

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

20/20 Seafood Restaurant And Market #2,

Appellant,

v.

Case Number: C0214035

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to withdraw the authorization of 20/20 Seafood Restaurant And Market #2 to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for six (6) months from the effective date of the withdrawal.

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 withdrew the authorization of the Appellant to participate as an authorized SNAP retailer.

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 sent the Retailer Operations Division an application dated July 26, 2018 for 2020 Seafood Shreveport, LLC, located at **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, Louisiana. However, there was already a store authorized at that location under the same ownership. The Retailer Operations Division contacted the Appellant and determined that she filed a new application because she wanted to remove her husband as an owner and make a name change to the firm.

However, the Retailer Operations Division determined that the couple was still married.

Because Louisiana is a community property state, a spouse of a store owner maintains an ownership interest. Therefore, the husband could not be removed from the firm ownership. As the store was due for periodic reauthorization, the Retailer Operations Division treated the submitted application as a reauthorization application for 20/20 Seafood Restaurant And Market #2. In a letter dated October 24, 2018, the Retailer Operations Division informed the Appellant that the firm was a SNAP ineligible restaurant because more than 50 percent of its total gross retail sales are from heated foods and/or prepared foods. Therefore, the firm's authorization was withdrawn. The letter also informed the Appellant that it could not submit a new application to participate in SNAP for a period of six (6) months from the effective date of the withdrawal as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter postmarked November 7, 2018, the Appellant requested an administrative review of the Retailer Operation Division's withdrawal of its SNAP authorization. The request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might 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(k) provides the authority upon which FNS shall withdraw the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

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

FNS shall withdraw the authorization 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)(iv) states, in part:

Ineligible firms. Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of SNAP shall not be eligible for program participation ... 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 [Emphasis added.]

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. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores. [Emphasis added.]

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 authorization for authorization in the program for a minimum period of six months from the effective date of the denial.

Regulatory Change

Foods heated after sale were at one time considered to be SNAP eligible. However, due to a recent change in Federal regulations, foods heated after sale are now considered to be SNAP ineligible in the same manner as foods sold hot at the point of sale. 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. This final rule added the language to existing regulations clarifying that foods heated or cooked after sale would be considered in determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

APPELLANT’S CONTENTIONS

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

20/20 Seafood Restaurant And Market #2 is no longer operating at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and no reauthorization application to participate in the SNAP Program has been filed on its behalf. After the dissolution of this company, a new application was made on behalf of 2020 Seafood Shreveport, LLC, and the firm provided the owner's name, personal identification, EIN number, personal State and Federal taxes, and all business licenses.

It now appears that the application for 2020 Seafood Shreveport, LLC, has been combined with the existing authorization for 20/20 Seafood Restaurant And Market #2, and the new application has been adversely affected by that decision. 2020 Seafood Shreveport, LLC, is a newly formed company that seeks to become an authorized SNAP participant by providing more than 50 percent of its total gross retail sales from the four (4) staple food categories. These items were on display when the representative made a store visit on October 12, 2018. 2020 Seafood Shreveport, LLC, do not fit the definition of a restaurant by intent or design because more than 50 percent of its total gross retail sales are not from "heated foods" and or prepared foods. Page 3 of the SNAP application shows that more than 50 percent of the 2017 sales resulted in the sale of "cold prepared foods."

The preceding may represent only a brief summary of the 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.

ANALYSIS AND FINDINGS

The central issue in this case is whether 20/20 Seafood Restaurant And Market #2 (now known as 2020 Seafood Shreveport, LLC) is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). In reaching its decision to withdraw the firm's authorization, the Retailer Operations Division relied upon the firm's application, the store visit report, and documents provided by the Appellant. A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that 20/20 Seafood Restaurant And Market #2 (aka 2020 Seafood Shreveport, LLC) does not qualify for the SNAP as it is primarily a takeout restaurant.

Firm History

The firm known as 20/20 Seafood Restaurant And Market #2 located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) Shreveport, Louisiana 71109 was initially authorized for the SNAP as a combination grocery on November 20, 2014. A store visit report conducted on October 15, 2014 noted that the firm was "a seafood store that offers you buy we fry services for an additional charge, while there are chairs available to sit while you wait on order all foods have to be taken somewhere else to eat." [Emphasis added.]

