographs show a large kitchen and food preparation area, a dining area consisting of five tables with chairs, and a restaurant style menu. In the dining area, the firm had one metal shelving unit with bags of rice, canned foods, spices, and other packaged foods and a few freezers and coolers containing beverages, eggs, dairy products, and limited quantities of meats and frozen foods. Appellant's contentions on administrative review confirm that the store has limited sales of foods other than hot and prepared foods. Based on the face of the application as completed by the Appellant, and Appellant's confirmation that 60 percent of the firm's sales are in hot and prepared foods, the firm is considered a restaurant and ineligible for SNAP authorization, as provided in 7 CFR § 271.2 and 7 CFR § 278.1(b)(1)(iv), because sales of hot and prepared foods exceed 50 percent of total sales.

Increased Sales if SNAP Authorized

Appellant contends the store would have higher sales of grocery items if it were SNAP authorized. Appellant says that customers have not been buying frozen or packaged foods because their only source of payment is SNAP benefits.

Regarding this contention, 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 decision. Eligibility is determined based upon existing inventory and sales, when available, rather than speculation of future sales. Additionally, Appellant's customers likely have sources of payment besides SNAP benefits given that they are customers of the store and the store is not SNAP authorized. Presumably customers use other forms of tender to purchase hot or prepared food items, but are, generally, not inclined to purchase grocery items at the store. SNAP authorization may increase these sales, but it is speculative to say that these sales would increase enough to make the store SNAP eligible.

CONCLUSION

Based on the analysis above, the determination by the Retailer Operations Division to deny the application of Golden Chicken and Meat Market to participate as a retailer in SNAP is sustained. The business does not operate as a retail food business within the meaning of the SNAP regulations at Part 271.2 (definition of a retail food store) and is ineligible for SNAP authorization under 7 CFR § 278.1(b)(1)(iv). Additionally, the contentions presented by Appellant are not sufficient to show that the denial decision should be reversed. Appellant is ineligible to reapply for SNAP authorization for a minimum period of six months from, January 14, 2022, the effective date of the denial.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this determination are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in SNAP regulations, at 7 CFR § 279.7. If 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.

MICHELLE WATERS
ADMINISTRATIVE REVIEW OFFICER

April 21, 2022