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

Bp Grill,	)	
	)	
Appellant,	)	
	)	
v.	)	**Case Number: C0193895**
	)	
Retailer Operations Division,	)	
	)	
Respondent.	)	
	)	

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny the application of Bp Grill ("Appellant") to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

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) § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Appellant to participate in SNAP in a letter dated August 30, 2016.

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

On July 21, 2016, the Retailer Operations Division sent a letter to Appellant indicating that the documentation in its possession indicated that the firm operated as a restaurant and requested additional information that would support Appellant's contention that is was not a restaurant. Appellant replied to the Retailer Operations Division in a subsequent letter.

In a letter dated August 30, 2016, the Retailer Operations Division denied the application of Appellant to participate as an authorized retailer in SNAP because the firm is not a retail food store as defined by the SNAP regulations. Specifically, the denial letter states that firms 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 either for carryout or on-premises consumption and requires no additional preparation, are not eligible to participate as retail food stores. The letter states the firm is primarily a restaurant based on information provided Appellant's application and the contractor's store visit report dated August 27, 2016. As the firm failed to meet the eligibility criteria for approval, 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 Section 9 of the Food and Nutrition Act of 2008, as amended.

In a letter dated September 9, 2016, Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a clear preponderance of the evidence that the administrative action should be reversed. That means 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 argument asserted is more likely to be true than not true.

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 § 278.1(k)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it meets the definition of an ineligible firm.

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv) which reads, in part:

> *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.*

The definition of retail food store at 7 CFR § 271.2 states, in part:

> *Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to- eat foods that are intended for immediate consumption either for carry-out or on-premises consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores.*

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

Appellant's contentions regarding this matter are essentially that it has two stores on the premises and one is a market. Appellant provided a one-page blueprint of the premises. The preceding may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any not specifically recapitulated.

ANALYSIS AND FINDINGS

With regard to Appellant's contentions, for the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has available for sale SNAP-eligible food. The central issue is whether actual sales of prepared foods comprise more than 50 percent of the store's total gross retail sales. There is no doubt that staple food items may be delivered to the store fresh, raw and unprepared, and are available to customers that way. However, the store presents itself and is set up primarily as a restaurant; thus, it is reasonable to expect that fresh food products do not outsell prepared and cooked food products at this establishment.

Appellant's contends that the there are two stores on the premises and one is a market. While the shelves of foodstuffs are located in one section of Appellant's facility, and there is a wall between this area and the dining tables, there is no evidence that this is a separate business. The market area and the remainder of the facility appear to share the same ownership, staff, marketing, bathrooms, administrative office, and external entrance. There is no evidence in the inspection report and photographs of the August 27, 2016 store visit, or in the information provided by Appellant, that indicated that there are two entities on the premises. The evidence indicates that Appellant is primarily a restaurant, that also sells other groceries.

The large menu display board and menu support Appellant largely sells prepared foods and meal combos. The external signage indicated Appellant is a restaurant. The pictures included in the menu are all of prepared foods. The layout of the store was that of a restaurant, with tables with chairs for dining on the premises. The firm's business license and marketing supports that Appellant is a restaurant. The firm's tax records show the majority of its sales are from (taxable) hot and prepared foods.

Summary

The authorization of a store to participate in SNAP must be in accord with the Food and Nutrition Act and regulations, as amended. Those requirements of law cannot be waived. This review is limited to consideration of the circumstances at the time of the denial action by the Retailer Operations Division. On the day of the store visit, the evidence supported that the store is primarily a restaurant, and firms that are primarily restaurants are not eligible to participate in SNAP.

The store is set up primarily to sell hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption or for carry-out, and require no additional preparation. Although food items in Appellant's store may be available for sale fresh, it is more likely true than not true that the majority of foods in the store are actually sold prepared and/or hot and ready-to-eat. Pursuant to 7 CFR § 278.1(b)(1) of the SNAP regulations, such a store is considered a restaurant and is not eligible for SNAP participation as a retail food store. Therefore, Appellant's store does not qualify as a retail food store for purposes of SNAP participation.

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.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny the application of Bp Grill to participate as an authorized SNAP retailer is sustained. Appellant is ineligible to submit a new application for SNAP authorization for a period of six months from the date of the denial letter, August 30, 2016.

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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

/S/	October 31, 2016
RICH PROULX	DATE
ADMINISTRATIVE REVIEW OFFICER	