

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

Bobs Seafood Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0267951

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 denied the application of Bobs Seafood Market (hereinafter “Appellant”) 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 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 Bobs Seafood Market.

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

On January 3, 2023, the Appellant submitted an application to become a SNAP authorized retailer. In a letter dated February 24, 2023, the Retailer Operations Division denied the Appellant’s application based on information provided on the SNAP authorization application, as well as information submitted as part of the application process. The denial letter stated that the firm was determined to be primarily a restaurant, because more than 50 percent of its total gross retail sales was from “heated foods” and/or “prepared foods.” Appellant was also informed that the firm could not submit a new application for SNAP authorization for a period of six months from the date of denial, in accordance with SNAP regulations at 7 CFR § 278.1 (k)(2).

On March 4, 2023, the Appellant requested an administrative review of the Retailer Operation Division's denial of its SNAP application. The request for review was 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 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 contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and is promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1 (k) provides FNS the authority to deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility requirements.

7 CFR § 278.1(k)(1) states, in part:

FNS shall deny the application of any firm if it determines that:

(1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section;

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 3 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.]

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

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

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

- The establishment is not a restaurant because it does not have the necessary parking, lacks waitstaff, and has only a few booths that are mostly for customers waiting for takeout.
- The establishment meets the same requirements of as every other seafood market in New Jersey that is still authorized to accept EBT.
- A business that was previously part of the same chain and has the same building and parking lot is still eligible to accept EBT.
- The business model changed during the pandemic as cooked takeout orders increased, but things have since normalized.

In correspondence dated March 14, 2023, the Appellant made the following summarized contention:

- Overall sales from 2022 were \$1,469,155 and prepared foods were \$486,042, approximately 33 percent, leaving 67 percent for food-grocery sales.

The Appellant did not submit any additional evidence in support of these contentions on administrative review.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final decision, this review gave full attention to all contentions submitted, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or invalidate the Retailer Operations Division's denial determination. 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 should be noted that on December 15, 2016, FNS published a final rule entitled “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP),” at 81 Federal Register 90675, that impacted the eligibility of firms that sell heated or prepared foods. If more than 50 percent of a firm’s sales come from the sale of heated or prepared foods, the firm is considered a restaurant under SNAP regulations, and therefore is ineligible for authorization. The final rule clarified that any foods cooked or heated on-site by the retailer before or after purchase, and any hot or cold prepared food not intended for home preparation or consumption, including foods consumed on the premises or sold for carryout, count toward the 50 percent threshold. This portion of the rule was implemented by FNS on October 16, 2017.

The information provided by the Appellant on its January 3, 2023, application indicates that the sale of hot prepared food was 30 percent of the firm’s total gross retail and the sale of cold prepared food comprised 60 percent of the firm’s total gross retail sales. On appeal, the Appellant argues that prepared foods sales were only 33 percent of gross retail sales. The Appellant, however, did not submit any documentation that its percentage of hot and/or cold foods was not what it reported on its application.

The Appellant also contends that the firm is not a restaurant because it does not have the necessary parking and waitstaff, and has only a few booths that customers use to wait for takeout orders. The Appellant’s contentions, even if true, do not provide a basis for reversing the Retailer Operations Division’s earlier determination that the firm has more than 50 percent of its total gross sales in prepared foods cooked or heated on-site before or after purchase and hot or cold prepared foods not intended for home preparation or consumption.

After reviewing the Appellant’s application and the contentions provided by the Appellant, this review finds that Bobs Seafood Market does not meet the definition and requirements of a retail food store. SNAP regulations at 7 CFR §278.1(b)(1)(iv) states, in part “firms that have more than 50 percent of their total gross sales in foods cooked or heated onsite 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.”

CONCLUSION

Based on the analysis above, the determination by the Retailer Operations Division to deny the application of Bobs Seafood Market to participate as a retailer in SNAP is sustained. The business does not operate as a retail food business within the meaning of the SNAP regulations at Part 271.2 5 (definition of a retail food store) and is ineligible for SNAP authorization under 7 CFR § 278.1(b)(1)(iv). Additionally, the contentions presented by Appellant are not sufficient to show that the denial decision should be reversed. Appellant is ineligible to reapply for SNAP authorization for a minimum period of six months from, February 24, 2023, the effective date of the denial.

ELIZABETH ALLEN
Administrative Review Officer

May 18, 2023