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

Figaro's,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0204151

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 Figaro's (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 Figaro's.

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, Figaro's, was originally authorized to participate as a retailer in SNAP on March 20, 2008. 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.

Effective October 16, 2017, SNAP regulations at 7 CFR § 278.1(b)(1)(iv) were amended to clarify the types of stores that are considered restaurants for purposes of determining eligibility. Prior to this regulatory change, FNS considered restaurants to be firms with more than 50 percent

of their gross sales from hot and/or cold prepared foods not intended for home preparation and consumption, including food items sold for carryout. This earlier regulation considered foods that were heated by the retailer **after** purchase to be staple foods for purposes of SNAP eligibility and thus did not count toward the 50 percent threshold.

The new rule changed the wording of the regulation to state that any foods cooked or heated on-site by the retailer before **or after** purchase must be counted toward the 50 percent threshold.

Figaro's, a pizzeria selling both hot foods and take-and-bake items, was identified by the Retailer Operations Division as a firm that could be affected by this change in regulation. On September 24, 2017, an on-site store visit was conducted by an FNS contractor in an effort to evaluate store conditions and inventory. After reviewing the store visit report, the Retailer Operations Division concluded that further evidence was necessary to determine whether or not the firm would meet eligibility criteria under the new rule.

On October 18, 2017, the Retailer Operations Division sent the firm a letter requesting verification of the firm's sales for the last three months, including a breakdown of hot foods, nonfoods, accessory foods, staple foods, and heating fees.

The Appellant was also provided with a reauthorization application, Form FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*.

In response to this request the Appellant submitted the following documentation:

- Accounting documents from July to September 2017 showing the total number of items sold (by item), gross sales (by item), and baking charges; and
- Seven pages of spreadsheets showing a variety of sales data from July to September 2017, from gross sales to net sales to transaction type (e.g. credit card, cash, EBT) to delivery sales, etc.;

In all, the firm's documentation shows gross retail sales for the three month period 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Total sales for hot food, including delivery fees and heating charges, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), or 59.1 percent of the firm's gross sales.

On the firm's reauthorization application, the Appellant owner stated the following: "I feel if given the ability to continue in the SNAP program under the new regulation…that my current SNAP customers would still buy my products take-n-bake, therefore keeping me in the program. But to remove me from the program, losing 25% of my take-n-bake business gives me no chance at obtaining 50% take-n-bake sales. I'm only 9.1% away! And I was forced to give the last 3 months, which were summer months that are always less take-n-bake sales."

After reviewing the store visit report and photographs as well as the Appellant's reauthorization application and sales evidence, the Retailer Operations Division determined that the firm was 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 November 1, 2017, 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 November 8, 2017, 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. It should be noted that the Appellant sent additional correspondence to the administrative review officer in a letter postmarked December 13, 2017.

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.

At the time of the withdrawal decision, 7 CFR § 271.2 defined 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, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including 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... [Emphasis added.][1]

At the time of the withdrawal decision, 7 CFR § 271.2 defined *staple food*, in part, as:
...food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products.... Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm.[2]

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)[3]; 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.]

[1] This definition, particularly in relation to Criterion A, was amended in regulation effective January 17, 2018.
[2] This definition, particularly in relation to accessory food items, was amended in regulation effective January 17, 2018.
[3] Eligibility for Criterion A was amended in regulation effective January 17, 2018.

APPELLANT'S CONTENTIONS

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

- Appellant is very close to qualifying as a retail food outlet under the new rules while using its sales mix from under the old rule.
- The firm is at 41 percent staple foods under the new guidelines. However, a large part of the sales are baking charges, which unfavorably skew the percentages.
- Appellant will stop charging a baking fee. With this change, Appellant believes it has a very good chance of qualifying as a retail food outlet.
- Appellant needs time to gather new data, but needs its current SNAP customers to continue shopping at the store. This is because they are a huge percentage of the take-and-bake sales.
- Appellant is asking for a fair shake, and to be allowed to continue accepting SNAP for unbaked items only.
- Appellant will also end the after-purchase baking charge for SNAP customers, which will improve the percentage of eligible staple items.
- If FNS will allow the Appellant to move forward for three to six months, it will go through the application process again to determine if the new sales mix allows the store to qualify as a retail food outlet under the new rules. If not, Appellant will voluntarily remove itself from the program.
- On December 13, 2017, the Appellant provided additional information and evidence. This evidence shows that progress has been made to comply with the new rule.
- It took the Appellant time to reconstruct its point-of-sale menu to reflect the change in the regulation. Under the old rule, the Appellant was able to count as staple foods the products that were baked after the point of sale. Beginning on December 1, 2017, it launched a new menu based on the new rules and is no longer adding a separate baking fee or allowing someone to pay with SNAP if the food is cooked on-site.
- After just 12 days of this new program, the firm is within 2 percentage points of falling into compliance with the new guidelines. As more SNAP customers visit the store for take-and-bake products, the percentage of hot food sales is sure to fall even further.
- After being on the program for 28+ years in full compliance, the firm relies on loyal SNAP customers and they rely on the firm to provide them with a nutritious alternative to the frozen supermarket offerings.
- Appellant is working very hard to continue its relationship with USDA and SNAP.
- Appellant asks for additional time to collect new data while still servicing SNAP recipients, as they are a huge portion of the take-and-bake business.

In support of these contentions, Appellant provided a new accounting document showing that from December 1, 2017 to December 13, 2017, the firm's hot food sales were 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which constitutes 52 percent of its gross sales.

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. It is not the authority of this review to consider subsequent remedial actions that may have been taken or will take place so that a store may begin to comply with program requirements. There are no provisions in the SNAP regulations for a reversal of a withdrawal decision on the basis of alleged or planned corrective actions implemented subsequent to the finding of a firm's ineligibility.

Based on the evidence provided by the Appellant (detailed on page 2 of this document), the firm's hot/prepared food sales clearly exceeded 50 percent of its gross retail sales at the time the withdrawal determination was made. Even the most current information, dated December 13, 2017, still shows that more than 50 percent of the firm's sales come from the sale of hot and/or cold prepared foods. In accordance with 7 CFR 278.1(b)(1)(iv), the Appellant firm is considered to be a restaurant. As such, it is not eligible for participation under Criterion A or B of the SNAP regulations.

The firm's remaining contentions, including the claim that the firm relies on its SNAP customers and the SNAP customers rely on the firm, have no relevance to this case, as the firm may only participate in SNAP if it meet basic eligibility criteria as outlined in 7 CFR § 278.1(b)(1).

As to the Appellant's request that it be given additional time to collect new data while remaining SNAP authorized, such a request cannot be granted. Regulation at 7 CFR 278.1(b)(1)(iv) is clear that a firm "shall not qualify" for SNAP participation if it does not meet eligibility criteria. There are no provisions in the regulations that would permit a firm to be provisionally authorized until it meets the required eligibility criteria.

CONCLUSION

The contentions and evidence presented by the Appellant are not sufficient to prove that the withdrawal decision made by the Retailer Operations Division was inaccurate or that it should be reversed. In fact, the opposite is true. The evidence clearly indicates that Figaro's is primarily a restaurant and as such, is not eligible for SNAP participation under Criterion A or B.

On the basis of the analysis above, the decision by the Retailer Operations Division to withdraw the authorization of Figaro's to participate as a retailer in SNAP 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 Figaro's shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted 10 days prior to the expiration of the six-month withdrawal period.

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 May 18, 2018
Administrative Review Officer