

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

Katya's Bakery Inc,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0230875

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to withdraw the authorization of Katya's Bakery Inc (hereinafter Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Appellant to participate as a SNAP retail store.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, "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 record shows that Appellant applied for reauthorization as a SNAP retailer store on November 1, 2019. On December 10, 2019, the Appellant firm was visited by an FNS contractor in an effort to determine whether or not the firm met eligibility requirements to be reauthorized in SNAP. During this visit, the contractor took photographs of the store and its inventory, spoke with store personnel, and completed a written report detailing its observations.

A review by the Office of Retailer Operations and Compliance found that Appellant's application and the store visit report and photographs indicated that the firm appears to operate primarily as a restaurant in that a majority of total gross retail sales are hot food (heated by the

firm before or after purchase) and/or cold prepared foods. Firms that have more than 50 percent of their total gross sales in heated foods and/or prepared foods are not eligible to participate in the SNAP as retail food stores. In order to verify the eligibility of the firm as a retail food store, the Office of Retailer Operations and Compliance began the up to three step process of requesting information and supporting documentation needed to quantify the firm's sales breakdown by specific categories (i.e. staple foods, accessory foods, hot prepared and heated foods, cold foods prepared onsite, charges for food heating services, and nonfood items).

Information needed for step one of this process was requested in a letter dated December 17, 2019. Appellant's response was received on December 23, 2019, but was not sufficient to permit an eligibility decision to be made. Accordingly, a step two request for information dated December 30, 2019, was sent to the firm requesting a week's worth of actual sales receipts and a breakdown by the same specific categories as specified in the step one request. Both the step one and step two letters included a caution that failure to respond could result in the withdrawal of the firm's SNAP retailer authorization.

No response was received from Appellant so the firm's SNAP retailer authorization was withdrawn by letter dated May 13, 2020, for failure to cooperate in the reauthorization process. The letter further explained that the term "failure to cooperate" may include "non-response to a request for information, failure to submit information timely, or submission of unclear or incomplete information in response to a request". In this case, Appellant was informed that it had failed to submit the requested information. The letter also stated the withdrawal determination was based on SNAP regulations found at 7 CFR § 278.1(n) and that a new SNAP retailer application could be submitted at any time.

By letter dated May 19, 2020, Appellant appealed the Office of Retailer Operations and Compliance's decision and requested an administrative review of this determination. The appeal was granted and implementation of the withdrawal held in abeyance pending completion of this review. No subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means 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 § 278 of Title 7 of the Code of Federal Regulations (CFR). Parts 278.1(b)(1)(i)(B), 278.1(m), and 278.1(n) establish the authority upon which the authorization of any firm to participate in SNAP may be withdrawn if it fails to cooperate in the reauthorization process.

7 CFR 278.1(b)(1)(i)(B) reads: A retail food store must meet eligibility determination factors which may be based on, but not limited to, visual inspection, sales records, purchase records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry. In determining eligibility, such information may be requested for verification purposes, and failure to provide such documentation may result in denial or withdrawal from the program.

7 CFR § 278.1(b)(1)(iv) reads: 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.

7 CFR § 278.1(m) reads: Refusal to accept correspondence or to respond to inquiries. FNS may withdraw or deny the authorization of any firm which: (2) Fails to respond to inquiries from FNS within a reasonable time.

7 CFR § 278.1(n) reads: Periodic reauthorization. At the request of FNS a retail food store or wholesale food concern will be required to undergo a periodic reauthorization determination by updating any or all of the information on the firm's application form. Failure to cooperate in the reauthorization process will result in withdrawal of the firm's approval to participate in the program.

APPELLANT'S CONTENTIONS

The following may represent a 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:

- The firm replied to both letters about reauthorizing the store with the needed information. Looking back, it appears the second letter sent by the firm was sent to the wrong address which is why FNS did not receive the information; and,
- A second evaluation on the firm is requested.

Appellant submitted no evidence or other rationales in support of these contentions.

ANALYSIS AND FINDINGS

With regards to Appellant's contentions listed above, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of the Office of Retailer Operations and Compliance, and as such it is limited to consideration of the relevant facts and circumstances that existed at the time of the decision. It must also be made clear that the objective of this review is not to determine the firm's eligibility for SNAP participation.

Rather it is solely to determine whether or not the firm failed to cooperate with the reauthorization process, which is the basis for the Office of Retailer Operations and Compliance's withdrawal determination.

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. SNAP regulations at 7 CFR § 278.1(b)(1)(iv) define restaurants as 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. Firms that are considered to be restaurants are ineligible for SNAP authorization as retail food stores. Accordingly, Criteria A and B are not applicable to these firms.

The Office of Retailer Operations and Compliance must determine if applicant firms meet the definition of a restaurant which entails determining the firm's sales breakdown by specific categories. This process requires the submission of sales records and other supporting documentation to substantiate actual sales by category. As previously stated in this decision, Appellant failed to respond to a written request dated December 30, 2019, by the Office of Retailer Operations and Compliance for this information and consequently the Appellant firm's SNAP retailer authorization was withdrawn. Appellant's request for administrative review dated May 19, 2020, states that the firm mailed its response to the step two request to the wrong address which is why FNS did not receive the information. Accordingly, this confirms that Appellant provided no response to FNS to the step two request and therefore there is no basis for reversal or modification of the withdrawal decision.

CONCLUSION

Based on a review of all of the evidence in this matter, the determination by the Office of Retailer Operations and Compliance to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained. Because evidence has not been provided that would definitively determine the Appellant's eligibility for continued SNAP participation, it is the determination of this review that the decision to withdraw the firm's authorization due to its failure to cooperate was appropriate and was made in accordance with SNAP regulations at 7 CFR § 278.1(n).

In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal action will become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted at any time. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record

of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

July 20, 2020