

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

ONECO MEATS,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0221385

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 (Retailer Operations) to withdraw the authorization of ONECO MEATS (hereinafter Appellant), for a period of six months, to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

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

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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In a letter dated August 21, 2019, Retailer Operations informed Appellant's ownership that it was being withdrawn from SNAP, as it no longer met the definition of a retail food store under 7 CFR § 271.2 and 7 CFR § 278.1(b)(1) of SNAP regulations. The letter stated that Appellant was primarily a restaurant as the evidence indicated that more than 50% of its gross retail sales are from heated, hot or cold prepared food not intended for home preparation and consumption. The

letter also informed ownership that it could not submit a new application to participate in SNAP for a period of six months from the effective date of the withdrawal, as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter dated August 26, 2019, Appellant's ownership requested an administrative review of Retailer Operations' decision to withdraw its SNAP authorization. The request for review was granted by letter dated September 1, 2019, and implementation of the withdrawal was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse action, 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 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 not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is contained in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2018, and SNAP regulations at 7 CFR Parts 271 and 278. In particular, SNAP regulations at 7 CFR § 278.1(1) establishes the authority upon which FNS may withdraw an application from a retail food store or wholesale food concern.

7 CFR §278.1(n) states, in part....

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.

7 CFR § 278.1(l) states in part, that:

(1) FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons.

(i) The firm's continued participation in the program will not further the purposes of the program;

(ii) The firm fails to meet the specifications of paragraph (b)

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, defines a retail food store, in part, as currently implemented*:

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 three* 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 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 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. **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 application for authorization in the program for a minimum period of six months from the effective date of the denial.

Regulatory Change

Due to a change in Federal regulations, foods cooked or 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). FNS published a final rule entitled “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)” at 81 Federal Register 90675 on December 15, 2016. 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

All contentions, as stated by the responding owner, have been considered in rendering this decision whether listed or not.

- Oneco Meats is a small, family owned and operated business since 01/02/1989 and have been authorized with the privilege of taking part in offering this program to my customers. I have taken pride in following all regulations and guidelines of the SNAP program and have never been fined or out of compliance.
- Oneco Meats is a Meat Market and deli retail business that sells a variety of meats, deli meats, and cheeses by the pound and also sandwiches as also shown fully on our website: onecomeats.com.
- We have generational customers that for the three decades know that they can come to Oneco Meats and purchase their meat packages and deli products utilizing the SNAP program and find competitive pricing and excellent customer service to enable them to feed their families.
- Given the income demographic in Oneco and the closer surrounding areas, Oneco Meats would be forced to turn existing customers away and any potential new customers that are referred.
- My small business relies on the resources and customer opportunities that being authorized with SNAP allows my business and to have this authorization withdrawn would be devastating for my small business. The negative impact of not being authorized to accept SNAP would be both distressing to our customer and our small business that has tried adapting with great adversities in the difficult and competitive economy.
- I would like to also inquire as to where the dollar amount and percentage representation indicated in the notice has been derived from? I am aware that there was a person on site (from the program) at my location taking pictures and reviewing, but I feel in no way has given an accurate representation of what my percentage of total sales with SNAP nor accurately has stated that I am operating primarily as a restaurant.
- I do not sell beer or wine and I do not have a hood system, nor a deep fryer. I have only two sandwich presses, one working stove/oven and the majority of my sales are meats being sold by the pound. I have added seating for the comfort of my customers that are blue collar workers that otherwise would be eating in their vehicles on their lunch breaks. I do not have servers also that typically are seen in "restaurants". We draw in customers with sandwiches which offer advertisement for our meat and deli sales.
- We consider it a privilege and are proud to be able to offer our customers the option of accepting SNAP and want to continue to offer this program because being a small business every customer counts and means a lot to our business.

In support of these contentions, the owner provided the following:

- A copy of Appellant's Food Safety Inspection Report dated October 19, 2018;
- A copy of the owners' July 2019 Merchant statement.

