

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

7th Heaven Food Mart,

Appellant,

v.

Case Number: C0208518

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to withdraw the authorization of 7th Heaven Food Mart (Appellant or 7th Heaven Food Mart) 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(n) in its administration of the SNAP when it withdrew the authorization of the Appellant 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

7th Heaven Food Mart, was originally authorized to participate as a retailer in SNAP on March 9, 2007. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization process to determine whether or not the firm still meets eligibility requirements. Appellant submitted a reauthorization form FNS-252-R, entitled Supplemental Nutrition Assistance Program Reauthorization Application for Stores, on January 30, 2018.

On February 2, 2018, the Retailer Operations Division requested tax returns for the business owners and officers. On February 9, 2018, an on-site store visit was conducted by an FNS contractor in an effort to evaluate store conditions and inventory. On February 13, 2018, the

Retailer Operations Division requested that Appellant correct the gross sales figures provided on its application for reauthorization because the figures differed from the tax returns that Appellant submitted.

On March 1, 2018, the Retailer Operations Division sent the firm a letter requesting the following information:

- Verification of total gross retail sales for the last 3 months (sales tax records, income tax records, or other records verifying total gross retail sales income).
- Verification of actual gross retail sales for the last 3 months (actual sales receipts, etc.).
- A summary of actual gross retail sales for the last 3 months (for example, including total dollar amount of gross retail sales, separated in the following categories: 1) heated or prepared foods, 2) non-foods, 3) accessory foods, 4) staple foods, and 5) charges for food heating services.
- Supply and inventory records (purchase orders, delivery receipts for suppliers/wholesalers, inventory logs, etc.).
- An affidavit stating that any handwritten receipts submitted are an accurate reflection of actual gross retail sales.
- Provide the IRS transcript of the 2016 Federal tax return for this business.

Appellant provided the inventory invoices and sales summary for two months but did not provide all of the requested documentation. In a letter dated March 12, 2018, the Retailer Operations Division informed Appellant that its SNAP authorization would be withdrawn if the information requested previously was not submitted within ten days. By letter dated March 24, 2018, Appellant submitted an administrative review request. However, the administrative review was not conducted because the request was based on an adverse action that was not in effect yet.

On March 29, 2018, the Retailer Operations Division again requested the IRS transcript for the federal business tax return and three months of Sales & Use Tax filings with three months of actual cash register receipts. The Retailer Operations Division indicated that the previously submitted data was unusable in the format that it was submitted. Appellant did not provide the requested documentation.

In a letter dated April 13, 2018, the Retailer Operations Division informed Appellant that 7th Heaven Food Mart was being withdrawn from continued participation as an authorized retailer in SNAP due to a failure to cooperate in the reauthorization process under 7 CFR 278.1(n). The letter noted that the Retailer Operations Division had not received information requested that was needed to complete the reauthorization process. The letter also stated that Appellant could reapply at any time after its withdrawal by completing an online store application.

In a letter postmarked April 23, 2018, Appellant requested an administrative review of the withdrawal determination. The request was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

On June 4, 2018, Appellant, through its representative, requested documents under the Freedom of Information Act (FOIA). FNS responded to the FOIA on July 2, 2018. On July 26, 2018, Appellant provided additional information in support of its administrative review request.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 USC § 2018, and SNAP regulations at Title 7 Code of Federal Regulations (CFR) Parts 271 and 278. In particular, SNAP regulations at 7 CFR § 278.1(n) establishes the authority upon which FNS may withdraw an application from a retail food store or wholesale food concern.

7 CFR 278.1(n) states ...

Periodic reauthorization. At the request of FNS a retail food store or wholesale food concern will be required to undergo a periodic reauthorization determination by updating any or all of the information on the firm's application form. Failure to cooperate in the reauthorization process will result in withdrawal of the firm's approval to participate in the program.

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 stockkeeping units, or other inventory or accounting recordkeeping methods that are

* 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>.

customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter....

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)(iv) states, in part:

Ineligible firms. Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of SNAP shall not be eligible for program participation ... 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

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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 [Emphasis added.]

