

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

**Cubanitos Bakery,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0216306**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of Cubanitos Bakery (hereinafter Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Appellant to participate as a SNAP retail store.

**AUTHORITY**

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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 record shows that Appellant applied for reauthorization on November 13, 2018. On November 9, 2018, the Appellant firm was visited by an FNS contractor in an effort to determine whether or not the firm met eligibility requirements to be reauthorized in SNAP. During this visit, the contractor took photographs of the store and its inventory, spoke with store personnel, and completed a written report detailing its observations.

A review by the Retailer Operations Division found that Appellant's application and the store visit report and photographs indicated that the firm appears to operate primarily as a restaurant in that a majority of total gross retail sales are hot food (heated by the firm before or after purchase) and/or cold prepared foods. Firms that have more than 50 percent of their total gross sales in heated foods and/or prepared foods not intended for home preparation and/or consumption are not eligible to participate in the SNAP as retail food stores. In order to verify the eligibility of the firm as a retail food store, the Retailer Operations Division began the up to three step process of requesting information and supporting documentation needed to quantify the firm's sales breakdown by specific categories (i.e. heated or prepared foods, non-foods, accessory foods, staple foods, and charges for food heating services).

Information for step one was requested and received; however, supporting documentation was insufficient to validate the sales breakdown. Subsequently, information for steps two and three was also requested with the same outcome. Specifically, the daily sales reports (Z reports) generated by the firm's cash register did not provide enough information to corroborate the sales information provided by the firm. During this process, it was also determined that the firm had a second unreported owner so documentation was requested and received in order to add this individual to the firm's FNS record.

In a letter dated March 8, 2019, the Retailer Operations Division informed Appellant that its SNAP retailer authorization would be withdrawn because it failed to cooperate in the reauthorization process. The letter further explained that the term "failure to cooperate" may include "non-response to a request for information, failure to submit information timely, or submission of unclear or incomplete information in response to a request". In this case, the Appellant was informed that the information it submitted was unclear or incomplete. The letter stated that the withdrawal determination was based on regulations found at 7 CFR § 278.1(n).

By letter dated March 11, 2019, Appellant appealed the Retailer Operations Division's decision and requested an administrative review of this determination. The appeal was granted and implementation of the withdrawal held in abeyance pending completion of this review. Subsequent correspondence dated April 4, 2019, was received from Appellant stating that ownership realizes it's time to upgrade the firm's POS system with a more up-to-date cash register that will generate detailed sales reports.

## **STANDARD OF REVIEW**

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action 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). Parts 278.1(b)(1)(i)(B), 278.1(m), and 278.1(n) establish the authority upon which the authorization of any firm to participate in SNAP may be withdrawn if it fails to cooperate in the reauthorization process.

7 CFR 278.1(b)(1)(i)(B) reads: A retail food store must meet eligibility determination factors which may be based on, but not limited to, visual inspection, sales records, purchase records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry. In determining eligibility, such information may be requested for verification purposes, and failure to provide such documentation may result in denial or withdrawal from the program.

7 CFR § 278.1(b)(1)(iv) reads: 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.

7 CFR § 278.1(m) reads: Refusal to accept correspondence or to respond to inquiries. FNS may withdraw or deny the authorization of any firm which: (2) Fails to respond to inquiries from FNS within a reasonable time.

7 CFR § 278.1(n) reads: 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. Failure to cooperate in the reauthorization process will result in withdrawal of the firm's approval to participate in the program.

### **APPELLANT'S CONTENTIONS**

The following 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:

- We believe all information requested during the reauthorization process was submitted timely and completely. The reauthorization application was filed timely and then a request for additional information was received and a response was mailed on November 20, 2018;
- On November 23, 2018, we received a request to submit information following the visit from the FNS contractor that included three months of sales broken down into categories

(heated or prepared food, nonfoods, accessory foods, and staple foods) and verification of gross sales for one rear. A response was sent on December 1, 2018;

- On December 10, 2018, another letter was received stating the information requested on November 23, 2018, had not been received and the SNAP authorization would be withdrawn if it was not received. Another package with all the information was sent on December 11, 2018, with a memo explaining that it had been sent earlier and a copy of the certified mail receipt as proof;
- The reauthorization was not completed due to the government shutdown. SNAP reauthorization was reinstated on February 2, 2019, and another request for information dated February 1, 2019, was received that requested sales for one week broken down into categories, electronic sales reports (Z tapes), an overview document in Excel totaling actual retail sales, and supply and inventory records for that month. The response was sent on February 8, 2019;
- On February 26, 2019, another letter was received stating that the information received was inadequate to demonstrate eligibility for reauthorization and the same information for a three week period (**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**) was requested. The response was sent on March 5, 2019;
- We were unable to reach the assigned program specialist as she was out of the office so the appeal request was submitted;
- Following the withdrawal, the owner's assistant spoke with the program specialist about the decision and was told the information submitted was not sufficient or was inadequate to determine the firm's eligibility to be a SNAP retailer. The explanation for this was that the electronic reports generated by the firm's cash register (Z tapes) did not provide enough information to corroborate the sales information provided. The cash register is an old model that only prints general information including the daily sales total in cash, credit/debit, and EBT; and,
- The owner realizes that it's time to upgrade the POS system with a more up-to-date cash register that will generate the detailed reports needed to be in compliance with USDA requirements. For this reason, we requested an administrative review and that during the process the firm be allowed to continue accepting EBT.

Appellant submitted no evidence or other rationales in support of these contentions.

## **ANALYSIS AND FINDINGS**

With regards to Appellant's contentions listed above, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts and circumstances that existed at the time of the decision. It must also be made clear that the objective of this review is not to determine the firm's eligibility for SNAP participation. Rather it is solely to determine whether or not the firm failed to cooperate with the reauthorization process, which is the basis for the Retailer Operations Division's withdrawal determination.

The authorization of a store to participate in the SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived. SNAP regulations at 7

CFR § 278.1(b)(1)(iv) define restaurants as 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. Firms that are considered to be restaurants are ineligible for SNAP authorization as retail food stores. Accordingly, Criteria A and B are not applicable to these firms.

The Retailer Operations Division must determine if applicant firms meet the definition of a restaurant which entails determining the firm's sales breakdown by specific categories. This process requires the submission of sales records and other supporting documentation to substantiate actual sales by category. Although Appellant was responsive to the agency's requests for information related to the firm's sales, it was unable to provide specific and clear documentation required to substantiate the sales data provided. Such clarification is critical in determining the firm's eligibility for SNAP retailer authorization. The documentation provided by Appellant was not sufficient to enable the Retailer Operations Division to determine whether or not the firm is primarily a restaurant rather than a grocery establishment.

It should be restated here that the term "failed to cooperate" in this case simply denotes that the Appellant did not submit sufficient or clear enough information to enable to the Retailer Operations Division to make an eligibility determination. It does not imply that the firm was unwilling or reluctant to provide the required information.

## **CONCLUSION**

Based on a review of all of the evidence in this matter, the determination by the Retailer Operations Division to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained. Because evidence has not been provided that would definitively determine the Appellant's eligibility for continued SNAP participation, it is the determination of this review that the decision to withdraw the firm's authorization due to its failure to cooperate was appropriate and was made in accordance with SNAP regulations at 7 CFR § 278.1(n).

In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal action will become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted at any time. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

## **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, 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.

ROBERT T. DEEGAN  
ADMINISTRATIVE REVIEW OFFICER

June 24, 2019