

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

Wings Over Syracuse,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0247202

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to withdraw the authorization of Wings Over Syracuse (“Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(l)(1)(iii), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew Appellant’s authorization to participate as a retailer in SNAP in a letter dated May 21, 2021.

AUTHORITY

According to 7 U.S.C. § 2023 and its 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 May 21, 2021, the Office of Retailer Operations and Compliance withdrew Appellant’s authorization to participate as a retailer in SNAP because the firm is not a retail food store as defined by the SNAP regulations. Specifically, the withdrawal letter states that firms that have more than 50 percent of their total gross sales in heated foods and/or prepared foods not intended for home preparation and/or consumption are not eligible to participate as retail food stores. The letter states the firm is primarily a restaurant based on information provided in Appellant’s application and the contractor’s store visit report dated March 3, 2021. As the firm

failed to meet the eligibility criteria for approval, Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months which is consistent with Section 9 of the Food and Nutrition Act of 2008, as amended.

In a letter dated June 3, 2021, Appellant appealed the Office of Retailer Operations and Compliance decision and requested an administrative review of this action. The appeal was granted.

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 § 278.1(l)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it meets the definition of an ineligible firm.

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv) 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. . . . This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

The definition of retail food store at 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.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- Appellant was temporary closed due to COVID.
- Appellant reopened on July 1, 2021.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant contends that the firm is not a restaurant, but a retail store. Appellant contends the retail portion of the firm was temporarily closed due to COVID, and has now reopened. For the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has available for sale SNAP-eligible food. The central issue is whether actual sales of prepared foods comprise more than 50 percent of the store's total gross retail sales. There is no doubt that staple food items may be delivered to the store fresh, raw and unprepared, and are available to customers that way. However, the store presents itself and is set up primarily as a restaurant; thus, it is reasonable to expect that fresh food products do not outsell prepared and cooked food products at this establishment.

In regards to Appellant's contention that the store sells a great deal of fresh and unprepared food, the documentation presented does not support that the majority of the firm's business is in the sale of fresh foods for home preparation and consumption. The evidence in the inspection report and photographs of the March 3, 2021 store visit¹, as well as the information provided by Appellant, supports that Appellant is primarily a restaurant.

Whether food is cooked as part of the initial purchase or through an additional charge is irrelevant to the determination of whether Appellant's establishment is a restaurant. Food cooked on the premises is not intended for home preparation.

Lastly, Appellant stated that a nearby competitor with the same business model has been approved as an authorized SNAP retailer. This administrative review is limited solely to those circumstances concerning Appellant's eligibility. Therefore, the firm's contention regarding the other firm cannot be used to reverse the decision of the Office of Retailer Operations and Compliance.

Summary

The authorization of a store to participate in SNAP must be in accord with the Food and Nutrition Act and regulations, as amended. Those requirements of law cannot be waived. This review is limited to consideration of the circumstances at the time of the denial action by the Office of Retailer Operations and Compliance. On the day of the store visit, the evidence supported that the store is primarily a restaurant, and firms that are primarily restaurants are not eligible to participate in SNAP.

The store is set up primarily to sell hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption or for carry-out, and require no additional preparation. Although food items in Appellant's store may be available for sale fresh, it is more likely true than not true

¹ A store visit on August 23, 2021 also supported that the firm is primarily a restaurant.

that 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.

CONCLUSION

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to withdrawal of authorization of Wings Over Syracuse to participate as an authorized SNAP retailer is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery of this letter.

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 Appellant desires a judicial review, 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.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

August 30, 2021