U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review Branch  
Alexandria, VA 22302

Lees Cake’s,  
Appellant,  
v.  
Retailer Operations Division,  
Respondent.

Case Number: C0198090

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support a finding that the initial decision by the Food and Nutrition Service Retailer Operations Division to deny the application of Lees Cake’s (hereinafter, “Appellant” and/or “Lees Cake’s”) to participate in the Supplemental Nutrition Assistance Program (SNAP) as an authorized retailer was properly imposed.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR §§ 271.2 and 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Lees Cake’s to participate in the SNAP as an authorized retailer via letter dated February 15, 2017.

CASE CHRONOLOGY

In a letter dated February 15, 2017, the Retailer Operations Division informed Appellant that the application of Lees Cake’s to participate as an authorized retailer in SNAP was being denied because it did not meet the definition and requirements of a retail food store as set forth in the Federal regulations at 7 CFR §§ 271.2 and 278.1(b)(1).

This determination was made as a result of a review of the electronic form FNS-252E Supplemental Nutrition Assistance Program Application for Stores initially submitted on December 7, 2016. Via letter received in the office of the Chief of the Administrative Review Branch on February 27, 2017, an administrative review of this action was requested, appealing the Retailer Operations Division’s decision. The appeal was granted.
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

7 U.S.C. § 2023 and it’s 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.”

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)¹, 7 USC 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR).² Part 278.1(b)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet established eligibility requirements.

Staple foods are defined in 7 CFR §271.2 as “food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products...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 eligibility of any firm...”

Retail food store is defined in CFR §271.2(1) as, “An establishment or house-to-house trade route that sells food for home preparation and consumption [Emphasis added] 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) 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 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 FSP participation as retail food stores under §278.1(b)(1) of this chapter.”[Emphasis added]

7 CFR § 278.1(b)(1) reads, in relevant part, “The nature and extent of the food business conducted by the applicant – (i) Retail food store. (A) An establishment or house-to-house trade route shall

¹ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment enacted February 7, 2014 through P. L. 113-79
² Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title07/7tab_02.tpl
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
two of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the
establishment ... in staple foods (Criterion B).” [Emphasis Added]

7 USC 2018 (b)(7)(e)

7 CFR §278.1(b)(1)(iv) Ineligible firms, states in part, “Firms that do not meet the eligibility
requirements in this section or that do not effectuate the purpose of the Food Stamp Program [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...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 [emphasis added]. In addition, 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...” [Emphasis
added]

7 CFR § 278.1(k)(2) reads, in part, “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 . . . for a minimum period of six months from the
effective date of the denial.”

APPLICATION SUMMARY

The administrative record includes form FNS-252E Supplemental Nutrition Assistance Program
Application for Stores dated December 7, 2016 which indicates that Lees Cake’s is selling a variety of
staple food products only in the “Breads/Grains” category. The material also indicates that Lees
Cake’s does not sell other foods or non-foods such as tobacco products, alcohol, lottery tickets,
gasoline and “other” products. The material indicates that Lees Cake’s estimated annual retail sales
of $100 per week or $52,000 annually, attributing 100 percent of those sales to breads and grains.

APPELLANT’S CONTENTIONS

In the request for administrative review letter postmarked February 24, 2017, Appellant through its
owner requests reconsideration of the Retailer Operations Division determination because Appellant
“is not a bakery”; “everything comes pre made and frozen just like your local grocery stores”; and
asks “how is a small business able to compete with the bigger stores if I am not afforded the same
opportunities, especially when trying to bring something to your low income areas which rely on
Food Assistance to live.”

Subsequent to receipt of the February 15, 2017 letter conveying the Retailer Operations Division’s
determination that Appellant was not eligible for SNAP retailer authorization a request for
consideration of additional information was received from The Honorable Keith J. Rothfus, US House
of Representatives, wherein it is asked that thorough review of Appellant’s application, together with a statement provided by Appellant’s owner be considered. The statement referenced indicates, “I sell cakes and cupcakes in my store in which they come in already baked, icing comes in in buckets. The USDA denied my application to get SNAP because they said I am a bakery and don’t sell bread. I don’t even have an oven. But I carry the same brands as other local stores and people with SNAP can buy the product there.”

The preceding may represent only a brief 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**

The record includes materials from a contracted store visit, conducted on January 18, 2017 under the authority of the self-identified “owner”.

**Criteria A:**

The store visit materials include a general report indicating that Lees Cake’s is located in a suburban commercial area in a “shopping mall” arrangement sized at approximately 384 square feet operating five (5) days per week from Wednesday through Sunday. The materials recounts that no hot foods or food for on-site consumption were identified; the store was best defined as a “Pastry Shop”; and, that there were “No significant amounts of non-foods”. The inventory checklist reports the only staple food stock as “Cakes/Muffins/Pastry/Pie Crusts/ Pancakes/Waffles” available in units of 20 or more.

