

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

The Bread Box,

Appellant,

v.

Case Number: C0210829

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the Retailer Operations Division properly withdrew the authorization of The Bread Box (hereinafter “Appellant”) from participation as a retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of withdrawal.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it withdrew the authorization of The Bread Box.

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 firm, The Bread Box, was originally authorized to participate as a retailer in SNAP on June 13, 2013. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization process to determine whether or not the firm still meets eligibility requirements. On February 19, 2018, the firm submitted a reauthorization application, Form FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*. On its application, the Appellant indicated that its total retail sales for tax year 2017 were 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of that amount, the Appellant reported that 5 U.S.C. § 552 (b)(6) & (b)(7)(C), or 79.4 percent, was in the sale of hot foods and cold prepared foods.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) address the types of stores that are considered restaurants for purposes of determining eligibility. The regulation states that firms that have more than 50 percent of their gross sales from the sale of hot and/or cold prepared foods not intended for home preparation and consumption, including food items sold for carryout, shall not qualify for SNAP participation. This includes any foods cooked or heated onsite by the retailer before or after purchase. It should be noted that hot foods are not eligible for purchase with SNAP benefits. Cold prepared foods, such as freshly-made sandwiches, may be eligible for purchase with SNAP benefits, but are not considered staple foods for purposes of determining Program eligibility.

On March 4, 2018, an on-site store visit was conducted by an FNS contractor in an effort to evaluate store conditions and inventory and to confirm the Appellant's sales estimates from its reauthorization application. After reviewing the store visit report and photographs, the Retailer Operations Division concluded that the firm was likely operating primarily as a restaurant. However, the agency decided that further evidence was necessary to definitively determine whether or not the firm met eligibility requirements.

In a letter dated April 3, 2018, the Retailer Operations Division requested verification of the firm's sales for the last three months, including tax records, sales receipts, and an accounting summary dividing sales into specific categories: hot or prepared foods, nonfoods, accessory foods, staple foods, and charges for food heating services.

In response to this request the Appellant owner submitted a copy of her 2017 U.S. Individual Income Tax Return, including Schedule C: "Profit or Loss from Business" showing that the firm had 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in gross sales for the year 2017. The Appellant also submitted Form 721 V.I.: "Gross Receipts Monthly Tax Return" from the Government of the U.S. Virgin Islands for the first three months of 2018. These monthly returns offered little detail except to show that the firm had 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in gross sales for the first three months of 2018.

The Appellant owner also submitted a short letter dated May 14, 2018, advising the Retailer Operations Division that "most of our business are from the sale of bread tarts and other delicacies associated with the bakery."

After reviewing the Appellant's reauthorization application and tax documentation and comparing them with the contractor's store visit report, the Retailer Operations Division concluded that the firm was operating primarily a restaurant, and thus did not meet the definition and requirements of a retail food store for purposes of SNAP authorization.

In a letter dated June 26, 2018, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it did not meet the necessary criteria to be eligible for SNAP participation. Specifically, the letter stated that the Appellant firm was a restaurant because more than 50 percent of its total sales were in the sale of hot and/or cold prepared foods not intended for home preparation and consumption. The letter stated that the withdrawal determination was based on 7 CFR § 271.2, § 278.1(b)(1), and § 278.1(k)(2).

In a letter postmarked July 5, 2018, the Appellant requested an administrative review of the withdrawal determination. The request was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as the withdrawal of a firm's SNAP authorization, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) reads, in part:

FNS may withdraw the authorization of any firm authorized to participate in the program for any of the following reasons:

- (i) The firm's continued participation in the program will not further the purposes of the program;
- (ii) The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;
- (iii) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...for the time period specified in paragraph (k)(2) of this section.

7 CFR § 278.1(k)(2) reads, in relevant part:

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

- (2) 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 § 271.2 defines a *retail food store* as:

- (1) An establishment or house-to-house trade route 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 *[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, 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 inventory or 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 cook 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....** [Emphasis added.]

7 CFR § 271.2 defines *staple food* as:

...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... 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. 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, in part:

An establishment...shall...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...including perishable foods in at least two of the categories (Criterion A); or have

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

more than 50 percent of the total gross retail sales of the establishment...in staple foods (Criterion B).

