

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

**Vienna Deli Inc.,**

**Appellant,**

**v.**

**Case Number: C0209238**

**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 withdraw the authorization of Vienna Deli Inc. 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 Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Vienna Deli Inc.

**AUTHORITY**

7 U.S.C. § 2023 and the 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**

Following a routine reauthorization process, the Retailer Operations Division informed the Appellant by letter dated May 8, 2018 that the authorization of Vienna Deli Inc. to participate in the SNAP was withdrawn because the firm no longer met the definition of a retail food store under 7 CFR § 278.1(b)(1). Instead, the firm was found to be a SNAP ineligible restaurant because more than 50 percent of its total gross retail sales are from heated foods and/or prepared foods. 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 withdrawal as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter postmarked May 15, 2018, the Appellant, through counsel, requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request for review was granted and implementation of the withdrawal was held in abeyance pending completion of this review.

### 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 covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2018, and SNAP regulations at Title 7 Code of Federal Regulations (CFR) Parts 271 and 278. In particular, SNAP regulations at 7 CFR § 278.1(l) establishes the authority upon which FNS may withdraw an application from a retail food store or wholesale food concern.

7 CFR 278.1(n) states, in part ....

**Periodic reauthorization.** At the request of FNS a retail food store or wholesale food concern will be required to undergo a periodic reauthorization determination by updating any or all of the information on the firm's application form.

7 CFR § 278.1(l) states in part, that:

- (1) FNS shall 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 specifications of paragraph (b) ....

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, defines a retail food store, in part, 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 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 three 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. [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. [Emphasis added.]

## **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, through counsel, made the following summarized contentions in its request for administrative review, and in subsequent correspondence, in relevant part:

- Vienna Deli Inc. previously provided a signed and notarized statement by the owner and accountant indicating that heated and prepared food sales are less than 50 percent of its total gross sales.
- The corned beef and cheese being sold at the business are sold by the pound to customers for home preparation and consumption. The Appellant believes that the inspector included the corned beef sold by the pound for home preparation in the heated/prepared food calculation.
- The Appellant can change its business model to sell more corned beef and cheese by the pound.

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 Vienna Deli Inc. is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). In reaching its decision to withdraw the store's authorization, the Retailer Operations Division relied upon the reauthorization application, the store visit report, and sales 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 Vienna Deli Inc. does not qualify for the SNAP as it is primarily a carryout restaurant.

### **Reauthorization Application**

As part of a routine reauthorization process, the Appellant submitted an online reauthorization form FNS-252-R, entitled "Supplemental Nutrition Assistance Program Reauthorization Application for Stores" on February 8, 2018. The FNS-252-R reported that only 5 U.S.C. § 552 (b)(6) & (b)(7)(C) percent of the firm's gross retail sales were in staple foods and that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) percent were in "accessory" food items such as snack foods, ice cream, pastries, potato chips, carbonated and non-carbonated beverages, condiments and spices. The Appellant reported that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) percent of its gross retail sales were in SNAP ineligible hot and cold prepared food not intended for home preparation and consumption. Based on the data submitted on the reauthorization application, Vienna Deli Inc. is an ineligible restaurant under 7 CFR § 278.1(b)(1)(iv).

### **Store Visit Report**

An FNS contractor conducted a store visit on March 24, 2018 to further assess the firm's continued eligibility for the SNAP. The store visit documented that the firm sold corned beef and cheese by the pound. The store also sold other staple foods including milk, bread, pasta, deli meats, and fresh fruits and vegetables. However, the store visit report documents that the interior footprint is largely devoted to SNAP ineligible hot, heated and cold prepared food not intended for home preparation and consumption. Vienna Deli Inc. has a large kitchen where heated and prepared food is made to order. The firm menu boards also prominently advertise SNAP

ineligible items such as prepared deli salads, hot and cold deli sandwiches and wraps, spaghetti, lasagna, wing dings, chicken tenders, fries, mozzarella sticks, Philly cheese steak and seafood dinners. The store visit report and pictures are consistent with the information submitted by the Appellant in its reauthorization application that over 50 percent of the firm's sales are in heated and/or prepared foods. Therefore, the store visit indicates that the firm is a primarily a take-out restaurant.

The Appellant contends that the store visit contractor included the corned beef and cheese sold by the pound for home preparation in the heated/prepared food calculation. Regarding this contention, the store visit contractor does not make any calculations as to what percentage of the firm's gross retail sales are in staple, accessory, prepared/heated food or non-food items. The store visit contractor merely takes pictures of the store and records information regarding the store condition, infrastructure and services. Instead it was the Appellant who provided the sales figures indicating that 69 percent of the firm's gross retail sales were in heated and/or prepared foods.

### **Supporting Documents**

The Appellant states that Vienna Deli Inc. previously provided a signed and notarized statement by the owner and accountant indicating that heated and prepared food sales are less than 50 percent of its total gross sales. The case record does not support this claim.

A review of the case record documents that the Appellant provided a notarized spreadsheet breaking down three-months of sales data by cold deli, hot food sandwiches, staple foods, accessory foods, and non-foods. Although these categories are not all clearly defined by the Appellant, the sale of corned beef and cheese by the pound should be included in staple food sales calculation. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The spreadsheet is also consistent with other casefile information that indicates that hot and cold prepared food accounts for more than 50 percent of the firm's gross retail sales.

### **Change in Business Model**

The Appellant, through counsel, asked if this review had the authority to allow the firm to continue to accept SNAP if a change in business model is made so that corned beef is sold cold without heating it for the customer or if the review could only look at the prior history of heating and sales. For the record, this administrative review is a limited review to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review can only consider the circumstances that existed at the time that the Retailer Operations Division's made its decision. This review does not have the authority to consider changes made in the business model after the store visit or after the withdrawal letter or any future changes that may be planned so that a firm may become eligible under SNAP regulations.

### **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 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 ....” 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 withdraw the SNAP application of the Appellant, Vienna Deli Inc., is sustained. In accordance with 7 CFR § 278.1(k) (2), the Appellant shall not be eligible to submit a new application for SNAP authorization for six months from the effective date of the withdrawal.

### **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, 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.

RONALD C. GWINN  
Administrative Review Officer

July 18, 2018