ANALYSIS AND FINDINGS

This review is to validate the determination by Retailer Operations and is limited to consideration of the relevant facts at the time of the decision. The authorization of a store to participate in SNAP must be in accord with the Act and the regulations, as amended; those requirements of law cannot be waived.

Ownership questions how the dollar amount and percentage representation of total sales were derived and contends that the store reviewer did not give an accurate representation of the percentage of total sales with SNAP and inaccurately stated that Appellant was operating primarily as a restaurant. Ownership contends Appellant is not a restaurant, but a meat market and deli retail business.

With regard to ownership's contentions, 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 issue is whether Appellant has more than 50% of total gross retail sales in the combined sales of heated and/or cold prepared foods. There is no doubt that staple food items may be available to customers. However, Appellant presents itself and is set up primarily as a restaurant; thus, it is reasonable to expect that staple foods do not outsell prepared and cooked food products at this establishment. The decision to withdraw Appellant from SNAP participation was based on information on the application submitted by ownership, an onsite visit by FNS-contracted staff, and analysis by Retailer Operations.

On Appellant's own reauthorization application dated December 19, 2018, ownership indicated that the majority of its sales are from hot and/or cold prepared foods. Specifically, the application shows total gross retail sales 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with hot and/or cold prepared food sales accounting for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) 67.37% of the firm's total gross retail sales. The store visit report and photos from the March 21, 2019, store visit show the firm's layout, facilities, and insufficient inventory of staple food items. Appellant has a kitchen area that contains large refrigerators and ovens. There is seating to accommodate customers to utilize while eating in-store cooked/hot and prepared foods, typical of a restaurant. There are large menu display boards, signage, and a website that shows Appellant sells a large variety of hot foods, prepared foods, lunch/dinner specials, offers delivery, pickup, dine in, and catering. Appellant is listed on Yelp, review.birdseye.com, restaurants.com as a restaurant/sandwich shop.

There is sufficient evidence to support Retailer Operations' determination to withdraw the authorization of Appellant to participate as an authorized retailer in SNAP because it did not meet the necessary criteria to be eligible for SNAP participation. In accordance with the regulations under §278.1(b)(1)(iv), firms that are considered to be restaurants, that is, firms that have more than 50% 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.

Ownership contends withdrawal would be devastating for its small business and to its customers. Economic hardship is a likely consequence whenever a store's SNAP authorization is withdrawn. However, there is no provision in SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship to the firm would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA virtually meaningless.

Moreover, giving special consideration to economic hardship of the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been withdrawn from the program in the past for similar deficiencies. Therefore, Appellant's contention that it will incur economic hardship based on deficiencies in meeting the eligibility requirements does not provide any valid basis for dismissing the withdrawal of Appellant's authorization.

There are no provisions in the Food and Nutrition Act or SNAP regulations allowing hardship to SNAP customers as a consideration in determining eligibility for participation in SNAP, with the exception of co-located wholesale/retail firms, which must meet a variety of additional requirements. Appellant is not a co-located wholesale/retail firm; therefore, such provisions do not apply in the present case.

CONCLUSION

This review is to ascertain if Appellant meets the regulations for reauthorization. SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. Based on a review of the evidence, the determination by Retailer Operations to withdraw the authorization of Appellant to participate as a SNAP retailer is sustained. Appellant does not meet the requirements of a retail food store as set forth in § 278.1(b)(1) of SNAP regulations. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived.

In accordance with 7 CFR § 278.1(k)(2), ownership will not be eligible to reapply for participation as a SNAP retail food store for a minimum period of six months from the effective date of the withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery of this letter.

General questions regarding the application process can be handled by contacting 877-823-4369 and by consulting the USDA website. Operational questions regarding the withdrawal should be directed to the office that initially took the action to withdraw Appellant; please contact Danielle Chandler at Danielle.Chandler@usda.gov or (804) 309-3880 with questions about operations.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this Decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to SNAP regulations at 7 CFR § 279.7. 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 Appellant's owners 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 30 days of receipt of this Decision. Please note that the judicial filing timeframe is specified in the Act, and this office is unable to grant an extension.

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.

KIM DAMERON
Administrative Review Officer

May 28, 2020