**Criteria B:**

The December 7, 2016 SNAP Retailer application provided for consideration under the signature of ownership indicates that Lees Cake’s derives 100 percent of its estimated $52,000 total retail sales from the sale of staple foods category breads/grains.

In response to Question 15 of the Supplemental Nutrition Assistance Program Application for Stores Appellant indicates that the sale of hot and/or cold freshly prepared foods that are ready-to-eat exceed 50 percent of Appellant’s total sales.

It is important to clarify that the SNAP regulations at 7 CFR § 278.1 (b)(1) under Criterion B requires that more than **50 percent** of the total gross retail sales must be in staple foods. However, that same regulation provides that “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 FSP participation as retail food stores under §278.1(b)(1) of this chapter.” It is evident from the contracted store visit materials that Lees Cake’s derives more than 50 percent of its total retail sales from the sale of cold prepared ready-to-eat foods that require no “home preparation”. Therefore, the Retailer Operations Division decision that Lees Cake’s does not meet the eligibility conditions of criterion B is affirmed.
Retail Food Store Definition:

The determination regarding whether Lees Cake’s is eligible to participate as an authorized SNAP retailer includes consideration of whether or not the firm meets the definition of retail food store as specified in 7 CFR §271.2(1); and, whether or not the firm is an ineligible firm under paragraph 7 CFR §278.1(b)(1)(iv) which includes “Firms...that do not effectuate the purpose of the Food Stamp Program [SNAP]...”.

As noted above, 7 CFR §271.2(1) provides a definition of a retail food store that requires sales of food for home preparation and consumption normally displayed in a public area, and either meets Criterion A by offering for sale a variety of foods in each of the four (4) categories of staple foods, or Criterion B by having more than 50 percent of its total gross retail sales in staple foods. The determination of whether or not a firm meets the retail food store definition can be made in several ways, as noted within the definition restated above.

The Retailer Operations documents a determination that Lees Cake’s does not meet the requirements as specified in 7 CFR §278.1(b)(iv) because it is principally a bakery/pastry shop, despite not having an oven; and that it is not selling bread. The administrative record and the official certified photographs from the January 18, 2017 contracted store visit clearly show the availability of fully cooked cakes and cupcakes displayed for sale. No bread is identified either in the store inventory materials or in the official certified photographs. Lees Cake’s meets a condition which subjects it to specific disallowance in the cited regulation by not selling bread. Further, Lees Cake’s derives more than 50 percent of its total retail sales from foods intended for immediate consumption for carry-out which is also specifically disallowed in the cited regulations. Notably the inventory documented at the store visit did not include “Loaf Bread (sliced, unsliced)/ Rolls/ Buns/ Bagels/ English Muffins/ Biscuits/ ...”

Equal Opportunity for Small Business:

In the request for review Appellant asks how small business are expected to be able to compete if not given the same opportunities, with inference to being denied authorization as a SNAP retailer.

The Food and Nutrition Act of 2008 states, in part, “Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of the Nation’s agricultural abundance and will strengthen the Nation’s agricultural economy, as well as result in a more orderly marketing and distribution of foods. To alleviate such hunger and malnutrition, a supplemental nutrition assistance program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation.” In support of the Act the general purpose of SNAP, as defined in 7 CFR § 271.1 is “to promote the general welfare and to safeguard the halt and well being of the Nation’s population by raising the levels of nutrition among low-income households”.

Retail food stores, as defined above, are then evaluated, based on materials provided in their Supplemental Nutrition Assistance Program Application for Stores, together with materials provided
from official visits and information and materials as requested from the applicant to affirm or deny eligibility of the applicant.

While support of small business as part of the Nation’s economic support as described in the definitions above is certainly a desired outcome; it is not a primary consideration in the determination of eligibility for SNAP retailer authorization. Neither the Act nor the pursuant regulations require the provision of equal opportunity between small businesses and grocery stores as requested by Appellant.

CONCLUSION

Based on the discussion above, the initial decision by the Retailer Operations Division to deny the application of Lees Cake’s to participate in the SNAP is sustained. Therefore, in accordance with 7 CFR § 278.1(k)(2) Lees Cake’s is ineligible to participate as a SNAP authorized retailer “for a minimum period of six months from the effective date of the denial”, which is six (6) months from the date of the denial letter, February 15, 2017.

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.

NANCY BACA-STEPAN March 30, 2017
ADMINISTRATIVE REVIEW OFFICER