

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

Tabooleh Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0224062

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 (Retailer Operations) to deny the application of Tabooleh Grocery (Appellant) to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP). As a result, Appellant may not reapply for six months from the effective date of the denial decision.

ISSUE

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

AUTHORITY

7 U.S.C. § 2023, and its 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 Agency's record shows that FNS received a SNAP application from Appellant to be authorized as a retailer. By letter dated September 13, 2019, Retailer Operations notified Appellant that the application could not be processed based on information provided in Appellant's application and/or a visit to Appellant by an FNS contactor on September 10, 2019. The letter requested additional information be sent, to verify the eligibility of Appellant as an

eligible retail food store, within 10 calendar days of receipt of this letter, or Retailer Operations would suspend work on Appellant's application and a new application may be required. Appellant responded to the request for information by letter dated September 23, 2019. By letter dated October 1, 2019, Retailer Operations denied the application of Appellant to participate as an authorized retailer in SNAP based on information provided on Appellant's retailer application.

Retailer Operations found that Appellant did not meet the eligibility requirements as set forth in § 278.1(b)(1) and § 271.2 of the SNAP regulations. In accordance with § 278.1(k)(2) of the regulations, the owner was informed that Appellant could not submit a new application to participate in SNAP for a period of six months from the effective date of the denial, and if the business model remains the same, a new application may be denied for the same reasons as the initial denial.

By letter postmarked October 21, 2019, Appellant requested an administrative review of the determination. The request for administrative review was acknowledged and granted by letter dated November 26, 2019.

Appellant sent correspondence, dated December 14, 2019, providing additional information in support of its case.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means 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 law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 USC § 2018), and 7 CFR § 278. In particular, 7 CFR § 278.1(b)(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 following represents a summary of Appellant’s contentions in this matter; however, in reaching a decision, full consideration was given to all contentions presented, including any not specifically summarized or explicitly referenced in this document:

- I have applied multiple times, to be an authorized retailer in SNAP, but have been denied every time. Emails are attached to prove this.
- I have expanded my grocery store and stock, to meet Criterion A, and have purchased an EBT machine.
- As I have only opened the grocery store, it is highly improbable that more than 50% of my total income will come from solely the grocery store. I can't have the grocery store provide over 50% of my sales revenue until I accept EBT.
- I have done everything possible to distinguish the grocery from the restaurant, including hiring completely different staff, processing all transactions through different machines and bank accounts, and sectioning off over 50% of the building for grocery use only.
- Although my grocery store does not meet Criterion B, I am still eligible due to the "Need for Access" clause.
- There are other restaurants in Iowa City that also contain a grocery store, or function primarily as a restaurant with a small grocery store, that are active in SNAP.

In a subsequent letter dated December 14, 2019, Appellant provided the following contentions:

- Since my last communication, I've completed the biggest renovation yet. I expanded the grocery to take up more than two-thirds of the real estate that originally belonged to the restaurant, and the main dining room has now been split in half to make more room for the grocery shelves.
- I am currently receiving the majority of total monthly gross retail sales from the sale of staple foods from the grocery, and therefore should be accepted into SNAP. I am providing photos and scanned grocery sale receipts as proof.
- I hope to completely convert the entire location into a grocery store, but cannot do so until sales increase. I expect grocery sales to completely nullify restaurant sales as soon as I am permitted to accept food stamps.
- Several potential buyers come in, expecting to be able to use their food stamps, but leave as soon as I inform them otherwise. Almost all potential clients are Arabs/Muslims, so the food I sell is primarily directed at the same group of people discouraged from buying and make up a large portion of the surrounding community. Even without food stamps, the grocery surpassed the restaurant by selling primarily to this community.
- I've looked over the 'Need for Access' clause on the USDA website and found that we are as close as can be to the need-for-access areas, without actually being clearly inside them.

ANALYSIS AND FINDINGS

The purpose of this review is to validate or invalidate the determination by Retailer Operations. Thus, it is limited to consideration of the relevant facts and circumstances that existed at the time of the denial determination.

