

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

Moruss Seafood & Crabhouse,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0221806

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to reverse the determination by FNS's Retailer Operations Division to withdraw the authorization of Moruss Seafood & Crabhouse (hereinafter "Appellant") from participation as a retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Retailer Operations Division shall continue to process the firm's application.

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 Moruss Seafood & Crabhouse.

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 SUMMARY

The Appellant firm, Moruss Seafood & Crabhouse, was originally authorized to participate as a retailer in SNAP on January 14, 2009. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization to determine whether the firm still meets eligibility requirements. On November 25, 2018, the firm submitted a reauthorization application in which it indicated that its total retail sales for tax year 2017 were 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of that amount, the Appellant reported that 18.3 percent of its sales were in the sale of hot and/or cold prepared foods intended for immediate consumption or carryout. The Appellant

further reported that 5.7 percent of its sales were in the sale of accessory foods, such as soft drinks and snacks, while 76 percent were in the sale of staple foods.

SNAP regulations address the types of stores that are considered restaurants for purposes of determining program eligibility. The regulation at 7 CFR § 278.1(b)(1)(iv) states that firms that have more than 50 percent of their gross sales from the sale of hot and/or cold prepared foods not intended for home preparation and consumption, including food items sold for carryout, shall not qualify for SNAP participation under eligibility Criterion A or B. This includes any foods cooked or heated onsite by the retailer before or after purchase. It should be noted that hot foods are not eligible for purchase with SNAP benefits. Cold prepared foods, such as freshly-made sandwiches or salads, may be eligible for purchase with SNAP benefits, but are not considered staple foods for purposes of determining Program eligibility.

On December 15, 2018, a contractor from FNS conducted a store inspection with the purpose of verifying whether the firm's reported sales percentages seemed reasonable. Upon receiving the store visit report and photographs back from the contractor, FNS suspected that the reported sales percentages were inaccurate. The contractor's photographs clearly showed that the firm sold some cold seafood by the pound, but there was a large menu board with dozens of hot food options, suggesting that many of the firm's sales were in the sale of foods that were heated on site either before or after the sale.

In a letter dated March 4, 2019, the Retailer Operations Division requested additional sales data from the Appellant in an effort to clarify the situation. Specifically, the Appellant was asked to provide sales records for a three-month period as well as an overview document, such as a spreadsheet, breaking down actual sales into the following categories: 1) heated or prepared foods, 2) non-foods, 3) accessory foods, 4) staple foods, and 5) charges for food heating services. The letter further requested tax records from the prior year to verify total gross sales.

In response to this request, the Appellant, through counsel, submitted an eight-page explanation of the firm's business model and a four-page spreadsheet showing the following information for the months of January, February, and March 2019:

Heated foods:	5 U.S.C. § 552 (b)(6) & (b)(7)(C) (approximately 31.7% of total sales)
Non-Foods:	5 U.S.C. § 552 (b)(6) & (b)(7)(C) (0.002%)
Accessory Foods:	5 U.S.C. § 552 (b)(6) & (b)(7)(C) (3.3%)
Staple Foods:	5 U.S.C. § 552 (b)(6) & (b)(7)(C) (61.8%)
Heating Charges:	5 U.S.C. § 552 (b)(6) & (b)(7)(C) (2.8%)

The Appellant also submitted six pages of sales and use tax documentation for the year 2018.

In its eight-page letter, the Appellant expressed concern that FNS seemed to put a great deal of stock in the contractor's December 2018 store inspection. The Appellant claimed that the contractor spent less than 10 minutes in the store, but its report resulted in FNS believing that the store was a restaurant rather than a retail food store. The Appellant also emphasized that while some of its sales were heated or cooked on-site, nearly all of those customers purchased the food items for home consumption. The Appellant further stated that the firm does not have the sales

records requested by FNS. According to the Appellant, the firm did not have a sophisticated cash register and does not print or maintain end-of-day sales summaries, such as Z-tapes.

After reviewing the Appellant's explanation and documentation, the Retailer Operations Division determined that the response was inadequate to verify the firm's ongoing eligibility in SNAP. On August 26, 2019, the agency sent the Appellant another letter, requesting additional sales data, this time for a one-week period. Requested information included the following:

- Actual sales receipts for one week
- Overview document for the same one-week period, breaking down sales into the following categories:
 - Staple foods
 - Accessory foods
 - Hot/heated foods
 - Cold foods prepared on site
 - Food heating charges
 - Nonfoods
- Federal business tax return for 2018, and sales tax returns for a one-year period.

