

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

**Chicago Chicken & Fish Delight LLC,
Appellant,**

V.

**Retailer Operations Division,
Respondent.**

Case Number: C0247711

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the Retailer Operations Division properly withdrew the authorization of Chicago Chicken & Fish Delight LLC (hereinafter “Appellant”) from participation as a 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, in its administration of SNAP when it withdrew the authorization of Chicago Chicken & Fish Delight LLC by letter dated June 16, 2021.

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

The Appellant firm, Chicago Chicken & Fish Delight LLC was originally authorized to participate as a retailer in SNAP on September 17, 2020 without a store visit due to COVID-19 protocols. In accordance with regulation, each SNAP authorized firm is required to undergo a periodic reauthorization process to determine whether the firm still meets eligibility requirement.

Effective October 16, 2017, SNAP regulations at 7 CFR § 278.1(b)(1)(iv) were amended to clarify the types of stores that are considered restaurants for purposes of determining program eligibility. Prior to this regulatory change, FNS considered restaurants to be firms that had more

than 50 percent of their gross sales from hot and/or cold prepared foods not intended for home preparation and consumption, including food items sold for carryout. This earlier regulation considered foods that were heated by the retailer **after** purchase to be staple foods for purposes of SNAP eligibility and thus did not count towards the 50 percent prepared foods threshold.

The **new rule** changed the wording of the regulation and state that any foods cooked or heated on-site by the retailer **before or after** purchase must be counted toward the 50 percent threshold. In other words, foods heated by the retailer after purchase are now considered prepared foods and are no longer counted as staple food items for the purpose of determining SNAP eligibility.

Appellant submitted an online reauthorization application dated June 16, 2021. During the reauthorization process, Chicago Chicken & Fish Delight LLC was identified by the Retailer Operations Division as a firm that could be affected by this change in the regulation. In correspondence dated June 6, 2021, Retailer Operations Division notified Appellant that review of the information submitted on your application for reauthorization indicates that your firm has significant prepared food operation and appears to operate primarily as a restaurant, in that a majority of your total gross retail sales are hot food (heated by your firm before or after purchase) and/or cold foods prepared on site. In order to verify the eligibility of your business as an eligible retail food store, please provide copies of all the following documents within 10 days of receipt of this letter:

- An overview document (e.g., an Excel Spreadsheet) that you create which totals actual retail sales for 1 representative week and breaks down these actual retail sales down into the following categories: 1) Staple Foods, 2) Accessory Foods, 3) Hot Prepared and Heated Foods, 4) Cold Foods Prepared on Site, 5) Charges for Food Heating Services, and 6) Nonfood items.
- Verification of actual retail sales for 1 representative week (actual sales receipts).
- Verification of total gross retail sales for the most recent quarter (State Sales and Use tax records, income tax records, or other records verifying total gross retail sales income).

On March 18, 2021, an FNS contractor attempted to conduct an on-site store visit in an effort to evaluate the store conditions and inventory. The record reflects that the store visit was refused. On May 20, 2021, an FNS contractor made a second attempt to conduct an on-site store visit in an effort to evaluate store conditions and inventory. The contractor's report and photographs indicated that the firm is mainly set up as a restaurant.

After reviewing this information, the Retailer Operations Division concluded that the documentation provided was inadequate to make a determination. As Appellant failed to fully respond to the request, Retailer Operations Division informed the firm, in correspondence dated June 17, 2021, that its authorization to participate as a retailer in SNAP was withdrawn.

In a letter dated June 20, 202, Appellant, through counsel, appealed Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means 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

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(n) 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(n) states in relevant 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. Failure to cooperate in the reauthorization process will result in withdrawal of the firm’s approval to participate in the program.”

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 qualifying staple food items on a continuous basis, evidenced by having no fewer than [three]¹ 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 [two]¹ 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 stock keeping units, or other inventory or accounting recordkeeping methods that are customary of reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter ...”

7 CFR § 271.2 defines staple food as: “... food items intended for home preparation and consumption in each of the following four categories: Meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products ... Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility under § 278.1(b)(1) of this chapter ... Accessory food items include foods that are generally considered snack foods or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other food items that complement or

¹ As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar ...”

7 CFR § 278.1(b)(1)(i) states in relevant part: “As establishment ... 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 ... including perishable foods in at least [two]¹ 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)(iv) stated in relevant 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 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 and 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 ...”

APPELLANT’S CONTENTIONS

In response to the Retailer Operations Division withdrawal letter and in the request for administrative review, Appellant has stated as its position in the matter the following:

1. The firm timely responded with responsive documents however the USDA prematurely sent another letter dated June 16, 2021 stating that the USDA did not receive the information requested by the deadline.
2. It is understandable why the information requested was initially missing from the firm’s response. The list of documents requested by the USDA were all in bullet format except for two items not in bullet format.
3. The firm is respectfully requesting an extension of time to a later date to provide written information in support of the firm’s position.

Appellant provided copies of the communications between Appellant and Retailer Operations Division, as well as a copy of the Letter of Representation.

The preceding may represent only a brief summary of Appellant’s contentions in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated or 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 the

Retailer Operations Division rendered its decision. It must also be made clear that the objective of this review is not to determine the firm's eligibility for SNAP participation. Rather it is solely to determine whether the firm failed to cooperate with the reauthorization process, which is the basis for the Retailer Operations Division's withdrawal determination.

It should be restated here that the term "failed to cooperate" in this case simply denotes that the Appellant did not submit sufficient or clear enough information to enable the Retailer Operations Division to make an eligibility determination. It does not imply that the firm was unwilling or reluctant to provide the required information.

As of June 17, 2021, it was determined that Appellant still had not provided primary documentation requested in order to properly determine Appellant's eligibility as required by SNAP regulations and Agency guidance. In its review request, Appellant, through counsel, contends that it is understandable why the information requested was initially missing from the firm's response. The list of documents requested by the USDA were all in bullet format except for two items not in bullet format. With regard to this contention, it is Appellant's responsibility to thoroughly read all correspondence sent by the Agency and if there are any questions or concerns about the information contained therein; Appellant should contact Retailer Operations Division for clarification.

CONCLUSION

The contentions presented by the Appellant are not sufficient to prove that the withdrawal decision made by the Retailer Operations Division was inaccurate or that it should be reversed. It remains unclear whether the firm is primarily a restaurant or an eligible retail food store.

Because evidence has not been provided that would definitively determine the Appellant's eligibility for SNAP participation, it is the determination of this review that the decision to withdraw the firm's authorization due to its failure to cooperate was appropriate and was made in accordance with SNAP regulations at 7 CFR § 278.1(n).

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the authorization of Chicago Chicken & Fish Delight LLC to participate as a retailer in SNAP is sustained. In accordance with the Food and Nutrition Act of 2008, as amended and SNAP regulations, the withdrawal of Chicago Chicken & Fish Delight LLC shall become effective 30 days after receipt of this decision. **A new application for SNAP participation may be submitted at any time.**

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to 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 (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

September 30, 2021