

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

Northlake Seafood,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0262537

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination of the Retailer Operations Division to deny the application of Northlake Seafood (“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, when it denied the application of Northlake Seafood to participate as an authorized SNAP retailer.

AUTHORITY

7 U.S.C. § 2023 and 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

Appellant submitted an application to become a SNAP authorized retailer on October 26, 2022. In a letter dated November 23, 2022, the Retailer Operations Division denied the Appellant’s application based on information provided on the SNAP authorization application, as well as information obtained during 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 November 30, 2022, Appellant requested an administrative review of the Retailer Operation Division's denial of its SNAP application. The request for review was granted. Appellant submitted supplemental information in support of its case on December 14, 2022.

STANDARD OF REVIEW

In appeals of adverse actions, such as an application denial, the appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This 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 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 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**

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.]

7 CFR § 271.2 defines a retail food store and 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.

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's contentions regarding this matter are summarized as follows:

- I disagree with the reason we were denied.
- I believe I may have submitted the wrong information on the application regarding our sales.
- I submitted 60 percent under cold foods prepared on site. I thought I was supposed to put the live crawfish, live crabs, fresh shrimp, and fresh fish there. We sell more live than anything in our fish market.
- I have invoices to prove that we are mainly live and fresh seafood with only a small percentage (20%) of sales in hot prepared food like po'boys and hamburgers.
- We are coming up on our extremely busy season with live crawfish and cannot afford to wait another six months to fill out another request on my error.

In addition to the request for review, Appellant submitted a sales range report showing sales for the year 2022, separated in food type categories. In sending the report, Appellant explained that the report showed food sales of \$172,824.76 of which fresh/live seafood was \$129,276.73, or 75 percent of the business. Appellant claims another section category, labelled "MISC" were fresh/live sales for which there was no button for specials on the point-of-sale device. Sales in the "MISC" category were \$32,018.02. Appellant also claims that boiled seafood sales included cold prepared seafood which it understood to be allowed to be purchased with SNAP.

The preceding may represent only a summary of Appellant's contentions presented in this matter. However, in reaching a final decision, full attention was given to all contentions presented, including any not specifically summarized here.

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.

After reviewing the SNAP application, as well as evaluating the contentions submitted by Appellant, this review finds the Retailer Operations Division properly determined that Appellant firm is primarily a restaurant and thus does not meet the definition of retail food store for purposes of SNAP authorization.

Restaurant Determination

On the SNAP authorization application, Appellant reported that 60 percent of the firm's total retail sales were in the sale of cold foods prepared on site and 20 percent were in hot foods. The Retailer Operations Division denied Appellant's SNAP application on the basis of these self-reported total retail sales percentages.

In administrative review, Appellant claims that it misreported its sales figures on the application and submitted a sales report for the year 2022, which Appellant says reflects its sales more accurately. The sales report is broken into the following categories with total sales in parenthesis: Beer (\$1,035.69), Beverage (\$4,900.59), Food (\$172,824.76), MISC (\$32,018.02), and Prepared Food/Boiled Seafood (\$90,730.12). The category "Food" was further broken into subcategories which appeared to include hot and prepared foods (totaling \$43,548.03) and a subcategory labelled "Fresh/Live" (\$129,276.73). Total sales were \$301,509.18.

Appellant claims that Fresh/Live accounts for 75 percent of the business. However, in making this claim, Appellant only factors in the subcategories in the "Food" section, and not all the other sales categories, such as Beer, Beverage, MISC, and Prepared Food/Boiled Seafood. The category "Fresh/Live" accounts for only around 43 percent of total sales when all sales categories are included.

Appellant said its understanding was some items it sells in the Prepared Food/Boiled Seafood category may be eligible for purchase with EBT if they are sold cold. However, regardless of whether these types of foods are eligible for purchase with SNAP, as described they are cold prepared foods that count toward the 50 percent threshold for retailer eligibility purposes.

Therefore, Appellant's eligibility really comes down to the MISC category on the sales report, which Appellant claims includes live/fresh items for which there was no button on the cash register. While it may be that the MISC category includes live/fresh items in part, the Retailer Operations Division noted that Appellant's social media presence includes posts of full prepared catered meals for the holidays. Appellant also posts photographs of items sold at the store that are not accounted for in the sales report, such as bottled salad dressings and sauces and prepared desserts. Since some items are missing from the sales report, it does not appear to accurately reflect the items sold by Appellant, as is necessary for a SNAP authorization determination. Without accurate and complete information, Appellant has not met its burden of proof and the Retailer Operations Division's determination stands.

Based on the face of the application as completed by the Appellant, the firm is considered a restaurant and ineligible for SNAP authorization, as provided in 7 CFR § 271.2 and 7 CFR § 278.1(b)(1)(iv), because sales of prepared foods exceed 50 percent of total sales.

CONCLUSION

Based on the analysis above, the determination by the Retailer Operations Division to deny the application of Northlake Seafood 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 (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 November 29, 2022, the effective date of the denial.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this determination are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in SNAP regulations, at 7 CFR § 279.7. If 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.

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.

MICHELLE WATERS
ADMINISTRATIVE REVIEW OFFICER

March 31, 2023