

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review
Alexandria, VA 22302**

Best Buy,)
)
 Appellant,)
)
 v.)
)
 Retailer Operations Division,)
)
 Respondent.)
_____)

Case Number: C0193108

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the decision by the Retailer Operations Division to withdraw the authorization of Best Buy (hereinafter Appellant) to participate 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 § 271.2 and 278.1(b)(1), in its administration of the SNAP, when it withdrew the authorization of Appellant to participate in SNAP by letter dated August 17, 2016.

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

In a letter dated August 17, 2016, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in SNAP was being withdrawn because the documentation in its possession indicated that the firm did not meet the definition and eligibility requirements of a retail food store established by Federal regulations at 7 CFR § 278.1(b)(1). This action was taken because the Retailer Operations Division had determined the

Appellant business was primarily a restaurant and as such failed to meet the definition of an eligible firm. This withdrawal action was based on observations during an onsite store visit on July 25, 2016. Specifically, the August 17, 2016, letter from the Retailer Operations Division to Appellant states the following, in relevant part:

“It is the determination of the Food and Nutrition Service that your firm is primarily a restaurant. Hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, either for carryout or on-premises consumption, and requiring no additional preparation, comprise more than 50% of the total sales at your firm. Restaurants are not eligible to participate in SNAP except in certain States that operate special restaurant programs allowing the elderly, disabled, and homeless participants to use SNAP benefits in restaurants. Your Store is not located in a state with a restaurant program.”

Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in § 278.1(k)(2). Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action in a request dated August 20, 2016. The appeal was granted. No subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means 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

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet the definition of an eligible firm.

7 CFR § 271.2 states, *inter alia* that *Retail Food Store* means: “An establishment ... that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods in at least two such categories (Criterion A)...or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)...Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter.”

Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated, and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining the eligibility of any firm.

Separate businesses that operate under one roof are considered to be a single entity when they share key aspects such as: management structure, logistics, bank accounts, employees, and inventory. The different businesses cannot be evaluated separately; they are one establishment and the entire nature and scope of the businesses must be taken into account when evaluating it for program eligibility, even if different EINs and business licenses are involved. An example of this type of situation is an eat-in restaurant that also operates a carry-out component or a convenience store under one roof.

7 CFR § 271.2 defines staple food, in relevant part, as “those food items intended for home preparation and consumption . . .”

Additionally, in interpretation of the regulations, relevant policy provides, *inter alia*, that:

Prepared, ready-to-eat foods cannot be counted as staple foods in determining if a store is eligible to participate in the SNAP...These are typically freshly made prepared foods, such as sandwiches and salads, which are ready-to-eat. They are usually prepared and/or found in the deli section of stores, but could be in other places such as salad bars or in the fresh vegetable section of the store.

7 CFR § 278.1(b)(1)(iv) states, in part, that, “Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from program participation. 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 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 under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout. Such firms may qualify, however, under the special restaurant programs that serve the elderly, disabled, and homeless populations, as set forth in paragraph (d) of this section.”

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, “[a] retail food store or wholesale food concern that is denied approval to accept and redeem benefits because

the store or concern does not meet criteria for approval . . . may not, for at least 6 months, submit a new application to participate in the program.”

STORE BACKGROUND

The record reflects that ownership submitted a SNAP application electronically on April 27, 2015, to participate as a retailer in the SNAP and that the firm was authorized on July 22, 2015. The firm’s SNAP retailer application estimated that staple foods accounted for 54 percent of the firm’s total retail sales. The accessory “other” food items showed an estimate of 16 percent of the firm’s total retail sales. Ownership estimated that 30 percent of retail sales came from nonfood items such as hot foods.

APPELLANT’S CONTENTIONS

In the request for administrative review, Appellant has stated as its position in the matter the following:

- The owner called the Retailer Operations Division on August 18, 2016, and was told to send total sales and purchase receipts for the last 90 days because the inspector did not see any cold food items accessible to the public. The owner replied that the food is accessible through double doors from the lobby area and that the inspector was only there for about two minutes and neglected to take pictures of the entire premises. The owner mailed pictures showing the store layout and food items the same day as well as over 90 pages of purchase receipts and monthly sales figures that included the SNAP part of total sales. The owner also explained that their cash register is a very basic model and is only used to add the total amount of the SNAP purchases and then manually key that amount into the POS terminal and for cash sales. He told the Retailer Operations Division that their system does not produce receipts that list every item purchased. He adds the cash sales to the total from the POS terminal to get the daily total sales and then tallies these figures for the month and reports them to the taxing agency. He does not save the daily Z tapes from the cash register and was never informed that he needs to keep them or for how long;
- The SNAP Training Guide for Retailers does not say businesses need to change their accounting procedures and the business has been following the guidance on page 12 for processing transactions without an electronic cash register and scanning system; and,
- The business has followed all of the rules pertaining to being a SNAP retailer and ownership requests the business be immediately authorized to accept SNAP and that the 10 day program withdrawal be cancelled or that the business at least be allowed to continue accepting SNAP during the review process.

Appellant submitted three months of sales tax reports, photographs of the store layout and inventory, and inventory receipts in support of these contentions. No other evidence was submitted in support of Appellant’s contentions.

The preceding may represent a summary of 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

With regards to Appellant's contentions above, the authorization of a business to participate in SNAP must be in accord with the Act, as amended, and regulations. These requirements of law cannot be waived. Thus, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the withdrawal action by the Retailer Operations Division. Based on the information from the July 25, 2016, store visit and other information, the evidence supports that the business is primarily a restaurant, and firms that are primarily restaurants are not eligible to participate in SNAP.