APPELLANT'S CONTENTIONS

Appellant made the following summarized contentions in its April 23, 2018, administrative review request and subsequent correspondence submitted by e-mail on July 26, 2018, in relevant part:

- The failure of an administrative agency to follow its own procedural rules violates the principle that agencies are bound by their own regulation *Vitarilli v. Seaton*, 359 U.S. 535, 547 (1959).
- On February 2, 2018, Appellant received a request to provide tax return documents and Appellant provided the requested documents.
- On February 9, 2018, a FNS contractor visited Appellant and noted that Appellant carries food in all staple food categories.
- On February 13, 2018, FNS requested that Appellant correct its reauthorization application because the gross sales figures do not match the business tax return and Appellant timely provided the requested documentation.
- On March 5, 2018, the Retailer Operations Division requested sales tax records, income tax records, actual sales receipts for three months, and the IRS transcript of the 2016 Federal tax return for the business.
- Voluminous documents were requested with an unfounded allegation that the rules were being evaded and that the business is run as a restaurant, despite FNS contractor's on-site report that there were no counters, stools, dining tables, or chairs.
- On March 12, 2018, FNS notified Appellant that its authorization to participate as a SNAP retailer was being withdrawn.
- On March 15, 2018, Appellant filed a request for administrative review and it was accepted on April 2, 2018.
- On March 29, 2018, FNS requested the IRS transcript for the federal business tax return and three months of Sales & Use Tax filings with the actual cash register receipts.
- The Retailer Operations Division indicated that the submitted data was unusable.
- On April 9, 2018, Appellant requested additional time if voluminous records are sought and the documents have been previously provided and acknowledged by FNS.
- Appellant requests a hearing and referenced 7 USC Sec. 2018 (d) and 2023(13).
- Petitioners have fully co-operated with FNS and timely supplied all the voluminous documents FNS sought.
- The due process clause may require the government to bear the burden of proof by clear and convincing evidence when it alleges fraud or some other quasi-criminal conduct.
- Appellant references several court cases including:
 - *Vandervelde v. Espy*, 908 F. Supp. 11, 16-18 (D.D.C. 1995);
 - *Director, Office of Workers Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994);
 - *Bender v. Clark*, 744 F.2d 1424, 1428-30 (10th Cir. 1984);

- *Vehicle Mfrs Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983);
- *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971);
- *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964);
- *Golightly v. Yeutter*, 780 F. Supp. 672 (D. Ariz. 1991); and
- *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60-61 (1984).
- FNS resorted to rule making when it sought individual cash register receipts and required the retailer to maintain sales records in an unspecified “usable” format or to maintain sales records separated by categories 1) heated or prepared foods, 2) Non-foods 3) accessory foods 4) staple foods and 5) charges for food heating services.
- Singling retailers out; repeatedly demanding unreasonable and voluminous records; and thereafter denying the retailer’s participation is arbitrary and capricious.
- Appellant is a small grocery store and uses cash registers that generates sales cash receipts but does not have computerized storage capacity to store individual sales records and category wise sales receipts, unlike large supermarkets or chain grocery stores.
- Appellant requests a hearing in conjunction with 7 USC Sec. 2023(13) and that it be held at the earliest in the Middle district of Florida, Tampa.

Appellant provided the following documents in support of its contentions:

- Exhibit A - February 2, 2018, letter from the Retailer Operations Division;
- Exhibit B - Store Visit Report Checklist of food inventory;
- Exhibit C - February 13, 2018, letter from the Retailer Operations Division;
- Exhibit D - March 1, 2018, letter from the Retailer Operations Division;
- Exhibit E - March 12, 2018, letter from the Retailer Operations Division;
- Exhibit G - UPS tracking document indicating a document was received on March 15, 2018;
- Exhibit H - March 24, 2018, request from Appellant for administrative review;
- Exhibit I - March 26, 2018, letter from the Retailer Operations Division;
- Exhibit J - April 9, 2018, letter from the Appellant firm to the Retailer Operations Division;
- Exhibit K - Internal FNS e-mail dated April 5, 2018; and
- Exhibit L - April 13, 2018, letter from the Retailer Operations Division.

The preceding may represent only a brief summary of the 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.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. 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 must be made clear that the purpose of this

review is not to determine the firm's eligibility for SNAP participation. Rather it is solely to determine whether or not the firm cooperated with the reauthorization process.

