

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

Pancho's Bakery,

Appellant,

v.

Case Number: C0208998

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that Pancho's Bakery (hereinafter "Appellant") was properly denied authorization to participate in the Supplemental Nutrition Assistance Program (SNAP) by the Retailer Operations Division, Retailer Operations Branch, hereinafter "ROD Office."

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1), (6) and § 278.1(k)(2) when it made the decision to deny the application by Appellant for authorization to participate in the SNAP.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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

The record reflects that on April 11, 2018, Francisco Cedillo signed as Owner of Pancho's Bakery an application for authorization to participate in the SNAP. A store visit was conducted on April 23, 2018. Appellant was subsequently advised in a letter dated April 30, 2018 of the Department's decision to deny the application. The regulatory bases given for that denial were 7 C.F.R. § 278.1(b)(1), (6) and § 278.1(k)(2). On May 7, 2018, Appellant requested an administrative review of this action. The request 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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the **Food & Nutrition Act of 2008**, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), (6) and § 278.1(k)(2) establish the authority upon which a retail food store or wholesale food concern may be denied authorization to participate in the SNAP. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary for stores to qualify for participation in the SNAP.

7 C.F.R. § 271.2 states, in part:

Retail Food Store means: 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 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)...or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)...Entities that have more than 50 percent of their total gross sales in: food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods that are consumed on the premises or sold for carry-out, are not eligible for SNAP participation as retail food stores...

And

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 foods that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt and sugar. Accessory food items shall not be considered staple foods for the purposes of determining the eligibility of any firm.

7 C.F.R. § 278.1(a) states:

FNS shall approve or deny the application within 45 days of receipt of a completed application. A completed application means that all information (other than an on-site

visit) that FNS deems necessary in order to make a determination on the firm's application has been received.

7 C.F.R. § 278.1(b)(1)(ii) further stipulates, in part:

Application of Criterion A. In order to qualify under this criterion, firms shall: 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 with a depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least two staple food categories.

7 C.F.R. § 278.1(b)(1)(iii) states, in part:

Application of Criterion B: In order to qualify under this criterion, firms must have more than 50 percent of their 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, such as rental fees, professional fees and entertainment/sports/games income.

7 C.F.R. § 278.1(b)(1)(ii)(C) states, in part:

...Variety of foods is not to be interpreted as different brands, nutrient values, flavorings, packaging types or styles or package sizes of the same or similar foods.

...Accessory foods shall not be counted as staple foods for the purposes of determining eligibility to participate in the SNAP as a retail food store.

7 C.F.R. § 278.1(b)(6) states, in part,

FNS will consider whether the applicant firm is located in an area with significantly limited access to food when the applicant firm fails to meet Criterion A or B, so long as the applicant firm meets all other SNAP authorization requirements.

7 C.F.R. § 278.1(k)(1) and (2) state, in part:

FNS shall deny the application of any firm if it determines that:
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; or The firm has failed to meet the eligibility requirements...under Criterion A or Criterion B....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.

7 C.F.R. § 278.1(l)(1)(ii) states, in part:

FNS shall withdraw the authorization of any firm that fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section.

APPELLANT'S CONTENTIONS

In its written request for review dated May 7, 2018, and in subsequent correspondence, Appellant provided information in which it was argued that:

1. The inspection was done very early in the morning following a weekend; the firm had just opened and was in the process of stocking the items on the shelves. A shipment was ordered on April 19, 2018 and was due for delivery on the day of the store visit.
2. Appellant provides product purchase receipts/invoices for purchases for March, April and May 2018. Appellant provides photographs of inventory current as of May 31, 2018.
3. Appellant sells fresh baked goods to cater to the Hispanic population.
4. Being able to participate in the SNAP, and other income associated with the SNAP, is a major source of income; Appellant has been severely affected by not being able to participate in the SNAP.

ANALYSIS AND FINDINGS

The record reflects that a contracted store visit to Appellant's firm was conducted on April 23, 2018. Documentation generated as a result of that visit includes photographs of the firm's interior and exterior, a store layout diagram and a store inventory survey reflecting that the firm had ample varieties of staple food stock in the breads and cereals category and in the fruits and vegetables category but had an inadequate stock of staple food in the dairy category and in the meats/poultry/fish category, thus failing to qualify under Criterion A. Information provided by Appellant in a letter dated May 7, 2018 failed to demonstrate that the firm qualified under Criterion A. Appellant's application to participate in the SNAP indicated that the firm's staple food sales did not exceed 50 percent of gross retail sales (Appellant had indicated staple foods comprised approximately 10% of total gross sales). As staple food sales must comprise more than 50 percent of a firm's gross retail sales, the store was ineligible for authorization under Criterion B. It is additionally noted that the Appellant firm maintained a considerable stock of prepared, ready-to-eat foods and accessory food items, which are not considered staple food for the purposes of the SNAP. In addition, the firm maintained a substantial inventory of tobacco products, health and beauty products, paper goods cleaning products and other non-food items. Thus the store visit further corroborated that staple food sales could not have reasonably exceeded 50% of gross sales.

