

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

**Anthony's Deli Warehouse,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0236985**

**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 Anthony's Deli Warehouse (hereinafter "Appellant") from participation as a 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 withdrawal.

**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 Anthony's Deli Warehouse.

**AUTHORITY**

7 U.S.C. § 2023 and its 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**

The Appellant firm, Anthony's Deli Warehouse, was originally authorized to participate as a retailer in SNAP on March 30, 2015. 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. On December 10, 2019, the firm submitted a reauthorization application, Form FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*. On its application, the Appellant indicated that its total retail sales for tax year 2018 were 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of that amount, the Appellant reported that 15 percent were in the sale of hot foods, while 65 percent were in the sale of cold foods prepared on

site and intended for immediate consumption or carryout. The Appellant further reported that just 15 percent of its total sales were in the sale of staple foods, and 5 percent were in the sale of accessory foods, such as snacks, soft drinks, condiments, etc.

SNAP regulations address the types of stores that are considered restaurants for purposes of determining eligibility. The regulation at 7 CFR § 278.1(b)(1)(iv) indicates that firms that have more than 50 percent of their gross sales from the sale of hot and/or cold prepared foods not intended for home preparation and consumption, including food items sold for carryout, shall not qualify for SNAP participation under eligibility Criterion A or B. This includes any foods cooked or heated onsite by the retailer before or after purchase. It should be noted that hot foods are not eligible for purchase with SNAP benefits. Cold prepared foods, such as freshly-made sandwiches or salads, may be eligible for purchase with SNAP benefits, but are not considered staple foods for purposes of determining Program eligibility.

On July 28, 2020, an on-site store inspection was conducted by an FNS contractor in an effort to evaluate store conditions and inventory and to help the agency assess whether or not the Appellant's sales estimates from its reauthorization application were reasonable. After reviewing the store visit report and photographs, the Retailer Operations Division concluded that the firm's self-reported estimate of 80 percent prepared hot and cold food sales was likely accurate and determined that the firm was operating primarily as a restaurant.

In a letter dated September 9, 2020, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it did not meet the necessary criteria to be eligible for SNAP participation. Specifically, the letter stated that the firm was a restaurant because more than 50 percent of its total sales were in the sale of heated and/or prepared foods not intended for home preparation and consumption. The letter stated that the withdrawal determination was based on 7 CFR § 271.2, § 278.1(b)(1), and § 278.1(k)(2).

In a letter postmarked September 23, 2020, the 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.

### **STANDARD OF REVIEW**

In an appeal of adverse action, such as the withdrawal of a firm's SNAP authorization, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 AND REGULATIONS**

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) reads, in part:

FNS may withdraw the authorization of any firm authorized to participate in the program for any of the following reasons:

- (i) The firm's continued participation in the program will not further the purposes of the program;
- (ii) The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;
- (iii) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...for the time period specified in paragraph (k)(2) of this section.

7 CFR § 278.1(k)(2) reads, in relevant part:

FNS shall deny the application of any firm if it determines that:

- (2) The firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B, as specified in paragraph (b)(1)(i) of this section.... Any firm that has been denied authorization on these bases shall not be eligible to submit a new application for authorization in the program for a minimum period of six months from the effective date of the denial.

7 CFR § 271.2 defines a retail food store as:

- (1) 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 customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in: Food cook 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.... [Emphasis added.]

7 CFR § 271.2 defines staple food as:

...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

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\* 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>.

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) states, in part:

An establishment...shall...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 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 and 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... [Emphasis added.]

## APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant petitions for reconsideration of the withdrawal determination because the firm is now and at all relevant times has been in full compliance with SNAP regulations. The Appellant further contends that the factual assertions set forth in the withdrawal notice are incorrect.
- The regulations provide that SNAP eligibility may be achieved by either having more than 50 percent of its total gross retail sales in staple foods **or** by offering the required number of inventory varieties and stocking units in each of the four staple food categories. The firm conforms with both of these provisions. A careful inspection of the facilities and an examination of the firm's inventory and invoices would confirm this.
- The firm consistently sells more than 50 percent of its retail sales in staple foods that are neither heated foods nor prepared foods. To be precise, the percentage of staple food

sales has historically been around 55 percent, which is comfortably above USDA's 50 percent threshold.

- Appellant is aware that a determination of eligibility may be made by a variety of factors, including visual inspection. However, the regulations also properly allow for a factual determination to be made by "...marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stockkeeping units, or other accounting recordkeeping methods that are customary or reasonable in the retail food industry" (see 7 CFR § 271.2). In reading the regulation, it is fair to assert that the multiple avenues of fact-determination were written by the USDA drafters to assure fairness.
- The withdrawal notice makes indirect reference to a document that the Appellant owner may have signed on July 28, 2020. The owner has a traditional sense of what it means to be an American, and he still believes that he can trust his government. The store inspector assured the owner that "everything looks good, just sign here." Accordingly, the owner signed as requested. The owner would not have knowingly signed anything that suggested that the firm was outside of compliance of the regulations. To the degree that any documentation signed by the owner on or about July 28, 2020 contradicts the assertions listed here, the owner openly rejects and denies the July 28 assertions as unintentional, and in their place, assert the arguments listed here.
- The neighborhood where Anthony's Deli Warehouse is located depends on the staple foods that the store provides and would be put into a position of hardship if the store were no longer able to provide the SNAP program.
- The Appellant's customers are more than customers. They are neighbors and friends and they depend on the store.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final decision, full attention was given to all contentions submitted, including any not specifically summarized or explicitly referenced in this document.

