

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

**Choice Market Osage,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0224544**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny the authorization of Choice Market Osage (hereafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

**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 Supplemental Nutrition Assistance Program (SNAP) when it denied Appellant authorization to participate as a retailer in SNAP on November 15, 2019.

**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 November 15, 2019, Retailer Operations Division denied Appellant’s authorization to participate as a retailer in SNAP. This denial was based on evidence obtained during a firm visit conducted on October 14, 2019, as well as information provided on the firm’s retailer application and additional documentation submitted during the application process.

Retailer Operations Division determined that the firm did not meet the definition and requirements of a retail food store as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations. The denial letter stated, in relevant part:

“It is the determination of FNS that your firm is primarily a restaurant, because more than 50 percent of your total gross retail sales are from "heated foods" and/or "prepared foods." "Heated foods" are foods cooked or heated by the retailer before or after purchase. "Prepared foods" are hot or cold foods not intended for home preparation and/or home consumption, including prepared foods that are consumed on the premises or sold for carryout. SNAP regulations, at 7 CFR 278.1(b)(1)(iv), provides that 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.”

As the firm failed to meet eligibility requirements for approval, 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 7 CFR § 278.1(k)(2).

In a letter postmarked November 25, 2019, Appellant appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal 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, 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 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 ....”

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.” [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**

In response to the Retailer Operations Division denial letter and in the request for administrative review, Appellant has stated as its position in the matter the following:

1. While we also have a prepared food and hot food portion of the business that only makes up 44.28 percent of our daily sales.
2. While we have a small lunch rush during the weekdays from 11am to 1pm due to our location, it is during this time period that the vast majority of our hot food and prepared food sales happen.
3. The day that the inspector came in he visited during this time frame so it could easily appear to him that our store functions primarily as a restaurant.
4. I have included sales data with this letter that breaks down our total sales by category. The prepared foods portion of our business only makes up 44.28 percent of our total sales.
5. Choice Market Osage is located in a food desert and is surrounded by low-income public housing.

Appellant provided a five page printout of a sales spreadsheet and a two page printout of a sales breakdown by category both from September 30, 2019 through November 23, 2019. The preceding may represent only a brief 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

In regards to Appellant's contention, its SNAP application indicated that its staple food sales consisted of 51 percent of its total gross retail sales and its hot/cold prepared foods consisted of 49 percent of its total retail sales. Retailer Operations Division completed a thorough review of the documentation provided by Appellant and determined that several line items required reclassification based on FNS' definition of staple foods, accessory foods, hot/cold prepared foods and non-food items. Appellant's sales percentages, after reclassification and analysis, indicated that 16 percent consisted of staple foods, 52 percent consisted of hot/cold prepared foods, 30 percent consisted of accessory items and two (2) percent consisted of non-food items.

Additionally, a review of the store visit photographs shows that Appellant has a dine-in area with a number of tables and chairs for customer use and onsite consumption, displays a prominent menu board serving breakfast items, sandwiches, salads, tacos and quesadillas, signature bowls, create your own bowl, smoothies, and a number of side items. Although Appellant has a selection of retail food items similar to that of a convenience store, the majority of the square footage of the establishment is dedicated to food preparation, storage or service.

Accordingly, the Retailer Operations Division correctly determined Appellant is not a retail food store as defined in §271.2 and operates as a restaurant, therefore, not eligible for authorization in the SNAP in accordance with §278.1(b)(1)(iv) of the SNAP regulations.

## CONCLUSION

Based on the discussion herein, the determination by the Retailer Operations Division to deny the authorization of Choice Market Osage to participate as a retailer in SNAP is sustained. Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six months, effective November 15, 2019.

It is important to reiterate that the denial letter states ***"if your business model remains the same and you reapply, your application may be denied for the same reasons it was denied this time."***

## RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to 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), 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.

Monique Brooks  
ADMINISTRATIVE REVIEW OFFICER

February 26, 2020