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

Chi Town Grill and Grocery,

Appellant,

v.

Case Number: C0215366

Retailer Operations Division,

Respondent.

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 Chi Town Grill and Grocery (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 Chi Town Grill and Grocery.

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, Chi Town Grill and Grocery, was originally authorized to participate as a retailer in SNAP on March 27, 2014. 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 September 18, 2018, an on-site store visit was conducted by an FNS contractor in an effort to evaluate store conditions and inventory. The contractor's report showed a store with a heavy emphasis on hot and/or cold prepared foods. The report indicated that the firm had a minimal amount of staple food, but had a commercial-grade kitchen along with a large menu board displaying a wide variety of prepared foods, such as sandwiches,

burgers, rice dinners, fried chicken and seafood, and an array of sides and desserts. Also available in the store were snack foods and drinks, tobacco products, and a small number of other nonfood items commonly found in convenience stores.

On October 17, 2018, the firm submitted a reauthorization application, Form FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores.* On its application, the Appellant stated that its total retail sales for the year 2017 were 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of that amount, the Appellant reported that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was in the sale of staple foods, cold prepared foods, and accessory foods, such as snacks and drinks. However, this data seemed to contradict the information obtained by the agency during its visit to the store, which indicated an emphasis on prepared foods. The Appellant's sales data also contradicted the firm's SNAP redemptions during the same period. Agency records show that the firm conducted approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP transactions during 2017, which strongly suggests that the firm was allowing customers to purchase hot foods or nonfood items with SNAP benefits.

In an effort to get a clearer picture of the firm's true sales data, the Retailer Operations Division sent the firm a letter dated November 2, 2018, along with a new reauthorization application. The letter asked the Appellant to submit a copy of its most recent Federal business tax return and to update the reauthorization application with corrected sales figures. In response to this request, the Appellant provided a copy of IRS Form 1065, "U.S. Return of Partnership Income," showing total sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). On it updated reauthorization application, the Appellant submitted the following breakdown of sales for 2017:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) address the types of stores that are considered restaurants for purposes of determining program eligibility. The regulation states 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.

In a letter dated November 28, 2018 (but not delivered to the firm until December 20, 2018), the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it did not meet eligibility requirements. Specifically, the letter stated that the Appellant firm was a restaurant because more than 50 percent of its total sales were in the sale of hot and/or cold 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 December 27, 2018, 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

[*] 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.

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 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 stopped accepting SNAP benefits on hot foods and prepared foods immediately after receiving the agency's withdrawal letter.
- The store is located in an area where people rely on SNAP.
- The firm sells groceries and frozen foods at the store and customers ask the Appellant to heat up their food.
- The Appellant had previously spoken to the Retailer Operations Division about the use of SNAP for heated and prepared foods, so it believes that it was not doing anything illegal.
- Appellant requests that SNAP benefits continue to be allowed for the firm's grocery items, like pop, chips, candy, etc.

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.

Based on a review of all evidence in this case, this review finds that the firm is operating primarily as a restaurant rather than an eligible grocery establishment. 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. On the Appellant's updated reauthorization application provided to FNS on November 14, 2018, the Appellant indicated that 5 U.S.C. § 552 (b)(6) & (b)(7)(C), or 52.4 percent of the firm's total sales, come from the sale of hot and/or cold prepared foods. In accordance with SNAP regulations, the firm is primarily a restaurant.

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 updated sales claims are inaccurate. As such, this review has little option but to conclude that the firm's claim of 52.4 percent prepared food sales is correct, and thus determine that the firm is operating primarily as a restaurant in accordance with 7 CFR § 278.1(b)(1)(iv).

Remedial Actions Taken

The Appellant has stated that once it received the withdrawal letter from the Retailer Operations Division, it immediately stopped accepting SNAP benefits for heated and prepared foods.

With regard to this contention, it must be restated that this review is limited to consideration of the facts as they existed at the time the Retailer Operations Division rendered its withdrawal decision. It is not the authority of this review to consider subsequent remedial actions that have been or will be taken so that a store may begin to comply with program requirements. There are no provisions in the SNAP regulations for reversal of a withdrawal determination on the basis of corrective actions implemented subsequent to the finding of a firm's ineligibility.

It is also worth noting that in determining whether or not a firm is a restaurant, the critical factor is not whether hot and/or cold prepared foods are exchanged for SNAP benefits, but rather the percentage of prepared food sales in relation to the firm's total sales – regardless of a customer's payment method. Even if the Appellant stopped accepting SNAP benefits for prepared foods, no evidence has been provided to demonstrate that the overall sales percentages for such foods have changed.

Hardship to Households

The Appellant contends that the store is located in an area where people rely on SNAP. This contention implies that SNAP households will experience some level of hardship as a result of the firm's withdrawal from SNAP. Unfortunately, such a contention is not a consideration in this matter. If a firm is determined to be an ineligible firm pursuant to 7 CFR § 278.1(b)(1)(iv), it cannot be authorized.

CONCLUSION

Based on the analysis above, it is the determination of this review that the Appellant firm, Chi Town Grill and Grocery, 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 Chi Town Grill and Grocery 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 Chi Town Grill and Grocery 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.

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 June 12, 2019
Administrative Review Officer