

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

Hazel Gourmet Deli,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0256258

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 Hazel Gourmet Deli (“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 Hazel Gourmet Deli 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 April 26, 2022. In a letter dated June 7, 2022, the Retailer Operations Division denied the Appellant’s application based on information provided on the SNAP authorization application, as well as information obtained 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.” The letter also provided that Appellant could 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).

On June 17, 2022, 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:

- The information we used in the application was from the estimates of the previous owner which we now realize were incorrect. They also sold alcohol and other items.
- Our store is a small neighborhood grocery store located in an area that is accessed by many individuals that walk from their house.
- The actual percentage of sales of prepared items is higher than most due to the limited items we sell. Most convenience stores sell beer and fuel that makes up most of their sales, so their "prepared foods," are a much smaller percentage.
- This store does not sell alcohol or fuel. Therefore, we have mostly grocery and grocery accessory items along with some prepared foods.
- The store uses meats to prepare sandwiches and then they also sell the same meat for customers to take home and prepared their own sandwiches or other items. This makes the cold deli percentage higher, but the items should be considered grocery and not prepared foods.
- The store does not provide any seating area for sit down meals.
- Our current percentages are showing grocery and grocery accessory items to be at 35 percent, hot deli at 24 percent, tobacco products at 20 percent and other household supplies and novelty items make up the balance.
- We would appreciate your reconsideration and reclassification to a retail store. Any visit to the location would certainly classify this as a retail convenience store.

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, 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 40 percent of the firm's total retail sales were in the sale of cold foods prepared on site and 20 percent were in the sale of hot foods. Additionally, the Retailer Operations Division noted that on social media, the firm appeared to have an extensive prepared food operation.

Appellant now contends that its reported sales figures self-reported on the SNAP application were obtained by the previous owner. Appellant says the store used to sell alcohol and other items but no longer does and that deli items are used for both prepared sandwiches and for customers to take home to prepare items at home. Appellant reported current sales percentages to include grocery and accessory items at 35 percent, hot deli items at 24 percent, tobacco items at 20 percent, and other household supplies and novelty items making up the balance.

While Appellant's revised sales percentages may currently be more accurate, Appellant has provided no evidence to show that these sales percentages are reflective of current sales. Additionally, Appellant's sales percentages do not separate out cold prepared food items, such as

cold sandwiches, that Appellant has acknowledged the store sells. Rather, these are folded into the grocery and accessory items sales percentage making it impossible to know if Appellant's sales of hot and cold prepared foods, combined, are at or below the 50 percent threshold. Accordingly, Appellant has not submitted information or evidence to demonstrate that the Retailer Operations Division's determination was incorrect when rendered.

Based on the face of the application as completed by the Appellant, the firm is considered a restaurant and is 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. Appellant has not submitted sufficient information or evidence to show that this is untrue. Accordingly, there is insufficient evidence in the record to overturn the Retailer Operations Division's determination that Appellant is a restaurant for SNAP authorization purposes.

CONCLUSION

Based on the analysis above, the determination by the Retailer Operations Division to deny the application of Hazel Gourmet Deli 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, June 13, 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

September 16, 2022