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

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| **K & S Delicatessen LLC,** | |
| **Appellant,** | |
| **v.** | **Case Number: C0220181** |
| **Retailer Operations Division,** | |
| **Respondent.** | |

## FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division (Retailer Operations) to deny the application of K & S Delicatessen LLC. (Appellant) to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for six months from the effective date of the denial decision.

## ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it denied the application of Appellant to participate in SNAP as an authorized retail food store.

## AUTHORITY

7 U.S.C. § 2023, and its 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 Agency's record shows that FNS received a SNAP application from Appellant to be authorized as a retailer. By letter dated August 1, 2019, 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 information obtained from a visit to the firm on July 30, 2019.

Retailer Operations found that the Appellant did not meet the eligibility requirements as set forth in § 278.1(b)(1) and § 271.2 of the SNAP regulations. In accordance with § 278.1(k)(2) of the regulations, the owners were 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 August 8, 2019, the Appellant requested an administrative review of the determination. The request for administrative review was acknowledged and granted by letter dated August 22, 2019.

## STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the 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 USC § 2018), and 7 CFR Part 278. In particular, 7 CFR § 278.1(b)(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) reads, in relevant part:

> 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 ….

7 CFR § 278.1(b)(1)(iv) states, in part:

> **Ineligible firms.** Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of SNAP shall not be eligible for program participation … **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 …. [Emphasis added.]

7 CFR § 271.2, states, in part:

> 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. [Emphasis added.]

7 CFR § 278.1(k)(2) reads, in relevant part:

> ...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.

**Regulatory Change**

Foods heated after sale were at one time considered to be SNAP eligible. However, due to a recent change in Federal regulations, foods heated after sale are now considered to be SNAP ineligible in the same manner as foods sold hot at the point of sale. On December 15, 2016, FNS published a final rule entitled "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)" at 81 Federal Register 90675. This final rule added the language to existing regulations clarifying that foods heated or cooked after sale would be considered in determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

## APPELLANT'S CONTENTIONS

The following represents a summary of the Appellant's contentions in this matter; however, in reaching a decision, full consideration was given to all contentions presented, including any not specifically summarized or explicitly referenced in this document:

- Site inspector believed my firm is primarily a restaurant. In my application I mention only 15% for hot coffee and hot sandwiches.
- If my store does more than 50 percent of gross sales from hot prepared food, then I should carry a hot plate, grill, and fryer, which I don't. I carry only a small personal kind of frypan. I started hot sandwiches to be in competition with the store across the street that does this, and also carries an EBT Retailer License.
- I removed the coffee table and hot sandwiches sign from my store. Seven store photos are provided as proof.

- I was a USDA SNAP retailer in the past. A memo from 2012, regarding Hurricane Sandy, is provided as proof.

## ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the determination by Retailer Operations. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the store visit and at the time Retailer Operations rendered its decision. The responding owner submitted seven store photos in support of its case. These photos do not provide an accurate depiction of the store at the time of the store visit and therefore cannot be considered.

The responding owner contends that the store was authorized in the past. That the store was authorized in the past is not in question. The central issue of this case is whether Appellant is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). In reaching its decision to deny the firm's application, Retailer Operations relied upon the firm's application and the store visit report. A review of the entire case record indicates by a preponderance of the evidence that Retailer Operations properly determined that Appellant does not qualify for SNAP as it is primarily a SNAP ineligible restaurant.

### Sales Figures in Application

The Appellant's application dated May 19, 2019, self-reported actual staple food sales at 20 percent of its annual gross retail sales with accessory food sales at 5 percent, nonfood sales at 10 percent, hot foods at 15 percent, and cold foods prepared on site at 50 percent. There is nothing in the case record which would indicate that the percentage of hot foods and cold prepared foods on site is inaccurate. Based on the face of the application, the firm would be considered a SNAP ineligible restaurant as defined at 7 CFR § 271.2 and 7 CFR § 278.1(b)(1)(iv).

### Store Visit Report

The case record documents that in reaching a denial decision, Retailer Operations also considered information obtained during a July 30, 2019, store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock and facilities.

Through the store visit report and photographs, Retailer Operations determined that the firm, more likely than not, has the majority of its gross retail sales in hot, heated and cold prepared food, not intended for home preparation and consumption. This is consistent with the sales figures that the Appellant reported in its application.

Although the firm sells some staple food and accessory food items, the store visit report and photographs further support that the firm is primarily a SNAP ineligible restaurant as that term is defined by regulations.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, in part "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. [Emphasis added.]

**Summary**

A preponderance of the evidence supports Retailer Operations' determination that the Appellant likely has more than 50 percent of its total gross retail sales in heated, hot, and cold prepared food not intended for home preparation and consumption. The SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, that "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." By definition these types of firms are considered restaurants and are ineligible for SNAP authorization.

## CONCLUSION

Based on the analysis above, the decision by Retailer Operations to deny the SNAP application of Appellant is sustained. The regulations clearly state the criteria that a firm must meet in order to be authorized for the SNAP. There are no exceptions to these requirements. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization until six months from August 1, 2019, which is the effective date of the denial. The six month waiting period has now passed, which means the Appellant is able to submit a new application at any time. However, please note that if the business model remains the same and you reapply, your application may be denied again for the same reasons.

## RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and 7 CFR § 279.7 addresses 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 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 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.

KIM DAMERON
Administrative Review Officer

March 17, 2020