

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

**Hook Fresh Fish & Chicken,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0262064**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny the application of Hook Fresh Fish & Chicken (Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program when it denied the application of Appellant to participate in SNAP.

**AUTHORITY**

7 USC § 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**

In a letter dated November 8, 2022, the Retailer Operations Division denied the application of Hook Fresh Fish & Chicken to participate as an authorized retailer in SNAP because the firm is not a retail food store as defined by the SNAP regulations. The Retailer Operations Division determined that Appellant is primarily a restaurant because hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, either for carryout or on-premises consumption, and requiring no additional preparation, comprise more than 50% of the firm’s total sales. Restaurants are not eligible to participate in SNAP except in certain states that

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operate special restaurant programs allowing the elderly, disabled, and homeless participants to use SNAP benefits in restaurants. Ownership was informed that the firm could not submit a new application to participate as a SNAP retailer for a period of six months as provided in § 278.1(k)(2).

In an e-mail sent November 22, 2022, ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted.

## **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 278.1(k)(1) Denying authorization, references 7 CFR § 278.1(b)(1)(iv) ineligible firms, which reads, in part:

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.

7 CFR § 278.1(k)(2) reads, in relevant 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.

7 CFR § 271.2 states, in part:

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 under § 278.1(b)(1) of this chapter.

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.]

### APPELLANT'S CONTENTIONS

Appellant made the following summarized contentions in its administrative review request e-mailed on November 22, 2022, in relevant part:

- Appellant has struggled over the past three years to sell as much fresh fish, seafood, groceries, and frozen goods.
- Appellant gets about 40 customers per day asking for EBT.
- Appellant is struggling to remain open and pay the bills.
- Appellant would easily sell more than 75% raw items if it was able to afford to carry a larger inventory.
- Appellant wastes plenty of food and it is not feasible if they want to stay open.

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

### ANALYSIS AND FINDINGS

The purpose of this review is to validate or to invalidate the decision of the Retailer Operations Division. Thus, it is limited to consideration of the relevant facts at the time the Retailer Operations Division rendered its decision as to this one Appellant. The authorization of a store to participate in the SNAP must be in accord with the Act and the regulations, as amended; those requirements of law cannot be waived.

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 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. The information provided by the owner on the August 15, 2022, application for authorization indicates that the sale of hot prepared food is ten % of total gross retail sales at the business and the sale of cold prepared food comprise

one % of the firm's total gross retail sales. The Retailer Operations Division requested receipts to support the sale of staple foods and hot food items. The sales receipts submitted by the firm show that 57% of the firm's total gross sales was in hot foods. The Retailer Operations Division also considered information obtained during an October 11, 2022, store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities.

Appellant explains that the sale of staple foods and raw food would be more than 75% of its total sales, if it was able to afford a larger inventory<sup>0</sup>. The purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the denial action. There are no provisions in the SNAP regulations for authorization based on possible after-the-fact corrective actions implemented after a finding of ineligibility. The sales documentation provided by the retailer at the time of its application for authorization document that its hot and prepared food items are more than 50% of its total gross sales.

The preponderance of evidence supports the Retailer Operations Division's determination that the firm has more than 50 percent of its total gross sales in prepared foods or heated on-site 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. According to 7 CFR § 278.1(b)(1) of the SNAP regulations, such a store is considered a restaurant and is not eligible for SNAP participation as a retail food store. Therefore, Appellant does not qualify as a retail food store for purposes of SNAP participation.

### **Appellant Hardship**

Appellant explains that the business is suffering. It is recognized that economic hardship is a likely consequence whenever a store is not eligible for SNAP authorization. However, there is no provision in the SNAP regulations for a waiver or reduction of an eligibility criteria based on possible economic hardship to the firm resulting from being determined ineligible for authorization. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

### **SNAP Household Hardship**

Appellant also contends that there are many low-income households visit the Appellant and want to purchase items with SNAP benefits. Unfortunately, this contention does not provide a valid basis for reversal of the Retailer Operations Division's denial determination. While stores that fail to meet Criterion A and B may sometimes be authorized if located in an area with significantly limited access to food, as provided under SNAP regulations at 7 CFR § 278.1(b)(6), firms determined to be restaurants are not eligible for authorization under this provision. There is no authority in SNAP regulations to authorize a firm determined to be a restaurant based upon SNAP recipient need

## **CONCLUSION**

The determination by the Retailer Operations Division to deny the application of Hook Fresh Fish & Chicken to participate as an authorized SNAP retailer is sustained.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owner resides or is 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, 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.

Mary Kate Karagiorgos  
ADMINISTRATIVE REVIEW OFFICER

March 2, 2023