

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

Browns Grocery & Carryout,

Appellant,

v.

Case Number: C0214235

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 Browns Grocery & Carryout to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for six (6) months from the effective date of the withdrawal.

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 withdrew the authorization of the Appellant to participate as a 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

As part of a routine reauthorization process, the Appellant submitted an online reauthorization form FNS-252-R, entitled “Supplemental Nutrition Assistance Program Reauthorization Application for Stores” on October 15, 2018. The Appellant provided its 2017 actual sales figures which documented that 63.6 percent of its gross retail sales were in hot and cold prepared food items.

In a letter dated November 6, 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 Therefore, the firm's authorization was withdrawn. 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 November 14, 2018, the Appellant requested an administrative review of the Retailer Operation Division's withdrawal of its 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 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 withdraw 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 withdraw the authorization 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 authorization 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:

- We usually purchase staple foods on Monday and Wednesday and sometimes three (3) times a week. Unfortunately, the September 29, 2018 store visit was a Saturday and the firm had sold a considerable amount of staple food and most of the items were out of stock when the contractor visited. We supplemented the temporarily out of stock foods immediately on the following Monday.
- We hereby promise that we will continue to carry a variety of foods in sufficient quantities on a continuous basis. We are small business owners and the business has been very slow lately due to the economy.

- The photos we sent show that the store carries a sufficient variety of staple foods in sufficient quantities on a continuous basis.
- To satisfy Criterion B, more than 50 percent of our gross retail sales come from groceries rather than heated food.
- If we do not accept SNAP, we would eventually have to close the business.

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 Browns Grocery & Carryout is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). In reaching its decision to withdraw the firm's authorization, the Retailer Operations Division relied upon the firm's application and the store visit report and photographs. A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that Browns Grocery & Carryout does not qualify for the SNAP as it is primarily a carryout restaurant.

Sales Figures indicate Firm is a Restaurant

The Appellant provided 2017 actual sales data in its reauthorization application. The Appellant now states that more than 50 percent of its gross retail sales come from groceries rather than heated food and the firm is therefore eligible. However, the Appellant does not appear to understand that cold prepared food sales are included with hot and heated food sales in determining whether a firm is a SNAP ineligible restaurant. The firm's 2017 sales figures documented that 63.6 percent of its annual gross retail sales are in hot, heated, and cold prepared food not intended for home preparation and consumption. Because the prepared food sales exceeded 50 percent, the Retailer Operations Division properly determined that the firm is a restaurant as defined by SNAP regulations at 7 CFR § 271.2 and 7 CFR § 278.1(b)(1)(iv).

Store Visit Report

The case record documents that in reaching a withdrawal decision, the Retailer Operations Division also considered information obtained during a September 29, 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 and is therefore a SNAP ineligible restaurant.

- The store photos document that Browns Grocery & Carryout sells prepared food items for carryout as well as non-food items, inexpensive staple and inexpensive accessory food items.
- The firm has a large commercial kitchen and food preparation area.
- There is a menu board near the checkout area that advertises breakfast, boxes of chicken dinners, grilled and fried chicken breasts, submarine sandwiches, regular sandwiches on bread or buns, chicken tenders, lake trout, pork chops, French fries, onion rings and other prepared food items.
- Some of these prepared foods (subs, fried chicken, and lake trout) are also advertised to the public on the exterior of the store.
- The store visit contractor confirmed that some of the staple food stock was used in the prepared food area namely bread, deli meats and cheese.
- The store visit contractor also noted that most of the stocked food items were not in customer view and in areas that were not accessible to customers.

The Appellant submitted additional store photos for the administrative review in a letter dated December 12, 2018. However, these photographs are not significantly different than those in the case record and tend to support the decision made by the Retailer Operations Division.

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.] A preponderance of the evidence supports the determination made by the Retailer Operations Division that the Appellant firm is an ineligible restaurant as defined under SNAP regulations.

Economic Hardship

The Appellant contends that the involuntary withdrawal will create a hardship for the business as it relies upon SNAP sales. 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 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 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.

Basis of Determination

It is 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 decision. The Appellant may reapply six (6) months from the effective

date of the withdrawal and any new business model or sales figures will be taken into consideration at that time.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP authorization of Browns Grocery & Carryout is sustained. The regulations clearly state the criteria that a store 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 (6) months after the effective date of the withdrawal 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, 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 15, 2019