As noted above there has since been a regulatory change impacting "you buy, we fry" firms. Foods heated after sale were at one time considered to be SNAP eligible. However, due to a recent change in Federal regulations, foods heated after sale are now considered to be SNAP ineligible in the same manner as foods sold hot at the point of sale. 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. This final rule added the language to existing regulations clarifying that foods heated or cooked after sale would be considered in

determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

On July 26, 2018, the Appellant submitted a new application in order to change the name of the firm and to remove her husband as an owner. However, because Louisiana is a community property state, a spouse maintains an ownership interest and therefore cannot be removed as an owner for SNAP purposes. The Retailer Operations Division contacted the Appellant and determined that the couple were still married and the firm was still located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Shreveport, Louisiana 71109. Therefore, there was no need for the Appellant to submit a new application. However, since the firm was coming due for reauthorization, the Retailer Operations Division treated the new application as a reauthorization application.

The Appellant believes that treating the new application as a reauthorization application put the firm at a disadvantage; however, in reality the end result would have been the same either way. In fact, the Appellant likely has benefited by the Retailer Operations Division treating the new application as a reauthorization application in that it has allowed the firm to remain authorized from July 2018 to the present date.

Sales Figures indicate Firm is a Restaurant

In the new application, the Appellant initially provided estimated 2018 gross retail sales figures. These estimated sales figures indicated that approximately 82 percent of the firm's gross retailer sales were in hot and/or cold prepared food. Staple food sales accounted for only 5.88 percent of estimated gross retail sales. Therefore, on the face of the application, the firm was a SNAP ineligible restaurant as defined under 7 CFR § 271.2 and 7 CFR § 278.1(b)(1)(iv).

At the request of the Retailer Operation Division, the Appellant provided 2017 actual sales data on a corrected page 3 of the application. The Appellant states that this document shows that more than 50 percent of the 2017 sales were from the sale of "cold prepared foods" and the firm is therefore eligible. However, the Appellant does not appear to understand that cold prepared food sales are included with hot and heated food sales in determining whether a firm is a SNAP ineligible restaurant. The firm's 2017 sales figures documented that 85 percent of its annual gross retail sales are in hot, heated, and cold prepared food not intended for home preparation and consumption. Because the prepared food sales exceeded 50 percent, the Retailer Operations Division properly determined that the firm is a restaurant as defined by SNAP regulations at 7 CFR § 271.2 and 7 CFR § 278.1(b)(1)(iv).

Store Visit Report

The case record documents that in reaching a withdrawal decision, the Retailer Operations Division also considered information obtained during an October 12, 2018 store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. Through the store visit report and photographs, the Retailer Operations Division determined that

the firm likely has the majority of its gross retail sales in hot, heated and cold prepared food not intended for home preparation and consumption and is therefore a SNAP ineligible restaurant.

The store photos document that 20/20 Seafood Restaurant And Market #2 (aka 2020 Seafood Shreveport, LLC) presents itself primarily as a seafood take out restaurant with a display menu of prepared foods. Although the firm likely has some fresh seafood sales, the firm has a large commercial kitchen and food preparation area along with chairs for customers to sit on while food is being prepared. Below the menu board are additional, hand written menu boards that display family meals and other complementary prepared foods, all of which are prepared from the same stock as those used in staple and accessory food sales. The prepared foods are also advertised to the public on the exterior store windows. There was a large tip jar at the checkout register which is typical of a take-out restaurant. The firm has incorporated a few staple and accessory food items around the store. Some of these foods are multi-pack foods being sold individually although the packs are not distributed to be sold for individual sales.

The Appellant submitted additional store photos and photocopies of store menus for the administrative review in a letter dated December 7, 2018. However, these photographs and documents are not significantly different than those in the case record and tend to support the decision made by the Retailer Operations Division that the firm is a SNAP ineligible restaurant.

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. [Emphasis added.] A preponderance of the evidence supports the determination made by the Retailer Operations Division that the Appellant firm is an ineligible restaurant as defined under SNAP regulations.

Basis of Determination

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 Retailer Operations Division. This review is limited to what circumstances existed at the time of the store visit which forms the basis of the Retailer Operations Division’s decision. The Appellant may reapply six (6) months from the effective date of the withdrawal and any new business model or sales figures will be taken into consideration at that time.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP authorization of 20/20 Seafood Restaurant And Market #2 is sustained. The regulations clearly state the criteria that a store must meet in order to be authorized for the SNAP. There are no exceptions to these requirements. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall

not be eligible to submit a new application for SNAP authorization until six (6) months after the effective date of the withdrawal decision.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that 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 you reside or are 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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute and unwarranted invasion of privacy.

RONALD C. GWINN
Administrative Review Officer

March 14, 2019