In response to this second request, the Appellant submitted a three-page letter as well as copies of the requested records "to the best of its ability." These additional records showed that for the period of August 19-25, 2019, the firm had 78 percent of its sales in staple foods, and just 17 percent in heated or prepared foods. According to the Appellant, these records provided clear evidence that less than 50 percent of the firm's gross sales were in the sale of hot prepared and heated foods or colds foods prepared on site.

After reviewing the firm's additional sales data, and evaluating its taxed sales vs. non-taxed sales in relation to sales tax rules for the District of Columbia (e.g. groceries are not subject to sales tax, but prepared foods are), the Retailer Operations Division determined that the firm was operating primarily as a restaurant and thus, was ineligible for ongoing SNAP authorization.

In a letter dated September 13, 2019, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it did not meet the requisite eligibility criteria. Specifically, the letter stated that the firm was a restaurant because more than 50 percent of its total sales were in the sale of heated and/or prepared foods not intended for home preparation and consumption, including prepared foods that were sold for carryout. The letter indicated that the withdrawal determination was based on regulations at 7 CFR § 271.2, § 278.1(b)(1), and § 278.1(k)(2).

In a letter dated September 18, 2019, the Appellant, through counsel, requested an administrative review of the withdrawal determination. The request was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

On the same date as its request for review, the Appellant submitted a request for case file information in a request made under the Freedom of Information Act (FOIA). In accordance with agency policy at the time of the FOIA request, the administrative review was held in abeyance pending a response to the FOIA request.

On January 19, 2022, the administrative review was reassigned to review officer Jon Yorgason.

On April 6, 2022, the FNS FOIA office completed its response to the Appellant's FOIA request and sent it to Appellant's counsel via e-mail. The following day, the review officer notified Appellant's counsel that it had 21 days to submit any additional information it would like considered in this matter. That same day, counsel requested an extension to May 20, 2022, to submit its materials.

On May 20, 2022, the Appellant submitted a six-page letter outlining its contentions in the case, along with seven accompanying exhibits. The exhibits, totaling 458 pages, consisted mainly of documentation that was part of the record prior to the firm's request for administrative review. New information included Exhibit G, which is a 28-page spreadsheet detailing every item purchased during the one-week period of August 19-25, 2019. The spreadsheet breaks down each purchase into the following categories (verbatim from the spreadsheet):

- Staples (Not Cooked/Heated/Prepared On-Site)
- Accessory Foods
- Heated/Cooked/Prepared On-Site
- Non-Foods
- Cooking/Heating Charges
- Tax

Based on these updated categories, the Appellant's evidence shows that for that one-week period, 58.16 percent of its total sales were from the sale of staple foods. Foods that were heated, cooked, or prepared on-site constituted 32.5 percent of the firm's sales.

STANDARD OF REVIEW

In an appeal of adverse action, such as the withdrawal of a firm's SNAP authorization, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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(l)(1) and (k)(2) provide the authority upon which FNS shall withdraw the authorization of any firm which fails to meet established eligibility criteria.

7 CFR § 278.1(l)(1) reads, in part:

FNS may withdraw the authorization of any firm authorized to participate in the program for any of the following reasons:

(i) The firm's continued participation in the program will not further the purposes of the program;

(ii) The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;

(iii) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...for the time period specified in paragraph (k)(2) of this section.

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.... 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.

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]* 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]* 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: Food cook 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**

* 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>.

consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under § 278.1(b) (1) of this chapter.... [Emphasis added.]

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....

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

An 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]** 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) 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 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...** [Emphasis added.]

ANALYSIS AND FINDINGS

This review finds that the new information provided by the Appellant sufficiently establishes that the firm is not primarily a restaurant and that it likely meets SNAP eligibility requirements under Criterion B as outlined in regulations at 7 CFR § 278.1(b)(1)(i). Accordingly, the agency's

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withdrawal determination is reversed and further analysis related to the Appellant's contentions is unnecessary.

This administrative review decision is based on the specific circumstances of this case as documented by materials provided by both the Appellant and the Retailer Operation Division. In addition, this administrative review decision does not establish policy or supersede federal law or regulations.

CONCLUSION

Based on a preponderance of the evidence, the determination by the Retailer Operations Division to withdraw the SNAP authorization of Moruss Seafood & Crabhouse is reversed.

The Retailer Operations Division shall continue to process the Appellant's reauthorization application without regard to the restaurant provision of 7 CFR § 278.1(b)(1)(iv). However, this decision shall not preclude FNS from withdrawing the firm's SNAP authorization during a future reauthorization if the firm's prepared food sales at that time are found to exceed 50 percent of its total sales.

RELEASE OF INFORMATION

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.

JON YORGASON
Administrative Review Officer

August 1, 2022