

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

Kimble Fish Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0264605

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 Kimble Fish 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 Kimble Fish 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

In a letter dated December 27, 2022, the Retailer Operations Division denied the Appellant’s SNAP application 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 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 dated January 3, 2022, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request 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 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

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

- Appellant intends to make the firm a grocery store.
- The firm sells cooked fish, but it also sells raw fish.
- There are no tables for people to eat.
- The firm was under renovations when the store visit occurred.
- Appellant is ready for a store visit now.

The preceding may represent only a summary of the Appellant's contentions presented in this matter. However, in reaching a final decision, full attention was given 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 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.

After reviewing the inspector's store visit report and photographs along with the contentions provided by the Appellant, this review finds that Kimble Fish Mart 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 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 November 10, 2022, application for authorization indicates that the sale of hot prepared food is 18% of total gross retail sales at the business and

the sale of cold prepared food comprise 45% of the firm's total gross retail sales. The Retailer Operations Division also considered information obtained during a December 19, 2022, store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities.

Appellant's administrative review request contends that the firm sells raw and cooked fish. Appellant may sell a variety of staple food items; however, there is no credible evidence to suggest that the information provided on Appellant's application indicating that 63% of total gross sales is from the sale of hot and prepared food items was incorrect.

Appellant further argued that there are no tables and chairs for dining. However, Appellant did not submit sufficient evidence to reverse the earlier determination that the firm has more than 63% 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.

Remedial Actions

The request for administrative review contends that the Appellant intends on converting the firm into a grocery store. Further, the Appellants stated that the visit occurred during renovations. The regulations do not permit this review to consider subsequent remedial actions that have been or will be taken so that a store may take in the future.

CONCLUSION

The determination by the Retailer Operations Division to deny the application of Kimble Fish Mart 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 Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

MYA DUPREE
Administrative Review Officer

April 10, 2023