

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

Gaetano’s Market and Deli,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0246328

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to sustain the Retailer Operations Division’s (Retailer Operations) decision to deny the application of Gaetano’s Market and Deli (Appellant), to participate in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 271.2 and 7 CFR § 278.1(b)(1), in its administration of the SNAP when it denied the application of Appellant to participate in the SNAP as an authorized retailer.

AUTHORITY

7 USC § 2023 and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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 FNS received a SNAP application from Appellant to be authorized as a retail food store. By letter dated April 29, 2021, Retailer Operations informed the owners that the application of Appellant to participate as a SNAP authorized retailer was denied. The determination was based on information provided on the authorization application, and the visit to the firm on March 19, 2021. Retailer Operations determined that Appellant did not meet the eligibility requirements as set forth in Sections 278.1(b)(1) and 271.2 of the SNAP regulations. In accordance with Section

278.1(k)(2) of the regulations, Appellant was also informed that the firm could not submit a new application to participate in the SNAP for a period of six months from the effective date of the denial, and if the business model remains the same, a new application may be denied for the same reasons as the initial denial. By letter dated May 5, 2021, one owner requested review of the determination. The request for review was acknowledged by letter dated May 18, 2021.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Section 278.1(b)(1) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 states that Retail Food Store means: “An establishment 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 seven 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 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 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 carry-out are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.” As currently implemented, the regulations require establishments offer for sale 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 on any given day of operation.

7 CFR § 271.2 states: “Staple food, means those 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. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (i.e., nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. 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.

7 CFR § 271.2 states: “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: “(A) An establishment shall normally be considered to have food business of a nature and extent that 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 as defined in § 271.2 of this chapter, including perishable foods in at least three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).”

7 CFR § 278.1(b)(1)(ii) provides that for a retail store to qualify for authorization under Criterion A, a firm shall: “(A) Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, no fewer than seven 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 and at least one variety of perishable foods in at least three staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement.” 7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis as offering for sale 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 on any given day of operation.

7 CFR § 278.1(b)(1)(ii) states: “(B) Offer for sale perishable staple food items in at least three staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks.”

7 CFR § 278.1(b)(1)(ii) requires that stores: (C) Offer a variety of staple foods which means different types of foods within each staple food category such as apples, cabbage, tomatoes, and squash in the fruit or vegetable staple food category, or milk, cheese, butter and yogurt in the dairy category. Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes. Similar processed food items with varying ingredients such as, but not limited to, sausages, breakfast cereals, milk, sliced breads, and cheeses, and similar unprocessed food items, such as, but not limited to different varieties of apples, cabbage, tomatoes, or squash shall not each be considered as more than one staple food variety for the purpose of determining variety. Multiple ingredient food items such as cold pizza, macaroni and cheese, soup, or frozen dinners, shall only be counted as one staple food variety each and will normally be included in the staple food category of the main ingredient as determined by the FNS.

7 CFR § 278.1(b)(1)(iii) provides that for firms to qualify for authorization under Criterion B: “Firms must have more than 50 percent of their total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees, and entertainment/sports/games income. However, a fee directly connected to the processing of staple foods, such as raw meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B.”

7 CFR § 278.1 (b)(1)(iv) states: “Ineligible firms: Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization and authorized firms will be withdrawn from program participation. 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 or 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. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.”

7 CFR § 278.1(k)(2) states: “FNS shall deny the application of any firm if it determines that 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 § 278.1(k) states: “FNS shall deny the application of any firm if it determines that (1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section.”

APPELLANT’S CONTENTIONS

All contentions as presented, and submissions have been considered, even those that may not be listed herein.

- I believe I know the reason that we were classified as a restaurant when we are not. We are licensed in Oregon under the Department of Agriculture as a retail store and meat seller. We do not fall under the County Health Department here because less than 51% of our sales are for ready to eat food.
- I believe I mistakenly categorized our pastas, lasagnas, and sauces as “prepared foods,” thinking they would fall under that category because we make them. However, we sell them packaged and the customer has to take them home and cook them.
- Our pasta is raw and our sauces and lasagna require the customer to heat or cook them at home. These are not ready to eat foods. The only foods we sell that are ready to eat are sandwiches and deli salads.
- I have recreated our summary document for the week of April 11-17 to reflect these changes. The sandwiches and deli salads constitute 34.7% of our sales in this week, which is typical. I have also created a summary for the week of April 18-24, which shows our ready to eat foods comprising 25.9% of our sales.

ANALYSIS AND FINDINGS

The purpose of this review is to validate or to invalidate the determination by Retailer Operations. As such, it is limited to consideration of the relevant facts at the time the determination was made. 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. The firm was denied because it was determined the business 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. This decision was based on information on the application submitted by the owner(s), and analysis of additional information submitted to Retailer Operations and in the record. In accordance with the regulations, 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 or 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. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

By letter dated March 25, 2021, Retailer Operations requested verification of actual retail sales for one representative week (actual sales receipts), and an overview document (e.g., an Excel

spreadsheet) which totals actual retail sales for one representative week, and breaks these actual retail sales down into the following categories: 1) Staple Foods, 2) Accessory Foods, 3) Hot Prepared and Heated Foods, 4) Cold Foods Prepared on Site, 5) Charges for Food Heating Services, and 6) Nonfood Items. If a food is both an Accessory Food and a Hot Prepared/Heated Food or both an Accessory Food and a Cold Food Prepared on Site, please count it in the “Hot Prepared and Heated Foods” or “Cold Foods Prepared on Site” categories respectively, and do not count it in the “Accessory Foods” category.

Retailer Operations’ review of the firm visit photos, the sales spreadsheet, and sales overview report determined that the establishment did not meet the definition of a retail food store. On review the responding owner submitted new information for two different one week periods in April 2021. However, no additional documentation such as Z tapes, cash register receipts, etc., were provided to support the restated actual gross sales. As noted, this review is only to assess if the determination made by Retailer Operations was correct or not. Appellant’s supporting sales overview document supports that Appellant’s staple foods comprised just 24% of its total sales, and cold prepared foods were stated to represent 60.7% of its total sales. Accessory foods are not considered staple foods for purposes of determining the eligibility of any firm.

The preponderance of the evidence supports that at the time that Appellant was denied, Appellant did not meet the criteria to participate in SNAP as an authorized retail food store. 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 or 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. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

CONCLUSION

After review of all the documentation in the record, the decision by Retailer Operations to deny the application of Appellant to participate in the SNAP as a retail food store is sustained. The preponderance of the evidence supports that Retailer Operations properly determined that the firm does 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. Therefore, Appellant is ineligible to participate in SNAP as an authorized retailer. The effective date of this decision is thirty (30) days after receipt by Appellant.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 USC § 2023) and to the Regulations at 7 CFR § 279.7 with respect to applicable rights to 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 the

Appellant's owners 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, 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

June 11, 2021