7 CFR § 278.1(b)(1)(iv) states, in part:

...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 and 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...** [Emphasis added.]

APPELLANT'S CONTENTIONS

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

- Appellant believes there was a misconception in determining the percentage of heated and/or prepared foods. The store owner considered all baked goods, including bread and pastries, as heated or prepared since they are oven-baked. This led to reporting an incorrect sales percentage.
- The firm would need a totally different type of business license to operate as a restaurant.
- The firm does have a deli section where it prepares a small assortment of island style fried foods, which customers pay for with cash. These items cannot be purchased with SNAP benefits.
- The Bread Box is associated with Thomas Bakery, Inc., and Gary's Bakery and Deli, which are prominent businesses on the islands of St. Croix and are proud SNAP participants.
- The Bread Box is primarily a bakery, and 80 percent of its sales come from its bakery, such as breads and pastries. The other 20 percent are from heated and prepared foods that cannot be purchased with EBT cards.
- Appellant hopes that by revising the retail sales percentages and removing breads and pastries from the heated and prepared foods category that this will clarify what misled FNS to determine that the firm operates primarily as a restaurant.

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

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is

limited to consideration of the relevant facts and circumstances as they existed at the time the Retailer Operations Division rendered its decision.

Based on a review of all evidence in this case, this review finds that it is more likely true than not true that the firm's hot and/or cold prepared food sales exceed 50 percent of its gross retail sales, thus making the firm a restaurant rather than a grocery establishment.

It should be reiterated that in an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. This means providing relevant and compelling evidence which would show that the Retailer Operations Division's determination was incorrect. In this case, the Appellant has not submitted any additional documentation at all to support its case. Assertions alone, without supporting documentation, do little to convince this review that the withdrawal decision should be reversed.

In the April 3, 2018, request for information, the Retailer Operations Division asked the Appellant to provide a summary of actual gross retail sales for the last 3 months, separated into the following categories: 1) heated or prepared foods, 2) non-foods, 3) accessory foods, 4) staple foods, and 5) charges for food heating services. None of this information was provided by the Appellant. As such, this review is left to make a determination based on the Appellant's reauthorization application, the written statement from the Appellant owner, and visual observations made by the store visit contractor. Based on these sources, there is little evidence that the firm is eligible for SNAP participation.

Based on the contractor's report, the sale of heated and prepared foods appear to be a significant portion of the firm's overall business. From this review's perspective, the report supports the Appellant's original claim of 79.4 percent heated and prepared foods. The Appellant now claims that the sales percentages were incorrectly reported on its reauthorization application, and that its heated and prepared food sales are actually only about 20 percent of its total sales.

Unfortunately, the visual evidence does not support this claim. The store visit report shows a firm with few staple food offerings, such as a small amount of bread and rolls and a small number of canned goods, and a heavy emphasis on fried foods, sandwiches, pastries, and beverages, none of which are staple foods for purposes of SNAP authorization.

Visually, the firm has every appearance of an establishment that sells primarily hot and/or cold prepared foods for immediate consumption and the Appellant has offered no evidence to disprove this assertion. Based on this analysis and in accordance with 7 CFR 278.1(b)(1)(iv) this review finds that the Appellant firm is operating primarily as a restaurant. The evidence strongly suggests that more than 50 percent of its total sales come from the sale of hot and/or cold prepared foods not intended for home preparation and consumption. As such, the firm is not eligible for participation under Criterion A or B of the SNAP regulations.

CONCLUSION

The contentions presented by the Appellant lack supporting evidence and thus are not sufficient to prove that the withdrawal decision made by the Retailer Operations Division was inaccurate or that it should be reversed. Further, the visual evidence from the contractor's store visit suggests

that The Bread Box has overestimated its revised staple food percentages. It is the determination of this review, therefore, that the firm is primarily a restaurant and is not eligible for SNAP participation under Criterion A or B. Accordingly, the agency's withdrawal decision is sustained.

Pursuant to 7 CFR § 278.1(k)(2), the 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. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of The Bread Box shall become effective 30 days after receipt of this decision.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a 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.

JON YORGASON
Administrative Review Officer

December 19, 2018