According to 7 CFR § 271.2 and 278.1(b)(1)(iv), firms are considered restaurants if they have more than 50 percent of total gross sales from heated foods and/or prepared foods. 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. If a firm is a potential restaurant, then the Retailer Operations Division must request additional information, in accordance with SNAP regulations at 7 CFR § 278.1(b). Failure to submit this requested information, or submission of inadequate information can result in withdrawal from SNAP for currently participating firms.

Appellant contends that it has fully co-operated with FNS and timely supplied all the requested documents. The record shows that Appellant provided 186 pages of invoices; a 14 page U.S. Income Tax Return for an S Corporation for 5 U.S.C. § 552 (b)(6) & (b)(7)(C). (submitted twice February 12, 2018, and March 14, 2018); sales summary report broken down according to groceries, café, beer/cigs, food stamps, credit card, and lottery for December 2017 and January 2018; and two Florida Sales Tax monthly reports for December 2017 and January 2018. However, the record is clear that Appellant did not provide all of the requested documentation in order for the Retailer Operations Division to make an eligibility determination. Specifically, Appellant did not provide the requested cash register receipts and the IRS tax transcript. Appellant has also clearly acknowledged that it does not maintain such sales records. Because evidence has not been provided that would definitively determine the Appellant's eligibility for SNAP participation, it the decision to withdraw the firm's authorization was appropriate and was made in accordance with SNAP regulations at 7 CFR § 278.1(n).

It should also be noted that the agency's minimum documentation standards has been modified somewhat since the time the withdrawal decision for 7th Heaven Food Mart was made. The modified policy no longer specifically states that a minimum of three months of sales data/receipts is required. Additionally, because there is not a required duration period for withdrawals made in accordance with 7 CFR § 278.1(n), a new application for SNAP participation may be submitted at any time.

Store Visit

Appellant noted the store visit report showed that it carried all the necessary food items. For the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has SNAP-eligible food available for sale. The issue is whether actual sales of prepared foods comprise more than 50 percent of the store's total gross retail sales. Appellant may sell a variety of staple food items; however, the Retailer Operations Division needed to review Appellant's sales to determine whether the firm is primarily a restaurant. That Appellant does not have any stools or tables is not evidence that Appellant is not considered a restaurant for SNAP purposes.

Case Law

Appellant cites some case law which it claims supports its position. Considerations of legal precedent through case law are beyond the scope of this review. Instead this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any application of a supposed judicial precedent would best be addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

Face-to-Face Meeting

Appellant, through its representative, requested a face-to-face hearing/meeting. Appellant refers specifically to 7 USC Sec. 2023(13) and requests that a hearing be held at the earliest in the Middle district of Florida, Tampa. However, this section specifically refers to a judicial review which is different from this administrative review. Appellant's right to a judicial review is described in a separate section.

The Final Rule, Food Stamp Program: Administrative Review Requirements - Food Retailers and Wholesalers, published on July 10, 2013, eliminated the in-person meetings during the administrative review process. Administrative review decisions are based on the documented facts of the case, not on a meeting or phone conversation. Appellant was informed that face-to-face meetings are not part of the administrative review process by e-mail on July 30, 2018. The regulations at 7 CFR § 279.1 fully describe the administrative review process.

Previous Administrative Review Request

Appellant explained that on March 15, 2018, Appellant filed a request for administrative review and that it was accepted on April 2, 2018. The record shows does show that on March 12, 2018, a letter was sent to Appellant informing it that its authorization would be withdrawn if the required information was not submitted within ten days. Appellant subsequently requested an administrative review. However, the Retailer Operations Division did not withdraw the authorization of the store at that time. Therefore, the administrative review was not conducted because the request was based on an adverse action that was not in effect.

CONCLUSION

The contentions and evidence presented by the Appellant are not sufficient to prove that the withdrawal decision made by the Retailer Operations Division was inaccurate or that it should be reversed. Appellant offered no evidence that it provided the sales receipt documentation which the Retailer Operations Division determined was necessary for an eligibility determination.

On the basis of the analysis above, the decision by the Retailer Operations Division to withdraw the authorization of 7th Heaven Food Mart to participate as a retailer in SNAP is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the

withdrawal shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted at any time.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 USC § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that 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 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

August 1, 2018