

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

**Don's Deli and Catering,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0220161**

**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 denied the application of Don's Deli and Catering (hereinafter "Appellant") to participate as an authorized 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 denial.

**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 denied the retailer application of Don's Deli and Catering.

**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 July 23, 2019, the Retailer Operations Division denied the Appellant's application to participate as an authorized retailer in SNAP. This denial action was based on observations made during a store inspection which occurred on July 17, 2019, as well as information provided on the firm's application dated June 25, 2019. The Retailer Operations Division determined that the firm was primarily a restaurant because more than 50 percent of its gross sales were estimated to come from the sale of hot and/or cold prepared foods not intended for home preparation and consumption. As a result of being found ineligible for participation in

the program, the Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter postmarked August 2, 2019, the Appellant requested an administrative review of the Retailer Operations Division's decision. The request was granted.

### STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, 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(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)(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 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**

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\* 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>.

**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...will 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.]

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\* 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>.

## APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- No one has asked to receive a report of the firm's sales, so it is not clear to the Appellant how FNS has determined that more than 50 percent of the firm's gross retail sales are from heated foods and/or prepared foods.
- The firm has a full deli along with a grocery section including, milk, juice, crackers, vegetables, fruit, cereal, and toiletries.
- The SNAP application, which was submitted on June 25, 2019, was completed based on information received from FNS's help desk.
- The previous owners at the same location were authorized to accept SNAP even though it had less variety of qualified food products than what the current owners stock.
- The store's shelves are stocked with necessary product.

In support of its contentions, the Appellant submitted eight color photographs of the store's grocery inventory and deli. These photos were submitted on September 9, 2019.

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 presented, including any not specifically summarized or explicitly referenced herein.

## ANALYSIS AND FINDINGS

The purpose of this review is to either validate or invalidate the denial determination made by the Retailer Operations Division. This review is limited to consideration of the relevant facts as they existed at the time of the contractor's store visit and at the time the Retailer Operations Division rendered its decision.

After reviewing the Appellant's SNAP application as well as the contractor's store visit report and photographs, and after considering the contentions and evidence submitted by the Appellant, it is the determination of this review that the Appellant firm is primarily a restaurant and thus does not meet the definition of a retail food store for purposes of SNAP authorization.

The Appellant has argued that no one from FNS has asked to receive a report of the firm's sales, so it is not clear to the Appellant how the agency determined that more than 50 percent of the firm's gross retail sales are from heated foods and/or prepared foods.

When the Appellant applied for SNAP authorization on June 25, 2019, it estimated that it would have annual retail sales of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Of that amount, the Appellant estimated that just 3 percent would come from the sale of staple foods. According to the Appellant's application, 10 percent of the firm's sales would be from the sale of accessory foods, such as chips, candy, soft drinks, condiments, etc. The remaining 87 percent of sales would be from hot foods (60 percent) and cold prepared foods (27 percent) intended for immediate consumption or carryout, such as sandwiches, fresh salads, etc.

It is difficult for this review to comprehend why the Appellant does not understand how FNS made its determination that the firm was a restaurant when the Appellant itself estimated on its application that 87 percent of its sales were from hot and/or cold prepared foods. If the estimated sales percentages listed on the SNAP application had been questionable or unreasonable in comparison with the contractor's store visit report, then the Retailer Operations Division would have requested sales evidence to support the claims on the application. But the store visit report fully supports the firm's sales estimates. It should be noted that in its request for administrative review the Appellant did not offer any sales documentation or other evidence to prove that its original sales estimates were inaccurate.

SNAP regulations at 7 CFR § 271.2 and § 278.1(b)(1)(iv) are clear that any firm which has more than 50 percent of its total gross sales in hot and/or cold prepared foods is considered a restaurant and is not eligible for SNAP participation under Criterion A or B. On the day of the contractor's store visit, the firm did have a small inventory of staple food items in each of the four staple food categories, but it was evident that the primary emphasis at the store was its sale of prepared foods. Regardless of a firm's overall staple food inventory, if prepared foods constitute more than 50 percent of its total sales it is considered a restaurant and cannot be authorized for SNAP participation.

Based on the Appellant's own sales estimates, the firm is primarily a restaurant, and thus, is not eligible for SNAP participation. Neither the store visit report nor the Appellant's contentions and evidence persuade this review to conclude otherwise.

### **Prior Store Authorized**

The Appellant contends that the previous owners at the same location were authorized to accept SNAP even though the prior store had less variety of qualified food products than what the current owners stock.

Unfortunately, this contention has no relevance to this case. A store, under its current ownership and present circumstances, may only participate in SNAP if it meets eligibility requirements, which Don's Deli and Catering does not.

### **CONCLUSION**

Based on the analysis above, it is the determination of this review that the Appellant firm is primarily a restaurant. In accordance with 7 CFR § 278.1(b)(1)(iv), the firm is not eligible for SNAP participation under Criterion A or B. Additionally, the contentions and evidence presented by the Appellant are not sufficient to show that the denial decision should be reversed. Accordingly, the decision by the Retailer Operations Division to deny the application of Don's Deli and Catering to participate as a retailer in SNAP is sustained.

In accordance with 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 July 23, 2019, which is the effective date of the denial.

## **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  
Administrative Review Officer

September 25, 2019