

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

Heart & Soul Café)	
)	
Appellant,)	
)	
v.)	Case Number: C0193453
)	
Retailer Operations Division,)	
)	
Respondent.)	
_____)	

FINAL AGENCY DETERMINATION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence that the Retailer Operations Division properly denied the application of Heart & Soul Café to participate as an authorized 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 denial.

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 denied the retailer application of Heart & Soul Café.

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

Heart & Soul Café submitted an application to participate in SNAP as a retailer on June 7, 2016. On August 4, 2016, the Appellant submitted the last of the required documentation necessary to complete the application. According to the application, the store was opened for business under the current ownership on June 20, 2016.

On August 16, 2016, a store visit was conducted by an FNS contractor to determine whether or not the firm met eligibility requirements to be authorized in SNAP. After reviewing the store visit report, the Retailer Operations Division determined that the firm did not carry a sufficient variety of staple foods in the dairy category, fruits/vegetables category, or in the meat/poultry/fish category. In order for a firm to be eligible to participate in SNAP under Criterion A, it must offer for sale on a continuous basis a variety of foods in each of the four staple food categories pursuant to 7 CFR § 278.1(b)(1).

In a letter sent on August 22, 2016, the Retailer Operations Division informed the Appellant that its SNAP application was denied because it did not offer for sale on a continuous basis a variety of foods in each of the four staple food categories as required under Criterion A. Specifically, the letter stated that the Appellant failed to stock an ample variety of staple foods in the dairy, fruits/vegetables, and meat/poultry/fish categories.

The Retailer Operations Division also informed the firm that it did not meet the eligibility requirements of Criterion B because the store did not have more than 50 percent of its gross retail sales in the sale of staple foods. While the Appellant previously disclosed on its SNAP application that 70 percent of the firm's sales were derived from the sale of staple foods, this percentage seemed excessively high when analyzing the store visit report and photographs. As a result, the Retailer Operations Division contacted the Appellant by telephone on August 22, 2016 to clarify the percentage of staple food sales. During that conversation, the Appellant acknowledged that its staple food sales were approximately 49 percent of its total retail sales. Because the percentage of staple foods was now considered to be less than 50 percent of the firm's total sales, the Retailer Operations Division concluded that the firm did not meet eligibility requirements under Criterion B.

It is further noted that on Question #16 of the SNAP application, the Appellant indicated that the sale of hot and/or cold freshly prepared foods that are ready to eat exceeded 50 percent of the firm's total sales.

In a letter postmarked August 31, 2016, the Appellant requested an administrative review of the Retailer Operations Division's decision to deny the firm's SNAP application. The appeal was considered timely and was therefore granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This 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 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(k) establishes the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility requirements.

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

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, **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... [Emphasis added.]*

7 CFR § 271.2 defines *staple food*, in part, 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.

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

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

In order to qualify under [Criterion A] firms shall:

(A) Offer for sale ... qualifying staple food items on a continuous basis ... on any given day of operation, no fewer than three different varieties of food items in each of the four staple food categories....[emphasis added]

- (B) Offer for sale perishable staple food items in at least two staple food items. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks; and
- (C) Offer a variety of staple foods which means different types of foods, such as apples, cabbage, tomatoes, and squash in the fruit or vegetable staple food category, or milk, cheese, butter and yogurt in the dairy category. Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes. Similar processed food items with varying ingredients such as, but not limited to, sausages, breakfast cereals, milk, sliced breads, and cheeses...shall not each be considered as more than one staple food variety for the purpose of determining variety...

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

In order to qualify under [Criterion B] firms must have more than 50 percent of their total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees, and entertainment/ sports/games income....

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 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) states, in 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.

APPELLANT'S CONTENTIONS

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

- The Appellant submitted 26 color photographs of the store “showing at least four of the different foods in each of the four food groups.” Included in the photographs were photos showing “the correct signage showing the business hours and prices.”
- Appellant provided a handwritten list of the following food items in each category, which the store allegedly carries:

- Dairy:
 - Yogurt
 - American cheese
 - Provolone cheese
 - Butter
 - Chocolate milk
- Meat/Poultry/Fish:
 - Vienna sausage
 - Beef ravioli
 - Corned beef hash
 - Turkey breast
 - Ham
- Fruits/Vegetables:
 - Bananas
 - Oranges
 - Lemons
 - Tomatoes
 - Green peas
 - Green beans
 - Mixed fruit cups
 - Applesauce
 - Corn
- Breads/Grains:
 - Assorted cereal
 - Oatmeal
 - Cereal bars
 - Rice

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. However, in reaching a final agency decision, full attention was given to all contentions presented, including any not specifically summarized or specifically 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 of the store visit and at the time the Retailer Operations Division rendered its decision.

