

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

**Grand Mid-East Pastry Inc.,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0251512**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the Retailer Operations Division's decision to deny the application of Grand Mid-East Pastry Inc. (Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1) and § 278.1(k)(2) in its administration of the SNAP when it denied the application of Grand Mid-East Pastry Inc. to participate as an authorized SNAP retailer.

**AUTHORITY**

7 USC § 2023 and the 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 online application for authorization form FNS-252, entitled *Supplemental Nutrition Assistance Program Application for Stores* on August 4, 2021. The FNS-252 reported that 80 percent of the firm's actual gross retail sales were in hot foods and 20 percent of the gross retailer sales were in cold prepared foods. An FNS contractor conducted a store visit on December 11, 2021, to document the firm's food inventory for the purpose of determining the continued eligibility of Appellant to participate in the SNAP. The store visit report showed that the store was deficient in the dairy staple food category; the meat, poultry or fish staple food category; and the fruit and vegetables staple food category.

In a letter dated December 21, 2021, the Retailer Operations Division informed ownership that the application of Grand Mid-East Pastry Inc. to participate as an authorized retailer in SNAP was denied because Appellant is not a retail food store as defined by the SNAP regulations.

In a letter dated January 4, 2022, ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions should be reversed. That 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 not true.

### **CONTROLLING LAW**

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 USC § 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) 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 ....

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

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

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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>.

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) ...

7 CFR § 271.2 states, in part:

Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on premises consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores ...”

7 CFR § 271.2 defines staple food, in part, 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)(A) reads, 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:

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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>.

(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 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(k)(1) Denying authorization, references 7 CFR § 278.1(b)(1)(iv) Ineligible firms, which reads, in part:

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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>.

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.

7 CFR § 278.1(k)(2) states, in part:

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**

Appellant made the following summarized contentions in its administrative review request dated January 4, 2022, in relevant part:

- Appellant qualifies as retailer food store that sells staple foods.
- Appellant has used EBT for 15 years with no problem before it moved locations.

In support of its contentions, Appellant provided the following information:

- A SNAP EBT POS receipt for \$30.00 dated May 21, 2021.
- State of Michigan license issued by the Department of Agriculture & Rural Development Food and Dairy Division.
- Weekly items Report with handwritten notes of explanation.
- Copies of the August 30, 2021, November 9, 2021, and October 20, 2021, December 21, 2021, letters from the Retailer Operations Division.
- Articles of Incorporation for the business.
- Sierra Produce invoice.

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

### **ANALYSIS AND FINDINGS**

The purpose of this review is to validate or to invalidate the decision of the Retailer Operations Division. Thus, it is limited to consideration of the relevant facts at the time the Retailer Operations Division rendered its decision as to this one Appellant. 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.

The information provided by the owner on the application for authorization indicates that the sale of hot prepared food is 80% of total gross retail sales at the business and the sale of cold prepared food comprise 20% of the firms total gross retail sales. The Retailer Operations

Division also considered information obtained during a December 11, 2021, store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. The photos from the store visit show a large kitchen with a customer seating area comprised of tables and chairs. There is a large menu for bakery and dessert type items as well as a separate menu for the hot and prepared food items. The firm's website advertises as a bakery and restaurant with no reference to staple food items. The social media pages advertise its specialty cakes. SNAP regulations at 7 CFR §278.1(b)(1)(iv) states, in part "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 or consumption, including prepared foods that are consumed on the premises or sold for carryout, **shall not qualify** for participation as retail food stores. [Emphasis added.]

Even if Appellant's hot and prepared foods items are less than 50% of its total gross sales, Appellant does not carry sufficient staple food inventory necessary for SNAP authorization. In order for a firm to be eligible for SNAP participation it must meet either Criterion A or Criterion B as described in regulations at 7 CFR § 271.2 and § 278.1(b)(1). To be eligible under Criterion A, a firm 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. This means that retail stores must have qualifying staple food items displayed in a public area on a continuous basis at the time of the store visit to qualify for SNAP authorization under Criterion A. In this case, the firm was deficient in three varieties of meat, poultry, or fish; two varieties of fruits and vegetables; and one variety in the dairy staple items, and therefore did not meet eligibility under Criterion A.

In the event of a firm's failure to meet the requirements of eligibility under Criterion A, federal regulations require that the firm's eligibility also be evaluated under Criterion B. To qualify for authorization under Criterion B, more than 50 percent of a retail store's total annual gross retail sales must come from the sale of staple foods. Based on the FNS store visit photographs and the application, Appellant is also ineligible for authorization under Criterion B according to 7 CFR §278.1(b)(1)(iii). Appellant's SNAP application estimates that zero percent of its gross annual retail sales come from the sale of staple foods and the store visit report and photographs confirm that Appellant's staple food sales could not possibly exceed 50 percent of its total gross sales. Most items sold in the store appear to be accessory foods, such as cookies, cakes, pastries, and other desserts, none of which are considered staple foods for the purpose of determining SNAP eligibility.

After reviewing the contractor's store visit report and photographs as well as evaluating the contentions and evidence submitted by the Appellant, Appellant does not carry sufficient staple food inventory necessary for SNAP authorization. The evidence of the onsite visit report and the documentation submitted to the Retailer Operations Division, support by a preponderance of the evidence that Appellant does not meet the definition of a retail store.

### **Previous Authorization**

Appellant contends that the firm was previously authorized for the past 15 years at a different location. It is beyond the scope of this review to evaluate whether any previously authorized

store was correctly authorized. Instead, this administrative review is limited to an evaluation of whether the Retailer Operations Division acted in accordance with the statute and regulations when it denied Appellant's application on December 21, 2021. Therefore, Appellant's contention concerning its previous authorization is irrelevant to this review.

It is important to note that as of January 17, 2018, SNAP regulations were amended to strengthen the requirements of program eligibility including a more detailed definition of the term "accessory food." Previously, the definition of accessory food was, "...food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices..." In the new rule, the definition of accessory food was expanded to reflect foods that are generally considered snack foods or desserts as well as other food items that complement or supplement meals. Accessory foods now consist of the items mentioned earlier in this paragraph plus additional items such as chips, ice cream, doughnuts, cupcakes, cookies, muffins, pastries, sweet rolls, pies, cakes, etc. (a full list can be found at [www.fns.usda.gov/snap/retailer/eligible](http://www.fns.usda.gov/snap/retailer/eligible)). These items are eligible for purchase with SNAP benefits at authorized stores, but are not considered staple foods for the purpose of determining SNAP eligibility.

## **CONCLUSION**

The Retailer Operations Division's decision to deny the SNAP application of Grand Mid-East Pastry Inc. is sustained. Appellant is not eligible to submit a new application for SNAP authorization until six months after December 27, 2021, the effective date of the denial decision. Please call 877-823-4369 with general questions regarding the application process and consult the USDA website for more retailer information.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it 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.

Mary Kate Karagiorgos  
ADMINISTRATIVE REVIEW OFFICER

May 17, 2022