

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

Ocean Breeze Café Realestate LLC,

Appellant,

v.

Case Number: C0208238

Retailer Operations Division,

Respondent.

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 Retailer Operations Division to deny the authorization of Ocean Breeze Café Realestate LLC (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is 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 SNAP, when it denied the application of Appellant to participate in SNAP by letter dated March 27, 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 March 27, 2018, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not meet the definition and eligibility requirements of a retail

food store established by Federal regulations at 7 CFR § 278.1(b)(1). This action was taken because the Retailer Operations Division had determined the Appellant firm was primarily a restaurant and as such failed to meet the definition of an eligible firm. This denial action was based on observations during an onsite store visit on March 5, 2018, as well as information provided on and in support of the firm's retailer application. Specifically, the March 5, 2018, letter from the Retailer Operations Division to Appellant states the following, in relevant part:

“It is the determination of FNS that your firm is primarily a restaurant, because more than 50 percent of your total gross sales are from “heated foods” and/or “prepared foods”. “Heated foods” are foods cooked or heated by the retailer before or after purchase. “Prepared foods” are hot or cold foods not intended for home preparation and/or home consumption, including prepared foods that are consumed on the premises or sold for carryout. Restaurants are not eligible to participate in SNAP except in certain States that operate special restaurant programs allowing the elderly, disabled, and homeless participants to use SNAP benefits in restaurants. Your Store is not located in a state with a restaurant program.”

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 § 278.1(k)(2). Appellant appealed the Retailer Operations Division determination and requested an administrative review of this action in a request dated April 10, 2018. The appeal was granted. No subsequent correspondence was received from Appellant.

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 Part 278.1(k)(1) and Part 278.1(l)(1) establish the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet the definition of an eligible firm.

7 CFR § 271.2 states that Retail food store means: (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 qualifying staple food items on a

continuous basis, evidenced by having no fewer than seven different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety, including at least one variety of perishable foods in at least three 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 stockkeeping units, or other accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. **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. [Emphasis added].** 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.

7 CFR § 271.2 defines staple food, in part, as: 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 . . . **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.** Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will be included in the staple food category of the main ingredient as determined by FNS. **Accessory food items include foods that are generally considered snack foods or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar. Items shall not be classified as accessory food exclusively based on packaging size, but rather based on the aforementioned definition and as determined by FNS. A food product containing an accessory food item as its main ingredient shall be considered an accessory food item. Accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm. [Emphasis added].**

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv) which states, in part, that, “Ineligible firms. Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the 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, 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 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].

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

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 denial letter states that Appellant has more hot items than cold items. A menu is attached showing more cold items than hot items.

Appellant submitted a one page listing of hot foods and cold foods in support of this contention.

ANALYSIS AND FINDINGS

The authorization of a business to participate in SNAP must be in accord with the Act, as amended, and regulations. These requirements of law cannot be waived. Thus, 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, and as such it is limited to consideration of the relevant facts and circumstances that existed at the time of the determination.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) state, in part, that, “Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose

of the SNAP shall not be eligible for program participation In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross retail 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.” As previously noted in the Controlling Law section, 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 SNAP regulations.

The FNS store visit conducted on March 5, 2018, confirms the firm is set-up primarily to sell hot and/or cold prepared foods that are consumed on the premises or sold for carryout and require no additional preparation. The store visit report and photographs show the firm is primarily a restaurant with a commercial kitchen/food prep area and a large storage freezer that is out of public view as well as menus advertising a wide range of hot and/or cold prepared, foods. The store visit report also notes that the quantity and variety of staple food items offered for sale is extremely limited with the firm being deficient in three of the four staple food categories having no staple food products available for purchase in either the dairy category or the meat, poultry, fish category and only bagels in the bread or cereals category. Businesses such as bakeries may qualify as SNAP authorized specialty stores selling only one food type under Criterion B if their sale of staple foods exceeds 50 percent and they sell bread.

Appellant contends that the firm is a not a restaurant because the March 27, 2018, denial letter says there are more hot foods than cold foods on the menu when there are actually more cold food than there are hot foods. Appellant has apparently misinterpreted the denial letter as it makes no comparisons between the numbers of hot and cold foods. The denial letter states that more than 50 percent of the firm’s total gross sales are from “heated foods” and/or “prepared foods”. “Heated foods” are foods cooked or heated by the retailer before or after purchase. “Prepared foods” are hot or cold foods not intended for home preparation and/or home consumption, including prepared foods that are consumed on the premises or sold for carryout.

For the purpose of determining whether a firm is or is not a restaurant under SNAP regulations, the fundamental issue is whether the firm has more than 50 percent of total gross retail sales in the combined sales of heated and/or prepared foods. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. This amount represents more than 74 percent of the firm’s total gross retail sales. Since the firm has more than 50 percent of total gross retail sales in the sale of hot and/or cold prepared foods it is classified as a restaurant under SNAP regulations making it ineligible for SNAP retailer authorization. A review of the store visit documentation including a staple food

inventory, store layout, and operating hours of 7:00 AM-5:00 PM Monday-Friday and closed on weekends further supports that the firm is primarily a restaurant.

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.” There is no agency discretion to impose a sanction less than six months when a firm does not meet the aforementioned eligibility requirements for authorization.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny the application of the Appellant firm to participate as an authorized SNAP retailer is sustained. The firm is ineligible to submit a new application for SNAP authorization for a period of six months from the date of the denial letter, March 27, 2018. 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

June 28, 2018