

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

Baker's Bread Co,

Appellant,

v.

Case Number: C0212058

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 deny the application of Baker's Bread Co. to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for six months from the effective date of the denial decision.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it denied the application of the Appellant to participate as an authorized SNAP retailer.

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 applied to participate in the SNAP as an authorized retailer in an application dated July 12, 2018. In a letter dated August 7, 2018, the Retailer Operations Division informed the Appellant that the firm was a SNAP ineligible restaurant because more than 50 percent of its total gross retail sales are from heated foods and/or prepared foods. Therefore, the firm's application was denied. The letter also informed the Appellant that it could not submit a new

application to participate in SNAP for a period of six months from the effective date of the denial as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter postmarked August 16, 2018, the Appellant requested an administrative review of the Retailer Operation Division's denial of its SNAP application. The request for administrative review was granted.

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 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(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

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

FNS shall deny the application of any firm if it determines that: (1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section

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 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.]

7 CFR § 271.2, states, in part:

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 under § 278.1(b)(1) of this chapter. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores. [Emphasis added.]

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

... 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.

Regulatory Change

Foods heated after sale were at one time considered to be SNAP eligible. However, due to a recent change in Federal regulations, foods heated after sale are now considered to be SNAP ineligible in the same manner as foods sold hot at the point of sale. On December 15, 2016, FNS published a final rule entitled “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)” at 81 Federal Register 90675. This final rule added the language to existing regulations clarifying that foods heated or cooked after sale would be considered in determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

APPELLANT’S CONTENTIONS

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

- The firm is a bakery/café model for the Great Harvest franchise.
- The firm would like to apply under Criterion A. Baker’s Bread Co. has redone its menus to make them fit under the Criterion A category.
- The changes include carrying orange, apple and other 100 percent juices.
- The firm carries milk and chocolate milk and will add butter, yogurt and cheese sticks.
- The firm carries deli containers of turkey, ham and roast beef and meat and cheese trays and rolls that people can take home to make sandwiches. The firm may add beef jerky.
- The firm carries ten (10) different types of bread. The firm also carries various mixes including dry soup mixes.
- Healthy choices are limited in Rexburg and the SNAP authorization of the firm will benefit the local college students and young children as well.

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 herein.

ANALYSIS AND FINDINGS

The central issue in this case is whether Baker's Bread Co. is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). In reaching its decision to deny the firm's application, the Retailer Operations Division relied upon the firm's application and the store visit report. A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that Baker's Bread Co. does not qualify for the SNAP as it is primarily a SNAP ineligible restaurant.

Application

The Appellant's application dated July 12, 2018 estimated the firm's staple food sales at only 36.8 percent of its annual gross retail sales with accessory food sales at 6.3 percent and non-food sales at 6.4 percent. The application estimated that 50.3 percent of the firm's annual gross sales are in hot, heated, or cold prepared food not intended for home preparation and consumption. There is nothing in the case record which would indicate that this percentage of hot, heated and cold prepared food sales to gross retail sales is inaccurate. Based on the face of the application, the firm would be considered a SNAP ineligible restaurant.

Store Visit Report

The case record documents that in reaching a denial decision, the Retailer Operations Division also considered information obtained during a July 31, 2018 store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. Through the store visit report and photographs, the Retailer Operations Division determined that the firm likely has the majority of its gross retail sales in hot, heated and cold prepared food not intended for home preparation and consumption. The store photos document that Baker's Bread Co. presents itself primarily as a dine-in restaurant with prominently displayed menu boards offering breakfast and prepared made-to-order sandwiches. Although the firm sells fresh bread, other staple food items are minimal. The store visit photos show that the firm has a large dining area with tables and chairs, and a full kitchen. The store visit report and photographs further support that the firm is primarily a SNAP ineligible restaurant as that term is defined by regulations.

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.]

Basis of Determination

The Appellant states that the firm is changing its menu to add additional staple food items in order to meet Criterion A. First, it should be noted that eligibility under Criterion A does not apply if the firm is determined to a restaurant. It is also important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time of the store visit which forms the basis of the Retailer Operations Division's action. The Appellant's plans to adjust or otherwise change its business model are not relevant to this case. The Appellant instead may reapply six (6) months from the effective date of the denial and any new business model will be taken into consideration at that time.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to deny the SNAP application of Baker's Bread Co. is sustained. The regulations clearly state the criteria that a firm must meet in order to be authorized for the SNAP. There are no exceptions to these requirements. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization until six months after August 7, 2018, the effective date of the denial decision.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 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 you 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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute and unwarranted invasion of privacy.

RONALD C. GWINN
Administrative Review Officer

October 24, 2018