

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

Sun Rise Grill,

Appellant,

v.

Case Number: C0208239

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to deny the application of Sun Rise Grill to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for six months from the effective date of the denial decision.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it denied the application of the Appellant to participate as an authorized SNAP retailer.

AUTHORITY

7 U.S.C. § 2023 and its 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

The Appellant applied to participate in the SNAP as an authorized retailer on December 21, 2017. In a letter dated March 30, 2018, the Retailer Operations Division informed the Appellant that the firm was a SNAP ineligible restaurant

because more than 50 percent of its total gross retail sales are from heated foods and/or prepared foods. Therefore, the firm's application was denied. The letter also informed the Appellant that it could not submit a new application to participate in SNAP for a period of six months from the effective date of the denial as provided by SNAP regulations at 7 CFR § 278.1(k)(2). In a letter postmarked April 9, 2018, the Appellant requested an administrative review of the Retailer Operation Division's denial of its SNAP application. The request for administrative review 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k) reads, in relevant part:

FNS shall deny the application of any firm if it determines that: (1) 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

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, 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. 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

Foods heated after sale were at one time considered to be SNAP eligible. However, due to a recent change in Federal regulations, foods heated after sale are now considered to be SNAP ineligible in the same manner as foods sold hot at the point of sale. On December 15, 2016, FNS published a final rule entitled “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)” at 81 Federal Register 90675. 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

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The firm is the only market in the community of Owatonna that carries halal groceries.
- Many of the firm’s customers cannot afford to buy groceries with cash and don’t have cars to drive outside the community to purchase groceries and halal foods.
- Letters of recommendation from the Owatonna mayor, the Chamber of Commerce and the United Way support the firm in its effort to obtain SNAP authorization.

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

ANALYSIS AND FINDINGS

The central issue in this case is whether Sun Rise Grill is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). In reaching its decision to deny the firm's application, the Retailer Operations Division relied upon the firm's application, the store visit report, and documents provided by the Appellant. A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that Sun Rise Grill does not qualify for the SNAP as it is primarily a dine-in/carryout restaurant.

Application and Store Visit Report

The case record documents that in reaching a denial decision, the Retailer Operations Division considered information obtained during a January 17, 2017 store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock and facilities.

Although the Appellant's initial application stated that 80 percent of the firm's gross retail sales were in SNAP eligible staple food, the Retailer Operations Division questioned the accuracy of this information. Through the store visit report and photographs, the Retailer Operations Division determined that the firm had likely underreported its hot food and prepared food sales. For example, Sun Rise Grill had a large kitchen and a small dining area with a prominently displayed menu board with hot and cold prepared food for sale. The firm also offered delivery for hot food only. The meat carried by the firm was offered for sale by the pound but was also used in the kitchen for prepared food. The firm also had only six (6) gallons of milk and two (2) were opened to be purchased by the ounce at customer request. In addition, the firm's business license states that Sun Rise Grill is a restaurant.

As a result of this conflicting information, the Retailer Operations Division had the firm provide additional financial records including inventory and sales receipts from December 2017 through February 2018. These actual sales records indicated that 66 percent of the store's sales were in hot and cold prepared food not intended for home preparation and consumption. SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, in part "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.

Supporting Documents

The letters of support by local officials all state that because the halal market is new to the firm's business it is therefore less than 50 percent of the firm's sales. These letters all state that the Appellant forecasts that if it is allowed to accept SNAP, its staple food sales will grow to more than 50 percent of its gross retail sales. With regard to these contentions, SNAP eligibility cannot be granted on projections of what a store might be able to do after it is authorized. In addition, the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. Therefore, this review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division's action.

Hardship to SNAP Community

The Appellant states that the local SNAP community will continue to face a hardship due to the lack of access to halal food in the area. Regarding this contention, there is nothing in the Food and Nutrition Act of 2008 or in SNAP regulations that would allow an ineligible restaurant as defined under 7 CFR § 278.1(b)(1)(iv) to be authorized for the SNAP due to a purported community hardship.

Summary

A preponderance of the evidence supports the Retailer Operation Division's determination that the Appellant firm likely has more than 50 percent of its total gross retail sales in hot and cold prepared food not intended for home preparation and consumption. The SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, that "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." By definition these types of firms are considered restaurants and are ineligible for SNAP authorization.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to deny the SNAP application of Sun Rise Grill is sustained. The regulations clearly state the criteria that a store must meet in order to be authorized for the SNAP. There are no exceptions to these requirements. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization until six months after March 30, 2018, the effective date of the denial decision.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

RONALD C. GWINN
Administrative Review Officer

June 25, 2018