

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Mirandas Subs And Bakery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0204743

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support a finding that the initial decision by the Food and Nutrition Service Retailer Operations Division, to deny the FNS-252E *Supplemental Nutrition Assistance Program Application for Stores* (hereinafter “Application”) of Mirandas Subs And Bakery (hereinafter, “Appellant” and/or “Mirandas Subs And Bakery”) to participate in the Supplemental Nutrition Assistance Program (SNAP) as an authorized retailer was properly imposed.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2 and 7 CFR § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Mirandas Subs And Bakery to participate in the SNAP via letter dated November 17, 2017 because it was determined that Mirandas Subs And Bakery did not meet the definition and requirements of a retail food store, finding instead that Appellant operates as primarily a restaurant.

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 17, 2017, the Retailer Operations Division informed Appellant that the application of Mirandas Subs And Bakery to participate as an authorized retailer in SNAP was being denied because it did not meet the definition of a retail food store as enunciated in the Federal regulations at 7 CFR § 271.2 and CFR § 278.1(b)(1). This determination was made as a result of a review of the application documented to have been initially received by FNS on August 17, 2017, and a store visit conducted by FNS contracted personnel on October 18, 2017. Via letter postmarked November 27, 2017 and received in the office of the Chief of the Administrative Review Branch on December 5, 2017, Appellant requested an administrative review of the action to deny authorization to participate as a SNAP Retailer. 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 AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)¹, 7 USC 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR).² Part § 278.1(k)(2) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet the definition of an eligible firm.

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, a 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, 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 stock-keeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set for 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 SNAP participation as retail food stores under § 278.1(b)(1) of this chapter.”

¹ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment enacted February 7, 2014 through P. L. 113-79.

² Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

7 CFR § 271.2 defines *Staple food* 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... Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm... 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.”

7 CFR § 278.1(b)(1)(iv) defines Ineligible firms as “Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the Food Stamp Program [SNAP] shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from program participation. Ineligible firms under this paragraph include, but are not limited to... **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**... This includes firms that primarily sell prepared foods that are consumed on the premises **or sold for carryout**. Such firms may qualify, however, under the special restaurant programs that serve the elderly, disabled and homeless populations, as set forth in paragraph (d) of this section. [Emphasis Added]

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 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 ... 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).” [Emphasis Added]

7 CFR § 278.1(b)(1)(ii) states in relevant part, that in order for a retail store to qualify for authorization under Criterion A, firms 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 three different varieties of food items in each of the four staple food categories. (B) Offer for sale perishable staple food items in at least two 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; and (C) Offer a variety of staple foods which means different types of foods, 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.”

7 CFR § 278.1(b)(1)(iii) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion B, it must “... have more than 50 percent of ... 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 ...”

7 CFR § 278.1 (k) reads, in 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 (k)(2), reads, in relevant part: “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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section.”

7 CFR § 278.1 (k)(5) reads, in part, “FNS shall deny the application of any firm if it determines that: The firm’s participation in the program will not further the purposes of the program.”

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, “A retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store or concern does not meet criteria for approval...may not, for at least 6 months, submit a new application to participate in the program.”

APPELLANT’S CONTENTIONS

In the request for administrative review Appellant indicates that internal business reports show that 52 percent of Appellant’s sales derive from the bakery and cold items. An error in initial state tax reporting led to a misunderstanding, and improper calculations, for the newly formed business.

In materials postmarked December 12, 2017 Appellant provided a summary report detailing sales for September, October and November 2017 with a breakdown of bakery items, cold items (including made-to-order sub sandwiches) and hot items. The material was appended with itemized cash register receipts.

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

The record reflects that Retailer Operations Division considered the nature and scope of Mirandas Subs And Bakery to determine whether it qualifies as a retail food store as per Sections §§ 278.1 (b)(1) and 271.2 of the SNAP regulations. Retailer Operations Division denied Appellant for SNAP authorization because the business does not meet the definition of a retail food store.

