

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

Seafood Market,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0247387

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service, finds there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to deny the application of Seafood Market (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it denied the application of Appellant to participate in SNAP by letter dated May 25, 2021.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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

A store visit by an FNS contractor occurred on April 20, 2021. Subsequently, the Appellant was requested, on two occasions, to provide documentation of store sales that included actual sales receipts and a breakdown by specific categories. The information provided did not meet these requirements. In a letter dated May 25, 2021, the Office of Retailer Operations and Compliance informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not meet the definition and eligibility requirements of a retail food store established by Federal regulations at 7 CFR § 278.1(b)(1). This action was taken because the Office of Retailer Operations and Compliance had determined the Appellant firm was primarily

a restaurant based on observations during an onsite store visit on April 20, 2021, as well as information provided on and in support of the firm's SNAP retailer authorization application dated March 3, 2021, and as such failed to meet the definition of an eligible firm. Specifically, the denial letter states your firm is primarily a restaurant, because more than 50 percent of your total gross retail sales are from "heated foods" and/or "prepared foods." "Heated foods" are foods cooked or heated by the retailer before or after purchase." Prepared foods" are hot or cold foods not intended for home preparation and/or home consumption, including prepared foods that are consumed on the premises or sold for carryout. SNAP regulations, at 7 CFR § 278.1(b)(1)(iv), provides that restaurants are not eligible to participate in SNAP.

By letter postmarked June 7, 2021, Appellant appealed the Office of Retailer Operations and Compliance's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument 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 implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.1(k)(1) and Part 278.1(l)(1) establish the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet the definition of an eligible firm.

7 CFR § 271.2 states, in part, that: 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

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv), Ineligible Firms, which states, in part, that: 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 or 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. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

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

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The store primarily sells fresh meat;
- It is a market with a little eatery located on the inside; and,
- Please send a more business-like individual to inspect our location – the person that came out just went over to the eatery and never viewed our marketplace.

Appellant submitted seven photos in support of these contentions.

ANALYSIS AND FINDINGS

The authorization of a firm to participate in SNAP must be in accord with the Act, as amended, and regulations. These requirements of law cannot be waived. Thus, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Office of Retailer Operations and Compliance, and as such it is limited to consideration of the relevant facts and circumstances that existed at the time of the denial determination.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) state, in part, that, “Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation 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 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 under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.” As previously noted in the Controlling Law section, 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 SNAP regulations.

For the purpose of determining whether a firm is a restaurant under SNAP regulations, the issue is not whether the firm has available for sale uncooked or raw SNAP-eligible food, the fundamental issue is whether the firm has more than 50 percent of total gross retail sales in the combined sales of heated and/or cold prepared foods, including foods cooked or heated after purchase. There is no doubt that uncooked or raw staple food items may be available to customers. However, Appellant’s SNAP retailer application submitted electronically on March 3, 2021, states that the majority of sales are from hot and/or cold prepared foods. Specifically, the application shows total 2020 gross retail sales of \$180,000.00 with hot and/or cold prepared food sales accounting for 80 percent of the firm’s total gross retail sales (hot foods 60 percent,

cold prepared foods 20 percent) while staple food sales accounted for only five percent. Since the firm has more than 50 percent of total gross retail sales in the sale of hot and/or cold prepared foods it is classified as a restaurant under SNAP regulations making it ineligible for SNAP retailer authorization. A review of the store visit documentation including a staple food inventory, store layout, and many photos confirms the firm is set-up primarily to sell hot and/or cold prepared foods that are consumed on the premises or sold for carryout and require no additional preparation. The store visit report and photographs show the firm has a large commercial kitchen/food prep area and both interior and exterior areas with tables, chairs, and picnic tables for eat-in customers showing that a sizeable proportion of the firm's floor space was dedicated to the sale or preparation of hot and/or cold prepared food items. Additionally, the firm's menu flyer lists a variety of hot sandwiches and cooked seafood or chicken baskets. The firm's online presence also identifies itself as a restaurant.

Since the firm has more than 50 percent of total gross retail sales in the sale of hot and/or cold prepared foods it is classified as a restaurant under SNAP regulations making it ineligible for SNAP retailer authorization.

CONCLUSION

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to deny the application of the Appellant firm to participate as an authorized SNAP retailer is sustained.

In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to reapply for participation as a retailer in the SNAP for a minimum period of six months from the effective date of the denial. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

November 22, 2021