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

El 7 Mares,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0212247

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 El 7 Mares (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 El 7 Mares.

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, El 7 Mares, was originally authorized to participate as a retailer in SNAP on December 18, 2003. 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 February 22, 2018, the firm submitted a reauthorization application, Form FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores.* On its application, the Appellant indicated that its total retail sales for tax 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), or 56.3 percent, was in the sale of hot foods and cold prepared foods.

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

On March 9, 2018, an on-site store visit was conducted by an FNS contractor in an effort to evaluate store conditions and inventory and to confirm the Appellant's sales estimates from its reauthorization application. After reviewing the store visit report and photographs, the Retailer Operations Division concluded that the firm was likely operating primarily as a restaurant. However, the agency decided that further evidence was necessary to definitively determine whether or not the firm met eligibility requirements.

In a letter dated June 20, 2018, the Retailer Operations Division requested verification of the firm's sales for the last three months as well as an accounting summary dividing sales into specific categories: hot or prepared foods, nonfoods, accessory foods, staple foods, and charges for food heating services. The Appellant was also asked to provide a copy of the firm's health permit, business licenses, and Federal business tax returns for the most recent filing year. The firm was given 10 days to provide the requested documentation.

The case record indicates that after two months the Appellant had not responded to the agency's request for information. Without additional information to counter the Appellant's own data, the Retailer Operations Division concluded that the firm was operating primarily a restaurant, and thus did not meet the definition and requirements of a retail food store for purposes of SNAP authorization.

In a letter dated August 15, 2018, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it did not meet the necessary criteria to be eligible for SNAP participation. 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 August 28, 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 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

[*] 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.

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:

- After receiving the agency's withdrawal letter, the Appellant called the Retailer Operations Division to explain that there had to be an error because the business is definitely not a restaurant, but is rather a retail food store. The Retailer Operations Division explained that the case file contained photos showing tables and chairs inside the store.
- Appellant believes that the inspector must have visited the incorrect location because the firm does not have any tables or chairs for customers. There are stainless steel tables in the work areas, but no eating tables.
- Being withdrawn from SNAP will negatively affect the business since it is located in a community that depends on its services.
- Appellant requests a review of the file and reconsideration of the decision.

In support of its contentions, the Appellant submitted six color photographs of the inside of the store, and one photo of the front of the business. These photos were submitted for comparison purposes with the photos taken by the agency contractor.

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 herein.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances 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 it is more likely true than not true that the firm's the firm's hot and/or cold prepared food sales exceed 50 percent of its gross retail sales, thus making the firm a restaurant rather than a grocery establishment.

It should be reiterated that 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 additional sales documentation to prove that its earlier claim was inaccurate; that is, that its hot and cold prepared food sales constituted 56 percent of its total sales. Any firm that has more than 50 percent of its total gross sales in the sale of hot and/or cold prepared foods is not eligible for SNAP authorization.

As to the photographs provided by the Appellant and the contention that the contractor must have visited the wrong store, these arguments do not provide a valid basis for this review to reverse the withdrawal determination.

When the contractor visited the store on March 9, 2018, she took photos from the same vantage points as the photos that were provided by the Appellant, proving that she was at the correct location. However, in her report, the contractor noted that there are three separate business on the property, including a full-service restaurant, a to-go food stand, and El 7 Mares. Between the food stand and El 7 Mares is a common outside dining area containing several tables and a few dozen chairs. According to the contractor, when customers purchase freshly prepared fish or salad from El 7 Mares, they are free to use the shaded dining area to consume their purchase. This information appears to have been excluded from the Appellant's photos; whether this was done intentionally or unintentionally is unknown.

Regardless of the presence of tables and chairs on the property, the primary issue in this case is whether or not the firm is a restaurant. This determination is based on sales percentages, not tables and chairs. The Appellant clearly reported on its reauthorization application that 56 percent of the firm's sales were in the sale of hot and cold prepared foods. Despite being given an opportunity to prove or disprove the accuracy of this claim, the Appellant has not offered any contrary evidence. As such, this review has little option but to conclude that the 56 percent claim is accurate, and thus determine that the firm is operating primarily as a restaurant in accordance with 7 CFR § 278.1(b)(1)(iv). Therefore, the firm is not eligible for participation under Criterion A or B of the SNAP regulations.

As to the Appellant's contention that a withdrawal from SNAP will negatively affect the firm as well as the community in which it is located, such an argument has no bearing on this case. A store may only remain authorized to accept SNAP benefits if it meets minimum program eligibility requirements.

CONCLUSION

Based on the analysis above, it is the determination of this review that the Appellant firm, El 7 Mares, 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 El 7 Mares 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 El 7 Mares 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
Administrative Review Officer

February 28, 2019