In the letter of determination dated November 17, 2017 Retailer Operations Division indicated that Mirandas Subs And Bakery was determined to be operating as “primarily a restaurant”.

The administrative record indicates that the Retailer Operations Division based their decision on consideration of: the information made available from the application initially submitted on August 17, 2017 together with documents provided by Appellant in response to an October 24, 2017 request. The materials evaluated include:

- a business license from the State of Florida, Department of Business and Professional Regulation, for “Seating Food Service” for Gazzousa LLC d/b/a Mirandas Subs And Bakery issued July 26, 2017, and expiring on October 1, 2017;
- State sales and use tax materials for August through October 2017.

The contracted store visit inspection of October 18, 2017 indicates Appellant reported operating in a 2500 square foot retail space; during the hours of 9AM to 8PM from Monday through Saturday each week. Appellant estimated total annual retail sales on the August 17, 2017 Application as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month which calculates to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per year estimating that 65 percent of that revenue was derived from breads and grains; ten (10) percent was derived from “other” foods such as snack foods, soft drinks or condiments, and 25 percent was derived from “hot food” and “other”.

Mirandas Subs And Bakery is identified as operating with a commercial kitchen from which food items are sold across a counter equipped with two (2) cash registers. The posted menu advertises items such as cold subs, hot subs, 6-inch subs, pizza, soup, sides, and salads; together with specialty bakery goods including cakes and cookies. The Retailer Operations Division documented calculating that 94 percent of the food sold at Mirandas Subs And Bakery consisted of **“hot and/or cold prepared foods not intended for home preparation and consumption”** based on Appellant provided tax materials.

On administrative review Appellant’s ownership explained that following initial opening on August 14, 2017, Appellant was closed for three (3) weeks in September because of Hurricane Irma; and that it had been determined that an error in tax submissions had been made for the newly opened business. Corrections for improperly paid taxes resulted in an Appellant estimated “52 percent bakery and cold items verses the hot” therefore deriving that Appellant was operating “more as a bakery than a restaurant”. Total gross sales, taxable sales, and non-taxable sales figures were provided for consideration.

In additional material postmarked December 12, 2017 Appellant provided a summary of items sales for September, October and November 2017; the November 2017 FL Department of Revenue Sales Tax report; and, cash register reports dated September 1, 2017 through November 30, 2017 itemizing individual daily sales. The new materials were provided for consideration by the Retailer Operations Division for their renewed assessment. Revised calculation by the Retailer Operations Division identified 70 percent of the sales in the period were of hot and cold prepared food items.

On review it is noted that the principal distinction in the calculations by Appellant and the Retailer Operations Division is the different categorization of made-to-order cold subs.

Appellant appears to consider cold subs as staple foods. As provided in 7 CFR § 271.2 staple foods are “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”. The definition goes on to exclude accessory foods (soft drinks, snack foods) and hot foods.

7 CFR § 278.1(b)(1)(iv) defines Ineligible firms as those “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”.

The contracted store photographs, and materials resulting from the October 18, 2017 store visit, clearly show a restaurant (dine in and carry out) that also sells made-to-order and pre-made specialty bakery items. Further, a Google review of the firm shows marketing and reviews for a restaurant and bakery with an emphasis on the hot and cold menu items prepared for dine in and carry out.

CONCLUSION

Based on the discussion above, the initial decision by the Retailer Operations Division to deny the application of Mirandas Subs And Bakery to participate in the SNAP is sustained. Therefore, in accordance with 7 CFR § 278.1(k)(2) Mirandas Subs And Bakery is ineligible to participate as a SNAP authorized retailer “for a minimum period of six months from the effective date of the denial”, which is six (6) months from the date of the letter of determination, November 17, 2017.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 and to Section §279.7 of the Regulations (7 CFR § 279.7) with respect to applicable rights 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 owner resides or is 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.

NANCY BACA-STEPAN
Administrative Review Officer

January 11, 2018