

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

Show Case Meat,

Appellant,

v.

Case Number: C0216043

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of Show Case Meat (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) part 278, in its administration of the SNAP when it withdrew the authorization of the Appellant to participate in the SNAP as an authorized retailer.

AUTHORITY

7 USC § 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

The Appellant submitted an online reauthorization form FNS-252-R, entitled *Supplemental Nutrition Assistance Program Reauthorization Application for Stores* which it signed on November 6, 2018. The information/documentation provided to the Retailer Operations Divisions reports that 21 percent of the firm's actual gross retail sales were in staple foods and that 79 percent were in hot and prepared foods. On November 23, 2018, an on-site store visit was conducted by an FNS contractor in an effort to evaluate the firm's conditions and inventory. After considering the available evidence, the Retailer Operation Division

determined that the majority of Appellant's sales were from hot and prepared food items and thus, the firm was primarily a restaurant.

In a letter dated February 22, 2019, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it did not meet the necessary criteria to be eligible for SNAP participation. Specifically, the letter stated that the Appellant firm was a restaurant because more than 50 percent of its total sales were in the sale of hot and/or cold prepared foods not intended for home preparation and consumption.

In a letter postmarked March 5, 2019, the Appellant appealed the Retailer Operations Division's decision and requested an administrative review of this action. The request for review was granted by letter dated March 8, 2019, and implementation of the withdrawal has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). In particular, 7 CFR § 278.1(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) reads, in part: FNS may withdraw the authorization of any firm authorized to participate in the program for any of the following reasons:

- (A) The firm's continued participation in the program will not further the purposes of the program;
- (B) The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;
- (C) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...for the time period specified in paragraph (k)(2) of this section.

7 CFR § 278.1(k)(1) Denying authorization, references 7 CFR § 278.1(b)(1)(iv) ineligible firms, 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 under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

7 CFR § 278.1(k)(2) reads, in relevant part: FNS shall deny the application of any firm if it determines that:

(2) 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.... 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 CFR § 278.1(b)(1)(i) states, 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).

7 CFR § 271.2 states, in part:

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.

7 CFR § 278.1(b)(1)(iv) states, in part:

. . . 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 and 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.** [Emphasis added.]

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all

contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the Appellant's request for administrative review, it was argued that:

- The Appellant has been in business for 47 years and has always qualified for participation in the SNAP under Criterion A.
- The Appellant sells a large variety of food items in each of the four staple food categories.
- The Appellant is expanding its business in May 2019 and expects a large increase in SNAP sales.
- The Appellant has a large clientele that is considered low income, disabled, and elderly. A SNAP authorization withdrawal will be devastating to the community.
- A SNAP authorization withdrawal will be devastating to the business.

In support of these contentions, the Appellant provided FNS with a list of staple foods stocked at the subject store in each of the four staple food categories and a sign advertising new meat bundles offered at the firm.

ANALYSIS AND FINDINGS

The purpose of this review is to validate or to invalidate the determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts at the time of the decision. 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 Appellant's arguments essentially consist of that the store has been in business for 47 years and has always qualified for participation in the SNAP under Criterion A. The Appellant sells a large variety of food items in each of the four staple food categories.

With regard to the Appellant's arguments, for the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has available for sale SNAP eligible foods. 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 the firm sells staple food items, such as fresh meats, bread, milk, and fresh vegetables. However, the store 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 Appellant argues that more than 50 percent of the firm's gross sales are in staple food sales and that it is expanding its business in May 2019 and expects a large increase in SNAP sales. However, the documentation presented does not support that the majority of the firm's business is in the sale of fresh foods for home preparation and consumption. There is no evidence in the inspection report and photographs of the November 23, 2018 store visit, nor in the information provided by the Appellant, that indicates that Show Case Meat is not primarily a restaurant. The large menu display boards and signage show that the store sells a large variety of hot foods, prepared foods, and meals. The information provided by the Appellant concludes that the

majority of its sales are from hot and prepared foods. The evidence supports that the firm has more than 50% of its total gross sales in foods cooked or heated on-site 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. The evidence supports by a preponderance of evidence that Show Case Meat is more likely a restaurant than a retail food store.

This decision was based on information on the application submitted by the owner, an onsite visit by FNS contracted staff, and analysis by the Retailer Operations Division. There is sufficient evidence to support the Retailer Operations Division's determination to withdraw the authorization of Show Case Meat to participate as an authorized retailer in the SNAP because it did not meet the necessary criteria to be eligible for SNAP participation. In accordance with the regulations, 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.

Customer Hardship

The Appellant contends that it has a large clientele that is considered low income, disabled, and elderly. A SNAP authorization withdrawal will be devastating to the community. However, 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 the SNAP, with the exception of co-located wholesale/retail firms, which must meet a variety of additional requirements. Show Case Meat is not a co-located wholesale/retail firm; therefore, such provisions do not apply in the present case.

Financial Hardship

The Appellant contends that a SNAP authorization withdrawal will be devastating to the business. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse the 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 the 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, the 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 the Appellant's authorization.

CONCLUSION

After review of all the documentation in the record, the decision by the Retailer Operations Division to withdraw the authorization of Show Case Meat to participate in the SNAP as a retail food store is sustained. The preponderance of the evidence supports that the Appellant is an ineligible firm as per the definition cited herein. Ineligible firms 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. In accordance with the Food and Nutrition Act of 2008, as amended, and the SNAP regulations, the withdrawal of Show Case Meat shall become effective 30 days after receipt of this letter.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right 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 you 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 thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is 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.

LORIE L. CONNEEN
Administrative Review Officer

April 24, 2019