

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

Fing Town 1,

Appellant,

v.

Case Number: C0204793

Retailer Operations Division,

Respondent.

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 Fing Town 1 (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 21, 2017.

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 21, 2017, 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 September 6, 2017, as well as information provided on the firm’s retailer application.

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 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. 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 dated December 4, 2017, 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2018 and Section 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k)(2) establishes the authority upon which the authorization of any firm to participate in SNAP may be denied if it fails to meet established eligibility requirements.

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, on a continuous basis, as 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 and 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 stock keeping 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 hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption, and

require no additional preparation, are not eligible for FSP [SNAP] participation as retail food stores under § 278.1(b)(1) of this chapter.” *[Emphasis Added]*

7 CFR § 271.2 defines staple food, in part, as “those 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.”

7 CFR § 278.1(b)(1)(i) relays specific program requirements for retail food store participation, which reads, in part, “An establishment . . . shall . . . effectuate the purposes of the program if it . . . 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) relays specific eligibility requirements for retail food store participation, which reads, in part, “Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the Food Stamp Program shall not be eligible for program participation... Ineligible firms under this paragraph include, but are not limited to, store 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 retail sales in hot and/or cold prepared foods not intended for home preparation and consumption, 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...” *[Emphasis Added]*

7 CFR § 278.1(k) reads, in 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 . . . for a minimum period of six months from the effective date of the denial.”

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. Our primary business activity is in the sale of food stuffs including bread, grains, dairy, canned foods, vegetables, fruit, meat, and seafood. The main source of sales is from the uncooked seafood.
2. The sale of grocery stuff and uncooked seafood total about 60 percent of our sales, the sale of hot or cold prepared foods account for a total of 30 percent of our sales; and the sale of snacks, chips, soft drinks, and other miscellaneous items account for a total of 10 percent of our sales.

Appellant provided a typed inventory list of grocery items, readily prepared items and miscellaneous items. Appellant also provided copies of eight color photographs showing the firm's stock.

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 contentions, the record reflects that Appellant presents itself to the public as a takeout establishment which reflects that it sells hot foods. Although Appellant appears to sell fresh uncooked seafood, documentation provided establishes that more than 50 percent of its gross retail sales were in hot prepared foods with an associated cooking fee. Additionally, store visit photographs show that the firm has posted menus that advertise Gizzard Combos, House Specials, Family Specials, Daily specials, side items. There were limited amounts of fresh fish displayed and advertised however; a sign with price per pound also states "food ingredient is refrigerated or frozen. Cooked food may applied certain amount of cook fee (SIC)." Appellant's firm also had chairs for customer's use while waiting on food orders. Store visit report also indicates that firm is deficient in the dairy products category.

Appellant contends that staple foods account for 60 percent of its total gross retail sales, hot/cold prepared foods account for 30 percent of its total gross retail sales, and miscellaneous food account for 10 percent of its gross retail sales however, Appellant's SNAP application indicates that 90 percent were in staple foods, 3 percent were in other foods and 7 percent were in non-foods and hot foods. As previously stated, documentation provided by Appellant establishes that more than 50 percent of its gross retail sales were in hot prepared foods.

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 Fing Town 1 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 21, 2017.

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

March 20, 2018