

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

I Crab New Orleans Seafood Market,

Appellant,

v.

Case Number: C0204735

Retailer Operations Division,

Respondent.

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 withdrew the authorization of I Crab New Orleans Seafood Market (hereinafter “Appellant”) from participation as a 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 withdrawal.

ISSUE

The issue accepted for review is whether or not 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 withdrew the authorization of I Crab New Orleans 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 CHRONOLOGY

The Appellant firm, I Crab New Orleans Seafood Market, was originally authorized to participate as a retailer in SNAP on July 8, 2016. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization process to determine whether or not the firm still meets eligibility requirements.

Effective October 16, 2017, SNAP regulations at 7 CFR § 278.1(b)(1)(iv) were amended to clarify the types of stores that are considered restaurants for purposes of determining eligibility. Prior to this regulatory change, FNS considered restaurants to be firms with more than 50 percent

of their gross sales from hot and/or cold prepared foods not intended for home preparation and consumption, including food items sold for carryout. This earlier regulation considered foods that were heated by the retailer **after** purchase to be staple foods for purposes of SNAP eligibility and thus did not count toward the 50 percent threshold.

The new rule changed the wording of the regulation to state that any foods cooked or heated on-site by the retailer before **or after** purchase must be counted toward the 50 percent threshold.

I Crab New Orleans Seafood Market, a seafood store and restaurant, was identified by the Retailer Operations Division as a firm that could be affected by this change in regulation. On November 12, 2017, an on-site store visit was conducted by an FNS contractor in an effort to evaluate store conditions and inventory. After reviewing the store visit report and photographs, the Retailer Operations Division concluded that further evidence was necessary to determine whether or not the firm would meet eligibility criteria under the new rule.

On November 15, 2017, the Retailer Operations Division sent the firm a letter requesting verification of the firm's sales for the last three months, including a breakdown of hot foods, nonfoods, accessory foods, staple foods, and heating fees.

The Appellant was also provided with a reauthorization application, Form FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*.

In response to this request the Appellant submitted the following documentation:

- Sales and Use Returns for the months of July, August, September, and October 2017.
- Financial reports for the months of July, August, September, and October 2017, which include sales by categories such as "Cold Foods," "Drink," "Market," "None" (cooking fees), "Hot Foods," "Sides," "Special" (such as crab cakes and salad), and "Wings."
- Thirty-nine pages of inventory invoices from various vendors.
- A completed reauthorization application, signed by the Appellant owner on November 22, 2017.

After reviewing the Appellant's reauthorization application and sales evidence, the Retailer Operations Division determined that the firm was primarily a restaurant, and thus did not meet the definition and requirements of a retail food store for purposes of SNAP authorization.

In a letter dated November 28, 2017, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it did not meet the necessary criteria to be eligible for SNAP participation. Specifically, the letter stated that the Appellant firm was a restaurant because more than 50 percent of its total sales were in the sale of hot and/or cold prepared foods not intended for home preparation and consumption. The letter stated that the withdrawal determination was based on 7 CFR § 271.2, § 278.1(b)(1), and § 278.1(k)(2).

In a letter postmarked December 4, 2017, the Appellant requested an administrative review of the withdrawal determination. The request was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as the withdrawal of a firm's SNAP authorization, 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 found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) reads, in part:

FNS may withdraw the authorization of any firm authorized to participate in the program for any of the following reasons:

- (i) The firm's continued participation in the program will not further the purposes of the program;
- (ii) The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;
- (iii) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...for the time period specified in paragraph (k)(2) of this section.

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

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

- (2) The firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B, as specified in paragraph (b)(1)(i) of this section.... 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.

At the time of the withdrawal decision, 7 CFR § 271.2 defined a *retail food store* as:

- (1) An establishment or house-to-house trade route that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods in at least two such categories (Criterion A) as set forth in § 278.1(b)(1) of this chapter, **or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)** as set forth in § 278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stockkeeping units, or other inventory or accounting

recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter... [Emphasis added.]¹

At the time of the withdrawal decision, 7 CFR § 271.2 defined *staple food*, in part, as: ...food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products.... Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm.²

7 CFR § 278.1(b)(1)(i) states, in part:

An establishment...shall...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)³; 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 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 summarized contentions in its request for administrative review, in relevant part:

- Appellant wishes a review of the case and reconsideration of the firm's participation in SNAP.

In support of its request for review, Appellant provided Sales and Use Return documentation for the months of July, August, and September 2017, which had been submitted previously to the Retailer Operations Division. Appellant also submitted a copy of the November 28, 2017 withdrawal letter.

¹ The definition of a retail food store, particularly in relation to Criterion A, was amended in regulation effective January 17, 2018.

² The definition of staple food, particularly in relation to accessory food items, was amended in regulation effective January 17, 2018.

³ Eligibility for Criterion A was amended in regulation effective January 17, 2018.

The preceding may represent only a brief 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 herein.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. 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.

Based on the evidence provided by the Appellant, particularly the detailed financial reports for the months of July, August, September, and October 2017, this review finds that it is more likely true than not true that the firm's the firm's hot/prepared food sales exceed 50 percent of its gross retail sales. As best as can be determined, the only non-prepared, staple foods come from the category on the report labeled as "Market." For the purposes of this review, it is assumed that all foods from the "Market" category are sold by the pound and leave the store cold, needing additional preparation at home. The "Market" category accounts for the following sales percentages:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Nearly all other food items in the store, totaling approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C), appear to be sold hot, prepared onsite, or sold in a "you-buy-we-fry" manner. A very small percentage (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) of sales comes from cooking fees and accessory foods, such as cold drinks. It should be noted that the report category labeled as "Cold Foods," lists prices that precisely match up to prepared meals on the menu board, so it is very likely that these items are sold cold and then heated afterward by the firm. As such, these items must be counted toward the restaurant threshold. Based on the Appellant's documentation and in accordance with 7 CFR 278.1(b)(1)(iv), the Appellant firm is considered to be a restaurant because more than 50 percent of its total sales come from the sale of hot and/or cold prepared foods not intended for home preparation and consumption. As such, it is not eligible for participation under Criterion A or B of the SNAP regulations.

As for the firm's remaining evidence, such as Sales and Use Returns and the inventory invoices, such documentation does not provide specific enough information to determine if the firm's staple food sales were sufficient to meet SNAP eligibility criteria. This evidence does show robust purchasing and sale of seafood, but does not specifically indicate whether the food was prepared onsite by the retailer for the customers' immediate consumption.

CONCLUSION

The evidence presented by the Appellant is not sufficient to prove that the withdrawal decision made by the Retailer Operations Division was inaccurate or that it should be reversed. In fact, the opposite is true. The Appellant's evidence strongly suggests that I Crab New Orleans Seafood

Market is primarily a restaurant and as such, is not eligible for SNAP participation under Criterion A or B. Therefore, the withdrawal decision is sustained.

Pursuant to 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from the date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of I Crab New Orleans Seafood Market shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted 10 days prior to the expiration of the six-month withdrawal period.

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.

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.

JON YORGASON
Administrative Review Officer

June 18, 2018