## **ANALYSIS AND FINDINGS**

The purpose of this review is to either validate or invalidate the withdrawal determination made by the Retailer Operations Division. This review is limited to consideration of the relevant facts as they existed at the time the Retailer Operations Division rendered its decision.

The Appellant clearly indicated on its reauthorization application that 80 percent of its gross retail sales came from the sale of prepared foods intended for immediate consumption or carryout (65 percent cold prepared foods; 15 percent heated foods). The reauthorization application was electronically signed by the store owner on December 10, 2019. By signing the application, the owner certified that he had "provided truthful and complete information."

In its request for administrative review, the Appellant now claims that historically, 55 percent of the firm's sales have been in the sale of staple foods. However, it has offered no evidence to support this assertion. As noted in the Appellant's list of contentions, FNS may consider a variety of factors in making an eligibility determination, including business licenses, purchase and sales records, or other customary or reasonable accounting records. Unfortunately, the

Appellant has submitted none of these. As such, there is no way for this review to verify or judge the reasonableness of the Appellant's updated claims.

A review of the store visit report shows a small store that offers a number of deli items, such as fresh bread and other bakery products, as well as meat and cheese varieties by the pound. The store also sells a small number of commercially-packaged staple food items, including pasta, eggs, butter, canned tomatoes, etc. But it appears clear that a major emphasis at this store is its prepared food offerings, including pizza, hot and cold sandwiches, prepared salads, and desserts. A sign inside the store also indicates that the store offers catering services. Based on this evidence, this review finds that it was reasonable for FNS to conclude that the firm's self-reported sales percentages on its reauthorization application were accurate and that the firm was operating primarily as a restaurant as described in SNAP regulations.

It must be noted that regardless of a firm's variety and quantity of staple food inventory in each of the four staple food categories, a firm cannot be authorized as a SNAP retailer if more than 50 percent of its gross retail sales come from the sale of hot and/or cold prepared food not intended for home preparation or consumption, including prepared foods that are sold for carryout. SNAP regulations at 7 CFR § 278.1(b)(1)(iv) are clear in this regard.

In an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. This means providing relevant and compelling evidence which would show that the Retailer Operations Division's determination was incorrect. In this case, the Appellant has not submitted any documentation to prove that its earlier sales claims were inaccurate. As such, it is the finding of this review, based on a preponderance of the evidence, that the Appellant's original 80 percent prepared foods claim is likely correct. Thus, the firm is operating primarily as a restaurant as described in 7 CFR § 278.1(b)(1)(iv) and is not eligible for continued SNAP authorization.

### **Store Visit Consent Form**

With regard to the Appellant's contention about the document signed by the owner on July 28, 2020, this document was nothing more than a consent form which allowed the store visit contractor to "review [the] store – to take photographs, to sketch the store layout, and to collect other information in connection with the store's participation in [SNAP]." The consent form does not indicate in any way that the firm was eligible or ineligible for continued SNAP authorization, and a contracted inspector has no authority to make such a determination. The role of the inspector is to conduct a written and photographic inspection and then provide a report to FNS's Retailer Operations Division. The agency then reviews the report and photographs and compares the data with the information provided by the firm on its reauthorization application. It then makes an eligibility determination.

This review finds no evidence that the Appellant owner was misled or deceived about the purpose of the contractor's store visit, and there is no evidence that the owner signed any documentation which suggested that the firm was outside of compliance with the regulations. Accordingly, the Appellant's contentions regarding the July 28 store inspection do not provide a valid basis for a reversal of the agency's withdrawal determination.

## **Hardship to SNAP Households**

The Appellant contends that SNAP recipients who live in the neighborhood where Anthony's Deli Warehouse is located depend on the staple foods that the store provides and would be put into a position of hardship if the store's SNAP authorization was withdrawn.

Unfortunately, this contention does not provide a valid basis for this review to reconsider the withdrawal determination. A firm can only be authorized if it meets minimum eligibility standards, including meeting the definition and requirements of a retail food store as set forth in SNAP regulations.

## **CONCLUSION**

Based on a preponderance of the evidence, it is the determination of this review that the Appellant firm, Anthony's Deli Warehouse, is primarily a restaurant and is not eligible for SNAP participation under Criterion A or B. This is in accordance with SNAP regulation at 7 CFR § 278.1(b)(1)(iv). Further, the contentions presented by the Appellant are not sufficient to show that the withdrawal decision should be reversed. Accordingly, the decision by the Retailer Operations Division to withdraw the SNAP authorization of Anthony's Deli Warehouse is sustained.

Pursuant to 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from the date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of Anthony's Deli Warehouse shall become effective 30 days after receipt of this decision.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

JON YORGASON  
Administrative Review Officer

December 15, 2020