

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

Halona Plaza,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0248079

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the Retailer Operations Division properly withdrew the authorization of Halona Plaza (Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether or not 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 withdrew the authorization of Halona Plaza to participate in SNAP.

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

As part of a routine reauthorization process, Appellant submitted an online reauthorization form FNS-252-R, entitled *Supplemental Nutrition Assistance Program Reauthorization Application for Stores* on January 18, 2021. The FNS-252-R reported that 76 percent of the firm’s actual gross retail sales were in hot foods and cold prepared foods; eight percent of gross retail sales were in the form of staple foods; five percent were in accessory foods; and 11 percent were from non-food items. A store visit, a routine part of the reauthorizations process, was conducted on May 27, 2021.

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In a letter dated July 6, 2021, the Retailer Operations Division withdrew the authorization of Halona Plaza to participate as an authorized retailer in SNAP because the firm is not a retail food store as defined by the SNAP regulations. The Retailer Operations Division determined that Appellant is primarily a restaurant because hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, either for carryout or on-premises consumption, and requiring no additional preparation, comprise more than 50% of the firm's total sales. Restaurants are not eligible to participate in SNAP except in certain states that operate special restaurant programs allowing the elderly, disabled, and homeless participants to use SNAP benefits in restaurants.

In a letter dated July 8, 2021, ownership appealed the Retailer Operations Division's decision and requested an administrative review. The appeal was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

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

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 § 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 § 278.1(l) states, inter alia:

FNS shall withdraw the authorization of any firm that fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section.

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 made the following summarized contentions in its administrative review request dated July 8, 2021, and subsequent correspondence dated September 3, 2021, in relevant part:

- The withdrawal from SNAP would cause irreparable harm on the community.
- The Pueblo of Zuni is an economically disadvantaged community and limited access to reliable transportation.
- Appellant is the only authorized firm on this side of the Zuni River.
- The restaurant is a completely different operation as the convenience store.
- The convenience store is under separate management and has different POS software and vendors; therefore, it should be treated as a standalone entity.

In support of its administrative review request, Appellant submitted the following:

- Letter From the governor of Pueblo or Zuni explaining that the withdrawal would be a hardship for the community.
- Chart listing the different managers, vendors, POS companies, and credit card processors for the convenience store and the restaurant.

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.

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.]

Appellant explained to the Retailer Operations Division that the restaurant and the store are two separate businesses during a phone conversation on July 7, 2021. However, there was no indication from the application for reauthorization that the hot food sales were separate and apart from the convenience food items. In fact, the information provided by the owner on the application for reauthorization indicates that the sale of hot and cold prepared food is 76% of total gross retail sales at the business and the sale of staple food items is eight percent, implying that it is one business

Appellant did not submit sufficient evidence to refute the earlier determination that the firm has more than 50 percent of its total gross sales in prepared foods or heated on-site 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.

Although Appellant sells a limited variety of staple food items, the majority of foods in the store are actually sold prepared and/or hot and ready-to-eat. According to 7 CFR § 278.1(b)(1) of the SNAP regulations, such a store is considered a restaurant and is not eligible for SNAP participation as a retail food store. Therefore, Appellant's store does not qualify as a retail food store for purposes of SNAP participation. There was insufficient to show that there are two separate businesses as Appellant alleges.

Need for Access

Appellant has made multiple claims of hardship to its customers if the store's authorization to accept SNAP benefits is withdrawn. It is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store is not authorized to accept SNAP benefits and households are forced to shop elsewhere. To address such situations, regulations at 7 CFR § 278.1(b)(6) state that FNS will consider authorizing in some instances if it is located in an area with significantly limited access to food and if it meets all other eligibility requirements. However, Appellant's authorization to participate as an authorized retailer in the SNAP because it did not meet the necessary criteria to be eligible for SNAP participation. Therefore, Appellant does not qualify for consideration of participation in the SNAP under the Need for Access provision.

CONCLUSION

The initial decision by the Retailer Operations Division to withdraw the authorization of Halona Plaza to participate as a retailer in SNAP for a period of six months from the effective date of withdrawal is sustained. The withdrawal shall become effective 30 days after receipt of this letter.

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 owners reside or are 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

January 25, 2022