

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

Lee Brothers Inc,

Appellant,

v.

Case Number: C0216933

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 to withdraw the authorization of Lee Brothers Inc. to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for six (6) months from the effective date of the withdrawal. However, if your business model remains the same and you reapply, your application may be denied for the same reasons it was withdrawn this time.

ISSUE

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

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

As part of a routine reauthorization process, the Appellant submitted an online reauthorization form FNS-252-R, entitled “Supplemental Nutrition Assistance Program Reauthorization Application for Stores” on October 28, 2018. The Appellant provided its 2017 actual sales

figures which documented that 82 percent of its gross retail sales were in hot and cold prepared food items not intended for home preparation and consumption.

In a letter dated March 15, 2019, the Retailer Operations Division informed the Appellant that the firm was a SNAP ineligible restaurant because more than 50 percent of its total gross retail sales are from heated foods and/or prepared foods. Therefore, the firm's authorization was withdrawn. The letter also informed the Appellant that it could not submit a new application to participate in SNAP for a period of six (6) months from the effective date of the withdrawal as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter postmarked March 27, 2019, the Appellant requested an administrative review of the Retailer Operation Division's withdrawal of its SNAP authorization. The request for review was granted and implementation of the withdrawal was held in abeyance pending completion of this review.

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, might 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(k) provides the authority upon which FNS shall withdraw 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 withdraw the authorization 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 authorization for authorization in the program for a minimum period of six months from the effective date of the denial.

Regulatory Change

Due to a recent change in Federal regulations, foods heated after sale are now treated the same as prepared hot and cold food not intended for home preparation and consumption in determining whether a store is a restaurant under 7 CFR § 278.1(b)(1)(iv). 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 Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The store is not a restaurant. It is a deli and grocery.
- The store has restocked and increased the number of grocery items to remain eligible for the SNAP and requests another inspection.
- The store and the local SNAP community would suffer a hardship if Lee Brothers Inc. is withdrawn from the SNAP.

The preceding may represent only a brief summary of the 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

The central issue in this case is whether Lee Brothers Inc. is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). In reaching its decision to withdraw the firm's authorization, the Retailer Operations Division reviewed the firm's reauthorization application and the store visit report and photographs. A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that Lee Brothers Inc. does not qualify for the SNAP as it is primarily a restaurant.

Sales Figures indicate Firm is a Restaurant

The Appellant provided 2017 actual sales data in its reauthorization application. The Appellant's sales data indicated that 82 percent of the firm's gross retail sales were in hot and cold prepared food items not intended for home preparation and consumption. Because the hot and cold prepared food sales exceeded 50 percent, the Retailer Operations Division properly determined that the firm is a restaurant as defined by SNAP regulations at 7 CFR § 271.2 and 7 CFR § 278.1(b)(1)(iv).

Store Visit Report

The case record documents that in reaching a withdrawal decision, the Retailer Operations Division also considered information obtained during a February 22, 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, the Retailer Operations Division determined that the firm likely has the majority of its gross retail sales in hot and cold prepared food not intended for home preparation and consumption and is therefore a SNAP ineligible restaurant.

- The store photos document that Lee Brothers Inc. sells a large menu of prepared food items for carryout as well as a limited amount of inexpensive staple and accessory food items and a small amount of non-food items.
- The firm has a large commercial kitchen, food preparation and food storage area. The kitchen included a grill, fryer, oven and microwave, storage coolers and storage freezers. The store visit contractor confirmed that the staple food stock stored in the coolers and freezers was used in the kitchen for the prepared food items.
- There are large menus posted on the wall adjacent to the checkout area and kitchen that advertises breakfast, hoagies, cheese steaks, sandwiches, burgers, buffalo wings, onion rings, chicken fingers, chicken nuggets, French fries, cheese fries and individual cups of coffee and tea in small, medium and large.
- An exterior portable sign displays the words "OPEN LEEBROTHER'S BREAKFAST & LUNCH."

The Retailer Operations Division determined that the store visit report and photographs support the information provided in the firm's reauthorization application that the large majority of the firm's gross retail sales are in hot and cold prepared food items.

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.] A preponderance of the evidence supports the determination made by the Retailer Operations Division that the Appellant firm is an ineligible restaurant as defined under SNAP regulations.

Hardship to Business and the Community

The Appellant contends that a six-month withdrawal from the SNAP will create a hardship for the business and the local community as they both rely upon the SNAP. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is withdrawn from participation in the SNAP. However, there is no provision in the SNAP regulations that would allow an ineligible restaurant to be reauthorized for the SNAP on the basis of possible economic hardship to either the firm or local community. To allow an ineligible restaurant to be reauthorized for the SNAP based on a purported hardship would render virtually meaningless the eligibility provisions of the Food and Nutrition Act of 2008.

Basis of Determination

The Appellant states that it has restocked its store with additional grocery items and requests another inspection. It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time of the store visit which forms the basis of the Retailer Operations Division's decision. The Appellant may reapply six (6) months from the effective date of the withdrawal and any new business model or sales figures will be taken into consideration at that time.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP authorization of Lee Brothers Inc. is sustained. The regulations clearly state the criteria that a store 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 (6) months after the effective date of the withdrawal decision. However, if the business model remains the same and you reapply, your application may be denied for the same reasons it was withdrawn this time.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (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 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, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

May 16, 2019