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

Teasers Diner #01,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0227761

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 a finding that the Retailer Operations Division's decision to deny the application of Teasers Diner #01 (hereinafter "Teasers Diner #01" or "Appellant") to participate in the Supplemental Nutrition Assistance Program (SNAP) was proper.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.1(b)(1) in its administration of the SNAP, when it denied the application 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

FNS received a SNAP application from the Appellant which was signed on January 22, 2020. FNS-contracted staff conducted an onsite visit to the business on February 12, 2020. By letter dated February 20, 2020, the Retailer Operations Division informed the owner that the application of the Appellant to participate as a SNAP authorized retailer was denied. The Appellant did not meet the eligibility requirements as set forth in Sections 278.1(b)(1) and 271.2 of the SNAP regulations. It was determined that the Appellant firm is primarily a restaurant because more than 50 percent of the firm's total gross retail sales are from "heated foods" and/or "prepared foods." In accordance with Section 278.1(k)(2) of the regulations, the owner was also

informed that the firm could not submit a new application to participate in the SNAP for a period of six months from the effective date of the February 20, 2020 denial.

By letter postmarked March 1, 2020, the owner requested administrative review of the denial determination. The request for review was acknowledged by letter dated March 11, 2020.

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). Section 278.1(b)(1) 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 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 two such categories, (Criterion A) as set forth in § 278.1(b)(1) of this chapter, or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) as set forth in § 278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stockkeeping units, or other accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. 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."

7 CFR § 271.2 states: "Staple food, means those food items intended for home preparation and consumption in each of the following four categories: Meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (i.e., nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food

category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility under § 278.1(b)(1) of this chapter. Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will be included in the staple food category of the main ingredient as determined by FNS.

7 CFR § 271.2 states: "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 food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar. Items shall not be classified as accessory food exclusively based on packaging size but rather based on the aforementioned definition and as determined by FNS. A food product containing an accessory food item as its main ingredient shall be considered an accessory food item. Accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm."

7 CFR § 278.1(b)(1)(i) states: "(A) An establishment shall normally be considered to have food business of a nature and extent that will 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 as defined in § 271.2 of this chapter, including perishable foods in at least three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B)."

7 CFR § 278.l(b)(1)(ii) provides that for a retail store to qualify for authorization under Criterion A, a firm shall: "(A) 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 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 and at least one variety of perishable foods in at least three staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement." 7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis as offering for sale no fewer than three 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 on any given day of operation.

7 CFR § 278.l(b)(1)(ii) states: "(B) Offer for sale perishable staple food items in at least three staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks."

7 CFR § 278.l(b)(1)(ii) states: "(C) Offer a variety of staple foods which means different types of foods within each staple food category. For example: Apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk, soy yogurt, soft cheese, butter, sour cream, and cow milk yogurt in the dairy products category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken, beans, nuts, beef, pork, eggs, and tuna in the meat, poultry, or fish category. Variety of foods is not to be interpreted as different brands, nutrient values (e.g., low sodium and lite), flavorings (e.g., vanilla and chocolate), packaging types or styles (e.g., canned and frozen) or package sizes of the same or similar foods. Similar food items such as, but not limited to, tomatoes and tomato juice, different types of rice, whole milk and skim milk, ground beef and beefsteak, or different types of apples (e.g., Empire, Jonagold, and McIntosh), shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any staple food category. Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store."

7 CFR § 278.l(b)(1)(iii) provides that for firms to qualify for authorization under Criterion B: "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. However, a fee directly connected to the processing of staple foods, such as raw meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B."

7 CFR § 278.l (b)(1)(iv) states: "Ineligible firms: Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization and authorized firms will be withdrawn from program participation. 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 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."

7 CFR § 278.1(k)(2) states: "FNS shall deny the application of any firm if it determines that 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(k) states: "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."

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 request for administrative review, the Appellant stated the following summarized contentions, in relevant part:

