

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

Bay State Bakery Inc,

Appellant,

v.

Case Number: C0224880

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 Bay State Bakery Inc. to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply to participate in the SNAP for a period of six (6) months.

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 in its administration of the SNAP, when it withdrew the authorization of Bay State Bakery Inc.

AUTHORITY

7 U.S.C. § 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

In a letter dated December 4, 2019, the Retailer Operations Division informed the Appellant that it was being withdrawn from the SNAP as it no longer met the definition of a retail food store under 7 CFR § 271.2 and 7 CFR § 278.1(b)(1) of the SNAP regulations. Specifically, the letter stated that the Appellant was primarily a restaurant as the evidence indicated that more than 50 percent of its gross retail sales are in heated, hot or cold prepared food not intended for home preparation and consumption. The letter also informed the Appellant that it could not submit a new application to participate in SNAP for a period of six (6) months from the effective date of the withdrawal as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter postmarked December 10, 2019, the Appellant requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request for review was granted and implementation of the withdrawal was held in abeyance pending completion of this review.

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 U.S.C. § 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(l) 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, in part

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.

7 CFR § 278.1(l) states in part, that:

(1) FNS shall 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 specifications of paragraph (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 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, 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 seven 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 three 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 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 **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

Due to a recent change in Federal regulations, foods cooked or heated after sale are now treated the same as prepared hot and cold food not intended for home preparation and consumption in determining whether a store is a restaurant under 7 CFR § 278.1(b)(1)(iv). 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 has been authorized for the SNAP for the past ten (10) years. Every year someone visits the firm and has never had any problems.
- The firm offers a large variety of products including chicken, meat, rice, beans, cheeses, olives, bread, frozen vegetables, canned food, etc.
- There has not been any recent changes to the business.
- Losing SNAP authorization will have a negative impact on the business and its customer base.

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 Bay State Bakery Inc. is a SNAP ineligible restaurant **as that term is defined under 7 CFR § 278.1(b)(1)(iv)**. In reaching its decision to withdraw the firm's application, the Retailer Operations Division reviewed the reauthorization application, the store visit report, and documents provided by the Appellant. A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that Bay State Bakery Inc. does not qualify for the SNAP as it is primarily a restaurant.

Reauthorization Process

As part of a routine reauthorization process, the Appellant submitted a reauthorization form FNS-252-R, entitled "Supplemental Nutrition Assistance Program Reauthorization Application for Stores" which was received on October 23, 2019. The Appellant later sent a corrected FNS-252-R which was received on November 7, 2019. The Appellant's reauthorization application stated that 41 percent of its 2018 actual gross retail sales were in staple foods. The Appellant reported that SNAP ineligible hot, heated, and/or cold prepared food accounted for 51 percent of its gross retail sales. The remaining eight (8) percent was in accessory food sales.

Accessory food items may be purchased with SNAP benefits but are **not** used in determining SNAP eligibility. 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.

Thus, on the face of the reauthorization application, the Appellant firm appeared to be an ineligible restaurant as defined at 7 CFR § 278.1(b)(1)(iv) which 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

Store Visit Report

On September 11, 2019, an FNS contractor conducted a store visit to assess the firm's continued eligibility for the SNAP. The store visit report revealed that the firm was a combined restaurant and food store under one roof with the same owner. The firm was approximately 3,000 square feet in size with the food store at 1,200 square feet and the restaurant at 1,800 square feet. The restaurant section consisted of a commercial kitchen; food storage and preparation area; a food order counter with a large menu; and chairs, tables, and booths for the consumption of hot, heated and cold prepared food. The store visit recorded that the firm only had a single checkout area with one cash register for both operations.

Supporting Sales Documents

After reviewing the store visit report, the Retailer Operations Division sent a letter dated October 24, 2019 to the Appellant requesting additional supporting documents from the firm in order to make an eligibility determination. These requested documents included:

- End-of-day sales summary reports that are electronically generated by the firm's cash register system, such as Z-tapes, to verify 3 representative months of actual retail sales at the firm.
- Verification of total gross retail sales for the last 1 year period (State Sales and Use tax records, income tax records, or other records verifying total gross retail sales income).

These documents along with the corrected FNS-252-R were received by the Retailer Operations Division on November 7, 2019. A review of the case record documents that the Retailer Operations Division completed a detailed review of the sales and tax documents provided by the Appellant. The Retailer Operations Division determined that the firm's sale of taxable items is higher than its sale of nontaxable items which is consistent with the information reported on the FNS 252-R that more than 50 percent of its gross retail sales are in heated, hot and cold prepared food. In addition, the firm's city permit identifies the business as a "food and drink establishment."

Social Marketing

In making its withdrawal determination, the case record documents that the Retailer Operations Division considered the store's marketing. The firm primarily promotes itself on its website as a restaurant with a grocery and bakery. The store has a cold, heated and hot food menu consisting of Middle-eastern salads and appetizers, soups, vegetarian dishes, sandwiches, plate dinners and meat/vegetable pies. Reviews by customers on websites such as Yelp and Google indicate that the firm is primarily considered by its customers as a Middle-eastern restaurant.

Prior Authorization

The Appellant states that it has been visited every year by FNS, but this is not true. The store was last reauthorized in 2016. SNAP authorized stores must undergo reauthorization on a periodic basis and eligibility is determined under circumstances at that time. The fact that the store has been authorized in the past is not relevant to this review. In addition, there have been changes in SNAP regulations since 2016 which have impacted the definition of what is a retail food store and what is considered a restaurant.

Hardship to the Firm

The Appellant states that losing its SNAP authorization will have a negative impact on the business and its customer base. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is withdrawn from participation in the SNAP. However, there is no provision in the SNAP regulations that would allow an otherwise ineligible firm to be reauthorized for the SNAP on the basis of possible economic hardship to either the ownership personally or the firm. To allow an otherwise ineligible firm to be reauthorized for the SNAP based on a purported economic hardship would render virtually meaningless the eligibility provisions of the Food and Nutrition Act of 2008.

Summary

A preponderance of the evidence supports the Retailer Operation Division's determination that the Appellant firm likely has more than 50 percent of its total gross retail sales in heated, hot and cold prepared food as reported by the Appellant on its FNS-252-R. The SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, that "firms that have more than 50 percent of their total gross retail sales in heated, hot and/or cold prepared foods not intended for home preparation and consumption, shall not qualify for participation as retail food stores." By definition these types of firms are considered restaurants and are ineligible for SNAP authorization.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP application of the Appellant, Bay State Bakery Inc., is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization for six (6) months from the effective date of the withdrawal. However, please note that if the business model remains the same and you reapply, your application may be denied for the same reasons it was withdrawn this time.

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, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

March 9, 2020