Appellant contends it has applied multiple times and continues to be denied. The authorization of a firm to participate in SNAP must be in accord with the Act, as amended, and regulations. These requirements of law cannot be waived.

Appellant contends it made renovations expanding the size of the grocery, increased grocery stock, changed business operations by designating separate personnel and banking for the grocery and restaurant, and staple food sales in the grocery now exceed restaurant sales. Photos and grocery receipts were submitted as proof of these contentions.

There are no provisions in the SNAP regulations for authorization based on possible after-the-fact corrective actions implemented subsequent to a finding of ineligibility. It is not the authority of this review to consider what remedial actions may be undertaken so that a store might begin to comply with program eligibility requirements after it has been determined to not meet the regulatory criteria. Photos taken after the store visit do not provide an accurate depiction of the store at the time of the store visit and therefore cannot be considered.

The central issue of this case is whether Appellant is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). In reaching its decision to deny the firm's application, Retailer Operations relied upon the firm's application, store visit report, and information submitted by Appellant as part of the authorization process. A review of the entire case record indicates by a preponderance of the evidence that Retailer Operations properly determined that Appellant does not qualify for SNAP as it is primarily a SNAP ineligible restaurant.

Appellant self-reported hot food sales at 71 percent on its application for SNAP authorization. Based on the face of the application, the firm would be considered a SNAP ineligible restaurant as defined at 7 CFR § 271.2 and 7 CFR § 278.1(b)(1)(iv).

The store visit report and photographs confirm hot food sales and restaurant seating. Retailer Operations determined that the firm, more likely than not, has the majority of its gross retail sales in hot, heated and cold prepared food, not intended for home preparation and consumption. This is consistent with the sales figures that the Appellant reported in its application.

Although the firm sells some staple food and accessory food items, the store visit report and photographs further support that the firm is primarily a SNAP ineligible restaurant as that term is defined by regulations.

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. [Emphasis added.]

Retailer Operations also considered documents submitted by Appellant as part of the authorization process, when rendering its denial decision. A lease submitted by Appellant extends through December 31, 2020, and indicates: 7. USE OF PREMISES. Tabooleh covenants and agrees during the term of this Lease to use and to occupy the Leased Premises only as a buffet style restaurant. Appellant's 2018 Tax filing submitted, indicates that the principal business activity is a restaurant.

Appellant contends that several potential buyers come in expecting to be able to use their SNAP benefits but leave as soon as they are informed otherwise. Almost all potential clients are Arabs/Muslims so the food sold is primarily directed at this group of people who are discouraged from buying, and also make up a large portion of the surrounding community. The store is as close as can be to the need for access areas, without actually being clearly inside them.

SNAP regulation 7 CFR § 278.6(f)(1) provides for civil money penalties in lieu of disqualification in cases where disqualification would cause hardship to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. Firms that are considered restaurants are not eligible for participation or a civil money penalty. However, Retailer Operations did review Appellant's location and determined it is not located in a low food access area.

Appellant contends there are other restaurants in Iowa City that also contain a grocery store, or function primarily as a restaurant with a small grocery store, that are active in SNAP.

Unfortunately, this contention has no relevance to this case. A store may only participate in SNAP if it meets eligibility requirements, which Appellant does not.

Summary

A preponderance of the evidence supports Retailer Operations' determination that Appellant likely has more than 50 percent of its total gross retail sales in heated, hot, and cold prepared food not intended for home preparation and consumption. 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 Retailer Operations to deny the SNAP application of Appellant is sustained. The regulations clearly state the criteria that a firm must meet in order to be authorized for SNAP. There are no exceptions to these requirements. In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to submit a new application for SNAP authorization until six months from October 10, 2019, which is the effective date of the denial. The six-month waiting period ends on April 10, 2020, which means Appellant may submit a new application at that time. However, please note that if the business model remains the same and you reapply, your application may be denied again for the same reasons.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and 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 Appellant's owner resides or is 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 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.

KIM DAMERON
Administrative Review Officer

March 24, 2020