- The assessment by FNS that the Appellant's sales are 50% from hot food is unfair.
- First, although this is a restaurant, it is a newly designed business that has equipment in it designed no different from gas stations that the owner has seen sprinkled throughout the state. These gas stations are cooking food and have fryers and baked items as well as sell just as much food as the Appellant firm.
- Secondly, the Appellant has been open barely under a year (i.e., 7 months old) and the owner does not have the data to give FNS an assessment that supports 50% of sales in support of hot food as the store has not started selling its cold deli items on the intended large scale.
- The Appellant already sells canned sodas, potato chips, cold sandwiches over the counter, cole slaw and salad wraps. However, the business is theoretically launching to expand.
- Everything that the Appellant cooks customers can purchase cold without standing in line at the register. That in no way can be less than 50% prepared foods.
- The Appellant's cold deli items are expected to soar past its prepared foods.
- The owner did not design the business to get rich. It was designed so that citizens who only have a few dollars and who are hungry can eat regardless of whether they have dollars or a SNAP card.
- The owner made a clerical error when completing the SNAP application and marked the 50% prepared foods margin. Because the owner has never completed a SNAP application and has never owned a business, she thought it was required to get approved to show that the Appellant was a restaurant. So, the owner mistakenly indicated 50% on the application. The Appellant's percentage of total sales from hot/prepared foods is below 50%.
- The Appellant needs time to implement this program to get more accurate sales. The Appellant is requesting that the entry of 50% from hot and prepared foods initially documented on the SNAP application be changed to 45%. The Appellant can resubmit financial stats in a year.
- A SNAP authorization denial is going to make the neighborhood citizens who are SNAP recipients suffer needlessly. Children who like ice cream and cold sandwiches, which the Appellant keeps competitively priced like supermarkets, can come down and get a nutritious sandwich big enough for two. Because of the Appellant's competitive prices, purchases of these large sandwiches does not use up a lot of the customer's SNAP

benefits and they do not have to take a bus to the supermarket which, in Lima, is located on four corners of the city.

- The owner has invested over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in a cold deli case and two 5 U.S.C. § 552 (b)(6) & (b)(7)(C) freezers. As such, a SNAP authorization denial will hurt the firm financially.

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.

It should be noted that 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, that impacted the eligibility of firms that sell heated or prepared foods. If more than 50 percent of a firm's sales come from the sale of heated or prepared foods, the firm is considered a restaurant under SNAP regulations, and therefore is ineligible for authorization. The final rule clarified that any foods cooked or heated on-site by the retailer before or after purchase, and any hot or cold prepared food not intended for home preparation or consumption, including foods consumed on the premises or sold for carryout, count toward the 50 percent threshold. This portion of the rule was implemented by FNS on October 16, 2017.

With regard to the Appellant's contentions that when applying for participation in the SNAP, the owner was not familiar with the SNAP regulations regarding restaurant participation and did not provide valid and correct information on the SNAP application, the firm was denied authorization because it was determined that the business did 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. 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. The evidence under review supports that the firm did not meet SNAP eligibility criteria to be an authorized retail food store when it was denied. 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.

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 February 12, 2020 store visit, nor in the information provided by the Appellant, that indicates that Teasers Diner #01 is not primarily a restaurant. The Appellant's application with sales data information provided to the Retailer Operations Division states that 80% of the firm's total gross sales are from hot and/or cold prepared foods. The menus and signage displayed in the firm show that the store sells a variety of hot foods and

cold prepared foods (sandwiches, burgers, dinners, lunch meals, appetizers, etc.). The store also has a kitchen area and numerous tables with chairs for customers to utilize while eating in-store cooked/hot and cold prepared foods. Therefore, by definition the Appellant is an ineligible firm.

There is sufficient evidence to support the Retailer Operations Division's determination to deny the authorization of Teasers Diner #01 to participate as an authorized retailer in the SNAP because it did not meet the necessary criteria to be eligible for SNAP participation. The business does not operate as a retail food business within the meaning of the SNAP regulations at Part 271.2 (definition of a retail food store) and is ineligible for SNAP authorization under 7 CFR § 278.l (b)(1)(iv).

With regard to the Appellant's contentions that a SNAP authorization denial will impose a hardship on SNAP customers, unfortunately these contentions do not provide a valid basis for reversal of the Retailer Operations Division's denial determination. A store may only accept SNAP benefits if it currently meets the minimum eligibility criteria for authorization. As stated previously, the Appellant firm was denied authorization because it was determined that the business did 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.

With regard to the Appellant's contentions that a SNAP authorization denial will impose a financial hardship on the firm, it is recognized that some degree of economic hardship is a likely consequence whenever a firm is not authorized. However, there is no provision in the SNAP regulations to authorize a business due to possible economic hardship to the firm. 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 denial of the Appellant's authorization.

CONCLUSION

Based on the analysis above, the determination by the Retailer Operations Division to deny the application of Teasers Diner #01 to participate as a retailer in the SNAP is sustained. The business does not operate as a retail food business within the meaning of the SNAP regulations at Part 271.2 (definition of a retail food store) and is ineligible for SNAP authorization under 7 CFR § 278.l (b)(1)(iv). Additionally, the contentions and evidence presented by the Appellant are not sufficient to show that the denial decision should be reversed. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for SNAP authorization for a minimum period of six months from February 20, 2020, the effective date of the denial.

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 April 27, 2020
ADMINISTRATIVE REVIEW OFFICER