

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

Sugar Rush Cake Gallery,

Appellant,

v.

Case Number: C0205400

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 Sugar Rush Cake Gallery (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) and § 278.1(k)(1) and (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.”

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.

CASE CHRONOLOGY

The record reflects that on October 23, 2017 **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** signed as Owner an application for authorization for the above-named firm to participate in the SNAP. A visit to the firm to obtain information regarding the firm's eligibility was conducted on December 16, 2017. Appellant was subsequently advised in a letter dated December 27, 2017 of the Department's decision to deny the application. The regulatory bases given for that denial were 7 C.F.R. § 271.2, § 278.1(b)(1)(iv) and § 278.1(k). On January 2, 2018, Appellant requested an administrative review of this action. The request was granted.

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) and § 278.1(k) establish the authority upon which a retail food store or wholesale food concern may be denied authorization to participate in the SNAP.

7 C.F.R. § 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.

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, different nutrient values, different varieties of packaging, or different package sizes.

...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)(1)(iv) states, in part, ineligible firms under this paragraph include:

...specialty doughnut shops or bakeries not selling bread.

...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 consumer on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B.

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.

APPELLANT'S CONTENTIONS

In its written request for review dated January 2, 2018, and in subsequent correspondence, Appellant provided information in which it was argued that:

1. The Owner of the Appellant firm was not in the store on the day of the store visit; employees had not put bread in the display case and the firm had not yet received its daily delivery of breads. The firm offers homemade bread, rolls and croissants and is a full service bakery. The firm now qualifies and requests another store visit. Appellant provides photographs and product purchase receipts/invoices in support thereof.
2. The firm had been SNAP-authorized for several years. But due to extenuating circumstances, Appellant returned a letter for review late to the ROD Office, which caused the firm to have to reapply to accept SNAP benefits.
3. The Owner of the Appellant firm has several locations and all accept SNAP benefits.

ANALYSIS AND FINDINGS

The record reflects that a contracted store visit of the Appellant firm was conducted on December 16, 2017. Documentation generated as a result of that visit includes photographs of the firm's interior and exterior, a store layout diagram and an inventory survey indicating that the firm operated primarily as a carryout/restaurant. Observations made during the visit include the following:

- No optical scanners.
- Approximately 3000 square feet of store space.
- No shopping carts or baskets.
- One check-out area, one cash register, no SNAP card reader.
- Storage area approximately 2500 square feet.
- Storage coolers present. One two-door upright cooler was empty; one small drink cooler held only one single-serving item.
- The firm accepts telephone orders.
- No delivery service offered.
- Most expensive items:
 - Lemon blondie cake - \$75 for full sheet.
 - Peach cobbler - \$50 for full pan.
 - Layer cakes - \$65 for three-tier.
 - Pineapple upside down cake - \$75 for full sheet.
- All information above was obtained in collaboration with store personnel (in the case, the store manager).
- Kitchen/food preparation area present. Preparation tables, food mixing apparatus, etc. Baking tray storage racks. Photos: 1, 5, 6, 7, 8, 9, 10, 14, 17 and 24.
- Dining area present. Photo: 29
- Display cases and tray storage racks contained cakes, cupcakes, cookies and other dessert items only. Photos: 1, 3, 6, 20, 22, 24, 27 and 30.

- The firm's menu/advertising flyer, and posted signage inside store, made no mention of bread offered for sale. No bread was seen on site during the visit. Photo: 25 and 29.

As noted above, 7 C.F.R. § 278.1(b)(1)(iv) states, in part, ineligible firms include specialty doughnut shops or bakeries not selling bread. Additionally, firms which primarily cook or heat food on-site before or after purchase, and/or sell primarily sell 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. Moreover, as noted in the foregoing (page 1 above), cakes, pies, cookies, cupcakes, etc., are considered accessory food items and, as such, cannot contribute to a firm's sales of staple food items. Further, the documentation indicated that the Appellant firm had ample varieties of staple food stock in none of the four required staple food categories, thus additionally failing to qualify under Criterion A, as detailed above. The visit further confirmed that the firm's staple food sales could not have reasonably exceeded 50 percent of its gross retail sales, rendering it ineligible for authorization under Criterion B, as staple food sales must exceed 50 percent of gross retail sales. As noted, accessory food items (including foods such as cupcakes, cookies, pastries, etc.) cannot count toward a firm's sales of staple food items. As noted, however, regardless of Criterion A or B considerations, a bakery not selling bread, or a firm selling primarily prepared food, is not eligible to participate in the SNAP.

In regard to contention 1 above, it is acknowledged 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. It is noted for the record that the store visit took place at approximately 2 PM in the afternoon on December 16, 2017; it is highly unusual that a firm regularly making/selling bread would not have placed any on display by mid-afternoon. Additionally, there is no provision in the statute or regulations which requires or allows such considerations to warrant a reversal of a denial decision correctly made. Additionally, as noted above, 7 C.F.R. § 278.1(k)(1) and (2) clearly provides that 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 and B.

As noted in the foregoing, the store visit did not reflect the presence of bread offered for sale at the Appellant firm. Appellant notes that it has added inventory since the store visit conducted on December 16, 2017, and now qualifies to participate in the SNAP. However, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the earlier decision of the SNAP Office and as such it is limited to consideration of the relevant facts and circumstances at the time of that decision. It is not within the scope of this review to consider actions Appellant may have taken to qualify for participation in the SNAP subsequent to the referenced store visit and the resulting decision by the SNAP Office. Therefore, Appellants' contention that it may now qualify under the eligibility requirements is not a valid basis upon which to reverse the decision.

Photographs provided by Appellant showing loaves of bread are undated and cannot reliably constitute evidence of inventory held at an earlier time. Similarly, the invoices/product purchase receipts provided by Appellant are dated following the store visit and likewise cannot constitute reliable evidence of inventory held at an earlier time. Moreover, the items purchased, while arguably used to produce bread, are also used to produce many accessory food items such as cake, cookies, sweet rolls, etc.

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. 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 2 above, Appellant may imply that a record of no prior non-compliance with eligibility requirements should be taken into consideration. However, such a record does not constitute valid grounds for reversing the SNAP Office's correct finding that the firm did not qualify on the day of the store visit. There is no provision in the Act, regulations or agency policy that allows a reversal of a correct eligibility determination based upon a lack of a firm's prior ineligibility or upon the duration of the firm's former eligibility. It is added for the record that it is not uncommon for a firm to qualify to participate in the SNAP at the time of application but for the firm's inventory to change such that the firm no longer qualifies at some later point. The purpose of periodic reauthorization procedures and store visits is to confirm continued store eligibility; the agency has a regulatory and policy-based obligation and authority to monitor firms' compliance with eligibility requirements. A firm's application and subsequent authorization does not entitle the store to SNAP participation in perpetuity; a firm must maintain eligibility at all times during its participation in the SNAP.

With regard to contention 3 above, there is no provision in the statute, regulations or agency policy allowing consideration of an applicant's prior SNAP eligibility, at the same or a different firm, as a justification of its current eligibility to participate in the program; generally, each location operated by a particular owner must be determined eligible to participate in the SNAP. As such, the contention cannot serve as a basis to reverse the decision of the SNAP Office to deny Appellant's application to participate in the SNAP.

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) and § 278.1(k). The denial, therefore, is sustained.

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

March 9, 2018