

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

Lee's Deli,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0264909

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service, finds there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to deny the application of Lee's Deli (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it denied the application of Appellant to participate in SNAP by letter dated December 28, 2022.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, "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 December 28, 2022, the Office of Retailer Operations and Compliance informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not meet the definition and eligibility requirements of a retail food store established by Federal regulations at 7 CFR § 278.1(b)(1). This action was taken because the Office of Retailer Operations and Compliance had determined the Appellant firm was primarily a restaurant based on information provided on and in support of the firm's SNAP retailer authorization application dated December 8, 2022, and as such failed to meet the definition of an eligible firm.

Specifically, the denial letter states your firm is primarily a restaurant, because more than 50 percent of your total gross retail sales are from "heated foods" and/or "prepared foods." "Heated foods" are foods cooked or heated by the retailer before or after purchase." Prepared foods" are hot or cold foods not intended for home preparation and/or home consumption, including prepared foods that are consumed on the premises or sold for carryout. SNAP regulations, at 7 CFR § 278.1(b)(1)(iv), provides that restaurants are not eligible to participate in SNAP.¹

By a request sent via email on January 8, 2023, Appellant appealed the Office of Retailer Operations and Compliance's assessment and requested administrative review. The appeal was granted. On January 15, 2023, Appellant by email provided additional information to include daily sales sheets; a google link showing a street view of the business; a google link showing the interior of the store as well as the foods that are served; and a link to a petition that supports Lee's Deli as an authorized EBT vendor.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument 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 implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.1(k)(1) and Part 278.1(l)(1) establish the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet the definition of an eligible firm.

7 CFR § 271.2 states, in part, that: 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

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv), Ineligible Firms, which states, in part, that: 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 or 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. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

¹ The denial letter also raised an additional issue which did not serve as a basis for the denial. Consequently, that issue will not be discussed in this opinion.

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

The following may represent a summary of Appellant's contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The change of ownership was the result of a stock purchase and not an asset purchase.
- With the stock purchase, nothing changed with regard to Lee's Deli, Inc. and the company would still operate under the same FNS # that we have operated under for the past 51 years.
- If this were an asset purchase, then a new application with the issuance of a new FNS # would be appropriate since a new entity would be formed for the purchase of the assets of Lee's Deli.
- The denial based on the letter from December 28, 2022, referencing the USDA classifying the business as a restaurant in which "more than 50% of your gross retail sales are food or prepared foods" is not applicable in this case.
- Lee's Deli is located in a geographical area that has a low to moderate income designation, The company serves the community in a significantly low food access area. HALO INC. is a homeless shelter that's .5 miles from the location of our business. We have always provided the shelter with fresh fruit and salads. Lee's Deli is also considered to be in a "food desert".
- Lee's Deli has also requested consideration under the USDA Access Provision.
- Prior to the suspension of SNAP, Lee's Deli was in process of making several investments in the business in order to serve the LMI community which included \$40,000 to upgrade the electrical service and plumbing; \$8,000 in freezers and sandwich prep coolers in order to carry more staple foods.
- Since we were suspended from SNAP, we are struggling financially. Our sales are down 65% from the same period last year. The company has had to reduce their hours and cut back on staffing in order to survive. With the staffing, we have had to lay off staff to reduce our wages paid.
- We have also made it clear that if we were granted back eligibility, we would welcome the opportunity to meet with USDA SNAP Representatives to inspect the operations of the business. We would also work with the USDA representative to develop a plan to increase the inventory of staple foods we carry, beyond the minimum requirement.
- If we do not receive an immediate reinstatement to the SNAP program, we may have to shut down the business and/or file bankruptcy.
- Daily sales receipts show that 92 percent of sales are staple foods.
- Appellant store meets both Criterion A and Criterion B.
- There are no tables or chairs that show they are serving food.

ANALYSIS AND FINDINGS

The authorization of a firm to participate in SNAP must be in accord with the Act, as amended, and regulations. These requirements of law cannot be waived. Thus, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Office of Retailer Operations and Compliance, and as such it is limited to consideration of the relevant facts and circumstances that existed at the time of the denial determination.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) state, in part, that, “Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation 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 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 under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.” As previously noted in the Controlling Law section, 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 SNAP regulations.

For the purpose of determining whether a firm is a restaurant under SNAP regulations, the issue is not whether the firm has available for sale uncooked or raw SNAP-eligible food, the fundamental issue is whether the firm has more than 50 percent of total gross retail sales in the combined sales of heated and/or cold prepared foods, including foods cooked or heated after purchase. Appellant’s SNAP retailer application showed that the majority of sales are from hot and/or cold prepared foods. Specifically, Appellant’s application showed that sales of hot and cold prepared food sales accounted for 62 percent of the firm’s total gross retail sales while staple food sales accounted for 25 percent. Furthermore, an analysis of the firm’s sales between September 1, 2022, thru September 9, 2022, showed hot and cold prepared foods accounted for 66 percent of total retail sales. Since the firm had more than 50 percent of total gross retail sales in the sale of hot and/or cold prepared foods it is classified as a restaurant under SNAP regulations making it ineligible for SNAP retailer authorization.

Appellant also argues that the purchase in this matter was a stock purchase rather than an asset purchase and therefore Lee’s Deli should have proceeded under the same FNS Number. If Appellant’s contention is, based on the particular characteristics of the sale, that this reauthorization should never have occurred, it should be noted that whenever there is a complete change in ownership, regulations require that a new application be submitted. Consequently, the type of sale is irrelevant to the authorization process. Appellant further argues that denying SNAP authorization will result in financial difficulties. While economic hardship is a likely consequence whenever a store’s SNAP authorization is denied, there is no provision in the SNAP regulations for reversing such determination based upon economic hardship to the firm.

Appellant also provided links to its online presence. The firm’s website, www.leesdeliracine.com/index.html, links to their menu and catering service. Pursuant to this

website, Lee's menu features a variety of cold and hot sandwiches, fish and chicken dinners, homemade potato salad, baked beans, Cole slaw, macaroni salad and more. Lee's also offers catering services from sandwich trays to sit-down banquet entrees. By every reasonable indicator, Appellant's main business model is the sale of prepared foods intended for immediate consumption or carryout. While the online presence does not show any tables and chairs for in-store consumption, the determining factor remains whether Appellant qualifies as a restaurant pursuant to USDA regulations. Again, based upon the reasons cited above, Lee's Deli qualifies as a restaurant pursuant to USDA regulations and therefore not eligible to qualify as a retail food store under Criterion A or B.

Appellant also request that they be allowed to participate in the USDA Access Provision. Based upon Appellant's contention that the firm serves a community in a significantly low food access area and provides food to a homeless shelter, it is presumed that Appellant is referring to the USDA FNS SNAP Restaurant Meals Program (RMP). Information on the USDA FNS SNAP Restaurant Meals Program (RMP) is available at <https://www.fns.usda.gov/snap/retailer/restaurant-meals-program>. Unfortunately, as of this date, Wisconsin does not participate in this program.

CONCLUSION

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to deny the application of the Appellant firm to participate as an authorized SNAP retailer is sustained.

In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to reapply for participation as a retailer in the SNAP for a minimum period of six months from the effective date of the denial.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

DAVID SHIVELY
ADMINISTRATIVE REVIEW OFFICER

February 21, 2023