The report and photographs from the FNS store visit conducted on July 25, 2016, confirm the business is set-up to sell hot, prepared, and ready-to-eat foods that are intended for immediate consumption or for take-out, and require no additional preparation. The photographs also show the business is primarily a dine-in or carryout restaurant with menus and signage advertising a wide range of hot, prepared, ready-to-eat entrees, sandwiches, and sides. The photographs showed no evidence of a retail food store such as shelves containing canned or packaged goods, coolers, shopping carts, hand baskets, or any signage either inside or outside of the business indicating that groceries were available for sale. The photographs did show that the business contained a large dining room with extensive seating at tables as well as a separate area with a large hot foods menu on the wall and a counter to place take-out orders that also had tables and chairs for customers awaiting take-out orders or for eating-in.

A search of internet sites (yelp.com, zomato.com, and facebook.com) showed the business is listed only as a restaurant and these sites contained various reviews, postings, and photographs all centering on hot foods. These sites also had menus listing the same foods as shown in the store visit photographs of the Appellant business and none of these sites made any mention of groceries being available for sale. This search also found a December 18, 2015, article in the online local newspaper News Star that talked about the restaurant and interviewed the owner with no mention of groceries being sold as well as an online copy of an article dated July 27, 2015 from Bayou Life Magazine that profiled the owner and discussed the business. This article noted that the business sold soul food and burgers and was one of the best kept secrets in town. It also mentioned that 95% of the business was in take-out orders, but made no mention of groceries being sold. Based on the business's layout, signage, internet presence, and articles in the local press, the business portrays itself to the public as a restaurant and only as a restaurant.

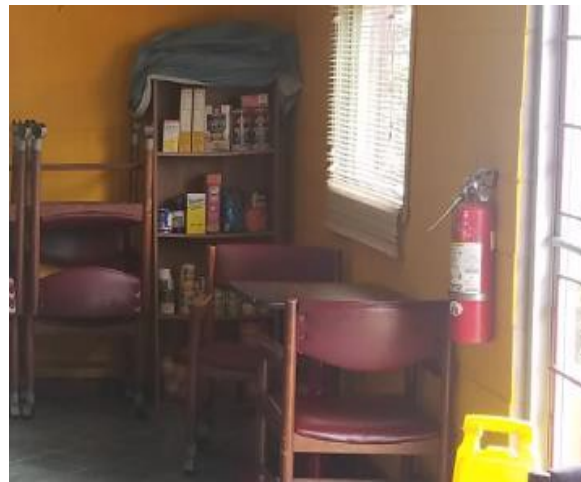
A comparison of FNS SNAP redemption amounts for the business against the SNAP figures reported in the owner's sales tax reports for May-July 2016 found significant differences in the dollar amounts reported for SNAP sales by the business. For example, FNS records reflect that

7 U.S.C. 2018 (b)(6) & (b)(7)(c) was redeemed in SNAP sales by the business in July 2016 while the Monroe City sales tax report provided by the owner shows SNAP sales in the amount of 7 U.S.C. 2018 (b)(6) & (b)(7)(c), thereby casting doubt on the accuracy of the sales reports figures. It is also noted that just because a transaction is processed by a store's POS terminal it does not mean that the transaction was a legitimate sale involving eligible foods. Additionally, the record notes that during a telephone conversation between Retailer Operations Division personnel and the owner's son, 7 U.S.C. 2018 (b)(6) & (b)(7)(c), on August 18, 2016, that 7 U.S.C. 2018 (b)(6) & (b)(7)(c) admitted to having sold hot foods using EBT benefits during the April-June 2016 timeframe in direct violation of SNAP regulations. This admission does provide a believable explanation for the volume of SNAP sales at the Appellant business while also refuting ownership's contention that the business has followed all of the rules pertaining to being a SNAP retailer. The invoices submitted by the owner do not provide any basis to determine that the SNAP sales were for eligible food items and not for hot, prepared, and ready-to-eat foods.

A review of the photographs submitted by store ownership against those included in the FNS store visit report contradicts the owner's statement that the inspector neglected to take pictures of the entire premises. The bookcase in the dining room containing canned and packaged foods in the photographs submitted by the owner was in fact visible in the far corner of the dining room in the store visit photographs covered by a tarpaulin and blocked by chairs in front of it while the small refrigerator sitting on top of a table in the same dining room was not in evidence in the FNS store visit photographs of the same location indicating that the photographs submitted by Appellant were in fact staged to support the owner's contention that the business sells staple foods. This is clearly evidenced by the photographs below.



FNS Store Visit Photograph 7/25/2016



Appellant's Photograph 8/18/2016



FNS Store Visit Photograph 7/25/2016



Appellant's Photograph 8/18/2016

The remaining photographs showing meats, tomatoes, margarine, eggs, potatoes, etc. are all located in the kitchen area of the store and not accessible by the public. Both the store owner and his son confirmed in conversations with Retailer Operations Division staff that these food items are the same ones that are used to prepare the hot foods sold by the business. Based on the evidence, it is more likely true than not true that the majority, if not all, of foods in the business are actually sold hot, prepared, and ready-to-eat. Pursuant to 7 CFR § 278.1(b)(1) of the SNAP regulations, such a business is considered a restaurant and is not eligible for SNAP participation as a retail food store.

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, “[a] retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store or concern does not meet criteria for approval . . . may not, for at least 6 months, submit a new application to participate in the program.” There is no agency discretion to impose a sanction less than six months when a firm does not meet the aforementioned eligibility requirements for authorization. Therefore, requests for a second store visit or to be reinstated as a SNAP retailer may not be granted.

CONCLUSION

After review of the pertinent documentation, and based on the discussion above, the initial decision by Retailer Operations Division to withdraw the authorization of Appellant to participate in the SNAP for a period of six months from the effective date of withdrawal is sustained.

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 a judicial review is desired, 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, it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

/s/

October 3, 2016

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

DATE