

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

New Cotes Market, Inc,

Appellant,

v.

Case Number: C0211494

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny the application of New Cotes Market, Inc. (“Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Appellant to participate in SNAP in a letter dated June 19, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and its 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

In a letter dated June 19, 2018, the Retailer Operations Division denied the application of Appellant to participate as an authorized retailer in SNAP because the firm is not a retail food store as defined by the SNAP regulations. Specifically, the denial letter states that firms that have more than 50 percent of their total gross sales in heated foods and/or prepared foods not intended

for home preparation and/or consumption are not eligible to participate as retail food stores. The letter states the firm is primarily a restaurant based on information provided Appellant's application and the contractor's store visit report dated June 11, 2018. As the firm failed to meet the eligibility criteria for approval, Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in Section 9 of the Food and Nutrition Act of 2008, as amended.

In a letter dated July 20, 2018, Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it meets the definition of an ineligible firm.

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv) which reads, in part:

Firms that are considered to be restaurants, that is, 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. . . . This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

The definition of retail food store at 7 CFR § 271.2 states, in part:

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.

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

Appellant's responses regarding this matter are essentially as follows:

- Appellant does not have a restaurant license, nor does it offer tables for in-store consumption of food;
- The business is new, and Appellant approximated the sales information;
- The store was previously authorized as a retail store and Appellant did not make any significant changes. Appellant provided ~12 store pictures, ~23 pages of invoices. 5 pages of information regarding the property assessment, a letter of support from Appellant's property manager, and an inspection report from the municipal board of health;
- Other supermarkets and convenience stores advertise hot foods but are still SNAP authorized;
- The menu is typical for a deli; and,
- Appellant is located in an area with many SNAP recipients. Appellant provided one page of signatures of customers.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant contends that the firm is a not a restaurant, but a retail store. Appellant states it does not have a restaurant license, nor does it offer tables for in-store consumption of food. For the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has available for sale SNAP-eligible food. The central issue is whether actual sales of prepared foods comprise more than 50 percent of the store's total gross retail sales. There is no doubt that staple food items may be delivered to the store fresh, raw and unprepared, and are available to customers that way. However, Appellant self-declared on its application for SNAP authorization that the majority of the firm's sales are in hot and cold prepared foods; thus, it is reasonable to expect that fresh food products do not outsell prepared and cooked food products at this establishment. Appellant contends the business is new, and Appellant approximated the sales information. However, Appellant did not provide evidence to support its contention that the majority of its sales are not in hot and cold prepared foods as stated on its application. Such evidence could have consisted of z-tapes or register receipts that break down Appellant sales into different categories such as include prepared foods, non-foods, and other food items. Appellant stated that hot food sales represents 30% of its profit, but the determination of whether a firm is a restaurant is based on gross sales, not profits from particular sales categories.

Appellant stated that the store was previously SNAP authorized under different ownership, other SNAP-authorized stores advertise hot foods, and that its menu is typical for a deli. This administrative review is limited solely to those circumstances concerning Appellant's eligibility. Therefore, the firm's contention regarding Appellant's predecessor or other firms cannot be used to reverse the decision of the Retailer Operations Division.

No Need for Access

Appellant has requested another chance because the store is located in an area where many people use SNAP. SNAP regulation 7 CFR § 278.6(f)(1) provides for civil money penalties in lieu of disqualification in cases where disqualification would cause hardship to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. However, 7 CFR § 278.6(f)(1) does not apply to firms that are considered restaurants.

Summary

The authorization of a store to participate in SNAP must be in accord with the Food and Nutrition Act and regulations, as amended. Those requirements of law cannot be waived. This review is limited to consideration of the circumstances at the time of the denial action by the Retailer Operations Division. On the day of the store visit, the evidence supported that the store is primarily a restaurant, and firms that are primarily restaurants are not eligible to participate in SNAP.

The store is set up primarily to sell hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption or for carry-out, and require no additional preparation. Although food items in Appellant's store may be available for sale fresh, it is more likely true than not true that the majority of foods in the store are actually sold prepared and/or hot and ready-to-eat. According to 7 CFR § 278.1(b)(1) of the SNAP regulations, such a store is considered a restaurant and is not eligible for SNAP participation as a retail food store. Therefore, Appellant's store does not qualify as a retail food store for purposes of SNAP participation.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny the application of New Cotes Market, Inc. to participate as an authorized SNAP retailer is sustained.

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 Appellant desires a judicial review, 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.

RICH PROULX
Administrative Review Officer

September 17, 2018