

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

John W. Faidley Seafood,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0249632

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service, finds there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to deny the application of John W. Faidley Seafood (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it denied the application of Appellant to participate in SNAP by letter dated May 25, 2021.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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

In a letter dated September 30, 2021, the Office of Retailer Operations and Compliance denied Appellant’s application to participate as an authorized retailer in SNAP because it did not meet the definition and eligibility requirements of a retail food store as established by Federal regulations at 7 CFR § 278.1(b)(1). This action was taken because the Office of Retailer Operations and Compliance had determined the Appellant firm was primarily a restaurant based on observations during an onsite store visit on July 26, 2021, as well as information provided on and in support of the firm’s SNAP retailer reauthorization application dated February 5, 2021, and as such failed to meet the definition of an eligible firm. Specifically, the denial letter states

that firms with more than 50 percent of their total gross sales in heated foods and/or prepared foods, cooked or heated by the retailer before or after purchase, are not eligible to participate as retail food stores. "Heated foods" are foods cooked or heated by the retailer before or after purchase." "Prepared foods" are hot or cold foods not intended for home preparation and/or home consumption, including prepared foods that are consumed on the premises or sold for carryout. SNAP regulations, at 7 CFR § 278.1(b)(1)(iv), provides that restaurants are not eligible to participate in SNAP.

Appellant appealed the Office of Retailer Operations and Compliance's assessment and requested administrative review via email on October 21, 2021. The appeal was granted. Subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that 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 untrue.

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 Part 278.1(k)(1) and Part 278.1(l)(1) establish the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet the definition of an eligible firm.

7 CFR § 271.2 states, in part, that: 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

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv), Ineligible Firms, which states, in part, that: 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.

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, that: 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

The following may represent a 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:

- Our market business, John W. Faidley Seafood Inc., reapplied to accept SNAP benefits in February 2021. We had accepted Food Stamps for nearly 60 years prior to being withdrawn on June 17, 2020. The determination of our Fresh Seafood and Market Stall to be a restaurant, once again is erroneous. Our market stall sells over 95 percent groceries. This was argued with USDA in 2019 and resolved. In 2020, FNS determined to disqualify our business instead for colocation. These claims were also erroneous. Colocation has four requirements and Faidley's does not meet all four requirements;
- The reapplication process has been extremely slow and burdensome. After several months of waiting we reached out to FNS for assistance and our call was returned by a Ms. Noury. She scheduled a site visit that was completed in July 2021 and requested a sales breakdown when we emailed about the status. We shared this confidential information and our breakdown of sales that we are over 70 percent uncooked foods company wide and that we comply with SNAP acceptance rules at our raw seafood and fresh food market stall. After sharing hundreds of documents and waiting nine months, we again received a denial letter dated September 30, 2021, that was attached to an email dated October 12, 2021. The letter stated that we were being denied again claiming that we have more than 50 percent of our sales in hot or prepared foods. Not only do our 2020 sales reflect over 72 percent uncooked (explained to both Ms Noury and a Ms Drane) the operations of our three stalls are separated. The 50 percent hot food argument was dropped in 2019 and our 2020 denial was based on colocation which is also erroneous. This is another denial based on false information;
- The claim that our gross sales are more than 50 percent heated and/or prepared foods is also false. More than 50 percent of our overall company sales is in shipped grocery or uncooked products meant for home consumption. This was explained to FNS staff;
- Our 2020 tax return that was mailed to FNS reflected a total revenue of \$2,245,971 with a breakdown of:
 - Kitchen & Raw Bar Stalls \$616,203.00 (27.43%)
 - Fish Mkt & Uncooked Carryout \$275,033.63 (12.25%)
 - Shipped Uncooked Grocery \$1,342,604.00 (60.32%)The S & U documents also support these percentages;
- Revenue from qualified uncooked grocery and grocery shipping accounts for 72.57 percent of our post Covid business. We continue to grow our online business by the day and expect our grocery shipping to grow another 25 percent this year. Faidley's has provided grocery delivery for over 40 years and we are developing a new expanded shipping site that will go live in November;
- We cannot see any way in which FNS could have determined that our firm has over 50% gross sales in hot or prepared food during the time period in question. We have enclosed spreadsheets that detail all of our revenues for the year of 2020 and the first two months (January and February) of 2021. As you can clearly see at no point does the firm's total

sales of Hot or Prepared foods eclipse 30%- and therefore according to USDA regulations we cannot be considered a restaurant which would be ineligible for the program. All of these numbers have come directly from our E-Commerce records, our third party shipping partner (Goldbelly), and Comus POS system and are consistent with all tax returns and statements that we have already supplied to your department;