Regarding contention 1 above, to the extent Appellant contends that extenuating circumstances may have contributed to the level and composition of staple food inventory observed at the firm on the day of the store visit, there is no provision in the statute, regulation or agency policy which allows such considerations to warrant a reversal of a denial decision correctly made. Additionally, as noted above, 7 C.F.R. §278.1(k) clearly provides that FNS shall deny the authorization of any firm if the firm fails to meet the requirements for eligibility under Criterion A or B.

Appellant provided two receipts dated April 19, 2018, one time-stamped as completed at 08:53 and one at 09:37. The earlier receipt reflects the purchase of milk, eggs (a total of 21 dozen), orange juice, bananas and a five-pound container of sour cream. The eggs and sour cream appear to have been purchased for use in food preparation, and not for retail sale, due to the quantity/package sizes. Nonetheless, adequate inventories of milk and eggs had both been noted as present on the day of the store visit. Sour cream had not been noted, though if added to the firm's inventory at the time the firm would nonetheless continue to fail to meet the requirements of Criterion A in the dairy category. Similarly, the second receipt, which reflects the purchase of milk, orange juice, eggs and soda, do not further advance the firm's eligibility under Criterion A. Appellant notes that this receipt reflects purchases made on April 19, 2018 but scheduled for delivery on April 23, 2018 (the day of the store visit); however, the record reflects that the vendor from which these items were purchased does not make deliveries. Nonetheless, as noted, the purchases do not demonstrate that the firm qualified under Criterion A.

In regard to contention 2 above, in Appellant's letter in support of its review request dated May 31, 2018, it provided additional invoices/product purchase receipts. Most of the receipts were dated after the store visit (after April 23, 2018) or too far in advance thereof (in excess of 21 days, thus prior to April 3, 2018) to be considered supportive of inventory on the day of the store visit. Five receipts are viewed as pertinent to the inventory held on the day of the visit; these were dated April 3, 6, 10, 14 and 17, 2018 and reflected the purchase of, among other items, milk and cheese, which were seen during the store visit and counted toward the firm's inventory; thus the receipts did not add to the firm's inventory or advance its eligibility. Photographs of inventory are undated, though said to reflect inventory obtained after the store visit and, as such, are unreliable indicators of inventory held at an earlier time.

With regard to contention 3 above, the firm met the requirements of Criterion A in the breads and cereals category; thus this aspect of the firm's eligibility is not in dispute. However, a firm must meet all of the requirements under Criterion A (or, if not, must meet Criterion B), which includes three other categories of staple foods in addition to breads/cereals, including the dairy category and meat/poultry/fish category, both of the which the firm failed to stock adequately.

The authorization of a store to participate in the SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived. The SNAP regulations at §278.1(b)(1)(i) are clear (with emphasis added) that, under Criterion A, a firm shall offer for sale, *on a continuous basis*, a variety of qualifying staple foods in each of the four categories of staple foods or have more than 50 percent of the total gross retail sales of the establishment in staple foods (Criterion B). The store was deficient in two of the four staple food categories on the day of the visit, and, therefore, did not offer qualifying staple foods on a *continuous* basis. Likewise, the firm could not reasonably have qualified under Criterion B. As noted, the firm's application for authorization (FNS – 252, signed by Appellant on April 11, 2018) indicated that staple food sales comprised approximately 10% of gross sales, thus failing to qualify under Criterion B. Appellant has provided insufficient information and/or documentation demonstrating that the firm qualified to participate in the SNAP at the time of the store visit and the resulting SNAP Office decision to deny the firm's application.

Regarding contention 4 above, to the extent Appellant implies that a failure to reverse the denial decision will work a hardship upon the firm or its customers, there are no provisions in the Act, regulations or agency policy allowing hardship to retailers and/or to SNAP customers as considerations in determining eligibility for participation in the SNAP, with the exception of co-located wholesale/retail firms, which must meet a variety of additional requirements. Appellant's store is not a co-located retail/wholesale firm and such provisions therefore do not apply in the present case

As referenced in the foregoing (page 3 above), recent changes to the SNAP provide that retailers located in a low-income/low food-access area may receive an exception to the standard eligibility rules for participation; however, the record reflects that the ROD Office duly evaluated Appellant's eligibility for such exception and correctly found that the firm did not qualify.

CONCLUSION

In view of the above, it is my determination that the ROD Office's denial of Appellant's application for authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), (6) and § 278.1(k). The denial, therefore, is sustained. However, it is noted that the six-month waiting period following denial stipulated by the **Food and Nutrition Act of 2008** (Sec. 9(d)) and the regulations at § 278.1(k)(2) will elapse on November 2, 2018; accordingly, Appellant may reapply for participation in the SNAP up to 10 days prior to that date.

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 provisions of the Freedom of Information Act (FOIA), FNS is releasing this information in a redacted format as appropriate and will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

DANIEL S. LAY
Administrative Review Officer

June 25, 2018