On June 7, 2016, the Appellant submitted an online form FNS-252, *Supplemental Nutrition Assistance Program Application for Stores*, in which it indicated that the firm carried at least three varieties of food in each of the four staple food categories. The Appellant also indicated on the application that 70 percent of its gross retail sales were in the sale of staple foods, with 30 percent in the sale of “other” foods such as snack foods, soft drinks, and condiments. The application indicated that the firm did not sell any nonfood items. (As noted earlier, after a discussion between the Appellant and the Retailer Operations Division, the 70 percent figure was changed to 49 percent.)

On August 16, 2016, an FNS contractor conducted a store visit at the firm to verify the information contained in the Appellant's application. Based on the store visit results, the Retailer Operations Division determined that the firm's SNAP application was not accurate. According to the contractor's written record of the store visit, the Appellant firm did not carry a sufficient variety of staple foods in the dairy category, the fruits/vegetables category, or the meat/poultry/fish category as necessary to be eligible under Criterion A. According to the report, the only dairy in the store was ice cream and yogurt; the only fruits or vegetables were single-serving sized cans of mixed fruit; and there were no meat/poultry/fish products.

After reviewing both the store visit report and the Retailer Operations Division's assessment of the visit, this review agrees that the Appellant firm carried an insufficient variety of staple foods in at least three categories – dairy, fruits/vegetables and meat/poultry/fish. In order to qualify under Criterion A, the firm must carry at least three varieties of food in all four staple food categories. It is important to note that the contractor's photos did show a few other food items in the store, such as frozen chicken, eggs, corn, tomatoes, etc. However, none of these items appeared to be for sale individually. Rather, the appearance was that they were for use in the preparation of meals. In accordance with 7 CFR § 278.1(b)(1)(ii)(C), multiple ingredient foods shall not each be considered as more than one staple food variety for the purpose of determining variety. This regulation further states:

Multiple ingredient food items intended for home preparation and consumption, such as, but not limited to, cold pizza, macaroni and cheese, soup, or frozen dinners, shall only be counted as one staple food variety each and will normally be included in the staple food category of the main ingredient as determined by the FNS.

At the time of the store visit, there were no menus posted, and no indication as to what prepared meals were actually available for sale. There was no way to determine what the main ingredient was in each meal, which meant that the Retailer Operations Division could not assign the food items to a particular staple food category.

Further, as noted earlier, the Appellant indicated on Question #16 of the SNAP application that the sale of hot and/or cold freshly prepared foods that are ready to eat exceeded 50 percent of the firm's total sales. According to 7 CFR § 278.1(b)(1)(iv), a firm with more than 50 percent of its sales in hot and/or cold freshly prepared foods not intended for home preparation and consumption, "shall not qualify for participation as [a] retail food [store] under Criterion A or B." There is no indication that the Appellant ever contended that its answer to Question #16 was incorrect.

This review also agrees with the Retailer Operations Division that the Appellant does not meet SNAP eligibility under Criterion B. In order to be eligible under this criterion, the sale of staple foods must comprise at least 50 percent of the firm's total sales. In this case, the Appellant reported on its application that more than 50 percent of its sales were derived from the sale of hot and/or cold freshly prepared foods not intended for home preparation and consumption. Such foods cannot be counted as staple foods for the purpose of determining a firm's eligibility. Therefore, the firm is not eligible for participation under Criterion B.

Photos Provided by Appellant

With regard to the photos provided by the Appellant in its request for administrative review, as well as its written list of available food items, it is acknowledged by this review that the amount of staple food in the photographs is greater than what was present at the time of the contractor's store visit. This review also concedes that there are new signs posted which show the firm's business hours and provide detailed information about the individual food items and the kinds of meals available for purchase at the store.

However, it must be reiterated that this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the store visit and at the time the Retailer Operations Division rendered its denial decision. It is not the authority of this review to consider what subsequent actions may have been taken by the firm so that a store may enhance or begin to comply with program requirements.

There are no provisions in the SNAP regulations or internal agency policy directives for a reversal of an application denial on the basis of alleged or planned after-the-fact corrective actions implemented subsequent to the finding of a firm's ineligibility. Therefore, the Appellant's contentions that an improvement of its staple food inventory has taken place or the implication that the staple food sales percentages have since changed do not provide a valid basis for reversing the Retailer Operations Division's determination.

CONCLUSION

The contentions presented by the Appellant are not sufficient to prove that the denial decision made by the Retailer Operations Division was inaccurate or that it should be reversed. The store visit cited by the Retailer Operations Division was conducted by an FNS contractor and was thoroughly documented. A review of the report has yielded no indication of error or discrepancy. Rather the report and accompanying photographs are specific and accurate with regard to store conditions and food inventory on the day of the visit, and in all other critically pertinent details.

On the basis of the analysis above, the decision by the Retailer Operations Division to deny the application of Heart & Soul Café to participate as a retailer in SNAP is sustained. In accordance with 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 August 23, 2016, which is the effective date of the denial.

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 (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/

JON YORGASON
ADMINISTRATIVE REVIEW OFFICER

November 28, 2016

DATE