- As you go through these numbers, please remember that WE ARE APPLYING THROUGH CRITERION A i.e. the staple food stocking requirement as a retail food store. According to USDA regulations, we more than meet the minimum requirements to be eligible as a SNAP retailer through this Criterion; at any given time our fish market stocks over 50+ varieties of perishable staple seafood items in the meat and poultry category, 8+ varieties in the perishable fruit and vegetables category, and anywhere from 3-6+ items in both the breads/cereals and Dairy (perishables) categories. At all times we have a minimum of 3 stocking units (usually much more) of each variety of stocking unit in each category. We not only meet the requirements set by the USDA, but we greatly exceed them;
- Since Covid, it has been necessary for many businesses to restructure their models, Faidley's included. All of the items shipped via our online service fall into the category of staple foods as outlined by USDA regulations and based off of this direct quote from Batista Edwards in our previous letter: "'Heated foods" are foods cooked or heated by the retailer before or after purchase. "Prepared foods" are hot or cold foods not intended for home preparation and/or home consumption, including prepared foods that are consumed on the premises or sold for carryout;" and,
- Every item we sell via our online grocery shipping operation requires home preparation. Every box of our crab cakes includes instructions on how to cook them at home. We have also included a picture showing the difference between our cooked crabcakes sold as carryout and pictures of the uncooked crab cakes sold as grocery/staple items (which require home preparation to eat) via our shipping operation. It is also important for me to point out that our shipping IS NOT CARRYOUT. We do not use, nor have we ever used, companies like DoorDash or UberEats. We ship via carriers such as UPS, FedEx, and NDX as next day air mail only. We can provide UPS and NDX statements to prove this at your request. Our shipping parcels are mailed with refrigerated or frozen grocery/staple items through next day air and delivered at the customers home, for them to prepare themselves. This meets all of the requirements as staple food according to USDA regulations, and is no different than Amazon now accepting EBT for online grocery services- with the exception that we must use outside carriers.

Appellant submitted spreadsheets for 2020 and for January and February 2021 sales as well as photos of cooked and uncooked food in support of these contentions.

ANALYSIS AND FINDINGS

The authorization of a firm to participate in SNAP must be in accord with the Act, as amended, and regulations. These requirements of law cannot be waived. Thus, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Office of Retailer Operations and Compliance, and as such it is limited to

consideration of the relevant facts and circumstances that existed at the time of the denial determination.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) state, in part, that, “Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation 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 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.” As previously noted in the Controlling Law section, 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 SNAP regulations.

Retailer Operations staff conducted an analysis of the information provided by the Appellant, including the firm’s Daily Transaction Journal for the period February 6-13, 2021, to determine the firm’s total sales for the three facets of the business: Kitchen (lunch counter), the Market, and the Raw Bar. The result of this analysis was that hot/cold prepared foods were determined to represent 78 percent of gross sales for the three facets of the business. Retailer Operations staff also discussed the store’s operations with store ownership on or about May 21, 2021. During this conversation, the owner was asked what has changed about the business. He explained that except for being a wholesale operation, which he has not been for 40 years, he has not changed the way he operates this business. He said, there are three facets to his business operating at the location: a Seafood Market, a Raw Bar, and a Lunch Counter. A store visit was made to the location by an FNS contractor on July 26, 2021. The contractor’s survey and pictures show a business operating generally as it had in the past, and as the owner described, except for the inclusion of outside dining, curbside pick-up, and advertisement offering steamed crabs. Additional information sent by Appellant via email on November 15, 2021, was also reviewed and analyzed by Retailer Operations staff. The result of the analysis of the 2020 year-end sales data was that hot/cold prepared foods were found to represent 74 percent of gross sales at the Lexington Market.

For the purpose of determining whether a firm is a restaurant under SNAP regulations, the issue is not whether the firm has available for sale uncooked or raw SNAP-eligible food, the fundamental issue is whether the firm has more than 50 percent of total gross retail sales in the combined sales of heated and/or cold prepared foods, including foods cooked or heated after purchase. There is no doubt that uncooked or raw staple food items is available to customers. Since the firm has more than 50 percent of total gross retail sales in the sale of hot and/or cold prepared foods it is classified as a restaurant under SNAP regulations making it ineligible for SNAP retailer authorization.

CONCLUSION

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to deny the application of the Appellant firm to participate as an authorized SNAP retailer is sustained.

In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to reapply for participation as a retailer in the SNAP for a minimum period of six months from the effective date of the denial. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

May 23, 2022