

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

Two J's Sandwich Shop,

Appellant,

v.

Case Number: C0202570

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of Two J's Sandwich Shop (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 271.2 and 278.1(l)(1)(iii), in its administration of the SNAP, when it withdrew the authorization of Appellant to participate as a SNAP retailer by letter dated August 30, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, "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

In a letter dated August 30, 2017, the Retailer Operations Division informed Appellant that its authorization to participate as an authorized retailer in SNAP was

being withdrawn because the documentation in its possession indicated that the firm did not meet the definition and eligibility requirements of a retail food store established by Federal regulations at 7 CFR § 278.1(b)(1). This action was taken because the Retailer Operations Division had determined the Appellant business was primarily a restaurant and as such failed to meet the definition of an eligible firm. This withdrawal action was based on observations during an onsite store visit on January 10, 2017. Specifically, the August 30, 2017, letter from the Retailer Operations Division to Appellant states the following, in relevant part:

“It is the determination of the Food and Nutrition Service that your firm is primarily a restaurant. Hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, either for carryout or on-premises consumption, and requiring no additional preparation, comprise more than 50% of the total sales at your firm.

Restaurants are not eligible to participate in SNAP except in certain States that operate special restaurant programs allowing the elderly, disabled, and homeless participants to use SNAP benefits in restaurants. Your Store is not located in a state with a restaurant program.”

Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in § 278.1(k)(2). Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action in a request dated September 5, 2017. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, 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 that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.1(k)(1) and Part 278.1(l)(1) establish the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet the definition of an eligible firm.

7 CFR § 271.2 states, *inter alia* 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, on a continuous basis, a variety of foods in sufficient

quantities in each of the four categories of staple foods including perishable foods in at least two such categories (Criterion A) . . . or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) . . . Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter.”

Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated, and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining the eligibility of any firm.

7 CFR § 271.2 define staple food, in relevant part, as “those food items intended for home preparation and consumption . . .”

Prepared, ready-to-eat foods cannot be counted as staple foods in determining if a store is eligible to participate in the SNAP . . . These are typically freshly made prepared foods, such as sandwiches and salads, which are ready-to-eat. They are usually prepared and/or found in the deli section of stores, but could be in other places such as salad bars or in the fresh vegetable section of the store.

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv) which states, in part, that, “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 to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible 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 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 . . . This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.* (Emphasis added.) Such firms may qualify, however, under the special restaurant programs that serve the elderly, disabled, and homeless populations, as set forth in paragraph (d) of this section.”

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, “[a] retail food store or wholesale food concern that is denied approval to accept and

redeem benefits because the store or concern does not meet criteria for approval . . . may not, for at least 6 months, submit a new application to participate in the program.”

APPELLANT’S CONTENTIONS

In the request for administrative review, Appellant has stated as its position in the matter the following:

- Ownership is appealing the decision because the determination says the business is primarily a restaurant and they disagree. The business does not have any seating and all foods/beverages are consumed off the premises; and,
- The determination states that qualified sales are not 50 percent of total sales. Enclosed are three months of sales summaries showing a breakdown of qualifying and non- qualifying sales. Approximately 60 percent of all sales qualify for SNAP. The largest source of sales is from cold sandwiches/hoagies. These sales are shown separate from hot sandwiches.

Appellant submitted detailed sales summaries for the months of November 2016, January 2017, and July 2017 in support of these contentions.

The preceding may represent a summary of 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

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) state, in part, that, “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 In addition, firms that are considered to be restaurants, that is, 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 under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.” As previously noted in the Controlling Law section, the sales of hot and/or cold, ready-to-eat prepared foods cannot be included in determining if staple foods account for more than 50 percent of overall sales since these items do not count as staple foods.

The FNS store visit conducted on January 10, 2017, confirms the business is set-up primarily to sell hot and/or cold prepared, ready-to-eat foods that are intended for carry-out and require no additional preparation. The store visit report and photographs show the business is primarily a carryout restaurant with menus and signage advertising a wide range of hot and cold prepared, ready-to-eat foods and

sides. Although the business does have a small section containing grocery items, the quantity and variety of staple foods offered for sale is extremely limited. Additionally, the store visit report and photographs show empty and marginally stocked shelves and dust on canned and packaged foods indicative of a slow turnover of stock.

With regards to Appellant's contentions, for the purpose of determining whether a firm is or is not a restaurant, the issue is not the percentage or dollar value of SNAP eligible versus ineligible food sales or even the amount of the firm's SNAP redemptions, the central issue is whether the actual sales of prepared ready-to-eat foods, that includes cold sandwiches, comprise more than 50 percent of the store's total gross retail sales. A review of the documentation provided to the Retailer Operations Division and the three months of detailed printouts provided by store ownership in support of the Administrative Review request shows that the sale of hot and/or cold sandwiches alone accounts for more than 69 percent of total gross sales. This is consistent with ownership's statement that the largest source of sales is from cold sandwiches/hoagies.

This determination is further supported by a review of internet sites such as foursquare.com, menupix.com, facebook.com, and google.com that all show the business categorized as a restaurant, deli restaurant, or sandwich shop with reviews focusing on hot and/or cold foods. The owners' claimed page on yelp.com categorizes the business as a deli with reviews focusing on hot and/or cold foods. Based on the business's layout, food inventory, interior/exterior signage, and internet presence, the business appears to be primarily a restaurant selling hot and/or cold foods for take-out and the business does portray itself to the public as a restaurant. Restaurants are not eligible to participate as SNAP retailers. Based on this documentation and pursuant to 7 CFR § 278.1(b)(1) of the SNAP regulations, the Appellant business is considered a restaurant and is not eligible for SNAP participation as a retail food store.

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, "[a] retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store or concern does not meet criteria for approval . . . may not, for at least 6 months, submit a new application to participate in the program." There is no agency discretion to impose a sanction less than six months when a firm does not meet the aforementioned eligibility requirements for authorization. Therefore, requests to be reinstated as a SNAP retailer may not be granted.

CONCLUSION

The authorization of a business to participate in SNAP must be in accord with the Act, as amended, and regulations. These requirements of law cannot be waived. Thus, it is important to clarify for the record that the purpose of this review is to

either validate or to invalidate the earlier determination of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the withdrawal action by the Retailer Operations Division.

After review of the pertinent documentation, and based on the discussion above, the determination by the Retailer Operations Division to withdraw the authorization of Appellant to participate as an authorized SNAP retailer for a period of six months from the effective date of withdrawal is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and the SNAP regulations issued pursuant thereto, this withdrawal action shall become effective 30 days after receipt of this letter and will continue for a period of six (6) months. A new application to participate as a SNAP authorized retailer may not be submitted until 10 days prior to the expiration of the six-month withdrawal period. When eligible, Appellant may reapply for SNAP retailer authorization using the application instructions contained in the FNS web site at fns.usda.gov/snap/retailer-apply.

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 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.

ROBERT T. DEEGAN
Administrative Review Officer

November 21, 2017