

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

Southern Pride Market, Inc.,

Appellant,

v.

Case Number: C0204870

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the Retailer Operations Division's decision to withdraw the authorization of Southern Pride Market, Inc. (Southern Pride Market or 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 7 CFR § 271.2 and § 278.1(b)(1) in its administration of the SNAP when it withdrew the authorization of Southern Pride Market to participate as an authorized SNAP retailer.

AUTHORITY

7 USC § 2023 and the implementing regulations at 7 CFR § 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

In a letter dated November 29, 2017, the Retailer Operations Division informed ownership that the authorization of Southern Pride Market to participate as an authorized retailer in SNAP was withdrawn because Appellant's firm does not meet the definition and requirements of a retail food store as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations. The Retailer Operations Division determined that Appellant is primarily a restaurant because hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, either for carryout or on-premises consumption, and requiring no additional preparation, comprise more than 50% of the firm's total sales. 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. Ownership was informed that the firm could not submit a new application to participate as a SNAP retailer for a period of six months as provided in § 278.1(k)(2).

In a letter postmarked December 8, 2017, ownership, through counsel, appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted 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 clear 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

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). Part 278.1(k) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 states, inter alia that Retail Food Store means: "An establishment . . . 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) . . . 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 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)(iii) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion B, it must ". . . have more than 50 percent of . . . 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. . ."

7 CFR § 278.1(b)(1)(iv) reads, in relevant part: "[F]irms 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 as retail food stores under Criterion A or B.”

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(l) states, inter alia, “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.”

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, through counsel, made the following summarized contentions in its December 8, 2017, administrative review request, in relevant part:

- In supports of its review request, Counsel re-submitted spreadsheets from the retailer’s accountant for the months of August 2017 through October 2017, with the corresponding monthly tax returns.
- There should be a division between the raw meat which is sold and those meats which are purchased and subsequently cooked by the retailer.
- The fee to fry those meats are significantly low, which represents a small amount of raw meats are cooked.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

According to 7 CFR § 278.1(b)(1) of the SNAP regulations, a store is considered a restaurant when the majority of foods are cooked or heated on-site by the retailer before or after purchase. Appellant’s application for reauthorization estimated its hot food items to be 13% of its total gross retail sales. However, the Retailer Operations Division determined that this estimate was unlikely based on a review of the store visit report and photos which indicate the store likely has a high percentage of hot food sales.

The Retailer Operations Division requested that Appellant provide documentation of its sales. In response, Appellant submitted some invoices, spreadsheets, and tax records. Appellant submitted the Michigan Department of Treasury 2017 Sales, Use, and Withholding Taxes Monthly/Quarterly Return for August, September, and October 2017. Each of the tax forms indicates that there were no hot food sales during these months (given that there was no sales figures listed in Part 1 question #2).

The following are the forms that Michigan firms use to file its sales and use taxes:

http://www.michigan.gov/documents/taxes/5080_546916_7.pdf This form directs the business owner to report information on Line 1a-2b from Worksheet 5095.

http://www.michigan.gov/documents/taxes/5095_546957_7.pdf Here is where business owners would separate their taxable goods (hot prepared food items) from its non-taxable good (food for home consumption) on line 5g.

The directions for completing Form 5080 direct the business to complete the Michigan Department of Treasury form 5095 “Use and Withholding Taxes Monthly/Quarterly and Amended Monthly/Quarterly Worksheet” prior to completing Form 5080. Specifically, Worksheet 5095 identifies item 1 “Gross sales. . .” and item 5G “Food for human/home consumption”. A review of the State of Michigan Department of Treasury website reveals that the instructions for completion of item 5G on form 5095 states “Enter the total of retail sales of grocery-type food, excluding tobacco and alcoholic beverages. Prepared food is subject to tax.”

These inconsistencies with the submitted tax forms, combined with the fact that this information is self-reported, and that Appellant did not provide any documentation such as sales receipts/records to validate these tax forms, lead to the conclusion that the documentation is not credible or convincing. A review of the information submitted reveals that Appellant does not sufficiently document that the store’s staple food sales exceed 50% of its gross retail sales.

In summary, there is no credible evidence in the report and photographs of the October 24, 2017, store visit, or in the information provided by Appellant, that indicate that Southern Pride Market is anything other than primarily a takeout restaurant, a firm that generates more than 50 percent of its income from the sale of hot and/or prepared food. Although raw food items in Appellant’s store may be available for sale, it is more likely true than not true that the majority of foods in the store are actually cooked or heated on-site by the retailer before or after purchase. 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 does not qualify as a retail food store for purposes of SNAP participation.

CONCLUSION

The initial decision by the Retailer Operations Division to withdraw the authorization of Southern Pride Market to participate as a retailer in SNAP for a period of six months from the effective date of withdrawal is sustained. The withdrawal shall become effective 30 days after receipt of this letter. In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to

reapply for participation as a retailer in SNAP for a minimum period of six months from the date of withdrawal.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 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 the 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 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.

Mary Kate Karagiorgos
Administrative Review Officer

March 1, 2018