

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

45 Seafood,

Appellant,

V.

Retailer Operations Division,

Respondent.

Case Number: C0233960

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny the authorization of 45 Seafood (hereafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2 and § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied Appellant authorization to participate as a retailer in SNAP on July 30, 2020.

AUTHORITY

7 U.S.C. § 2023 and the 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

In a letter dated July 30, 2020, Retailer Operations Division denied Appellant’s authorization to participate as a retailer in SNAP. This denial was based on evidence obtained during a firm visit conducted on July 17, 2020, as well as information provided on the firm’s retailer application.

Retailer Operations Division determined that the firm did not meet the definition and requirements of a retail food store as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations. The denial letter stated, in relevant part:

“It is the determination of FNS that 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, except in certain States that operate special restaurant programs allowing the elderly, disabled, and homeless participants to use SNAP benefits in restaurants. Your Store is not located in a state with a restaurant program.”

As the firm failed to meet eligibility requirements for approval, Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in 7 CFR § 278.1(k)(2).

In a letter dated August 5, 2020, Appellant appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal 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, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

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 deny 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 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)(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”

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(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.”

APPELLANT’S CONTENTIONS

In response to the Retailer Operations Division denial letter and in the request for administrative review, Appellant has stated as its position in the matter the following:

1. My store is a retail store, not a restaurant. We are selling approximately 20 percent of our total gross retail sales from heated foods and/or prepared foods. (see attached reports)
2. During the pandemic several customers came to our stores to request the hot foods, it might cause an increase of heat and/or prepared foods.
3. After your inspection on July 17, 2020, our store followed the regulations and commit to maintain the heat and/or prepared foods sales percentage.
4. I would like you to review my application and schedule another visit to give us an opportunity to prove our sales and business operation.

Appellant provided its sales report dated from July 27, 2020 through August 7, 2020. The preceding may represent only a brief 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.

ANALYSIS AND FINDINGS

In regards to Appellant’s contentions, its SNAP application indicated that its hot and cold prepared foods entailed 97 percent of its total retail sales and a review of the store visit photographs confirms that the establishment appears to be a seafood market which houses a restaurant within the store. There is restaurant seating which accommodates 14 tables and chairs. Prepared foods and fresh/frozen seafood is paid for at the seafood market counter. The firm’s pictures show advertising for seafood meals/combos and there are menus available online that show all menu options which include a wide variety of lunch and dinner options. The firm offers carryout and in-house dining as well as seafood meal options and fresh or frozen seafood. There is also kitchen cooking equipment present. It is noted that the bottom of one of the menus states “you buy we boil or fry for \$2.00 per pound.” Store visit notes indicates that the owner stated that they don’t sell hot food but cook fresh seafood for the customer after they have purchased the fresh seafood. They also take phone orders for seafood that the customer wants cooked so it

can be ready for pickup. The firm is also listed on Yelp, Zmenu, Facebook, etc., as a seafood restaurant.

Appellant provided its sales report which were dated for the period July 27, 2020 through August 7, 2020. The sales report are dated after the store visit and therefore ineligible during this review. Accordingly, the Retailer Operations Division correctly determined Appellant is not a retail food store as defined in §271.2 and operates as a restaurant, therefore, not eligible for authorization in the SNAP in accordance with §278.1(b)(1)(iv) of the SNAP regulations.

CONCLUSION

Based on the discussion herein, the determination by the Retailer Operations Division to deny the authorization of 45 Seafood to participate as a retailer in SNAP is sustained. Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six months, effective July 30, 2020.

It is important to reiterate that the denial letter states ***“if your business model remains the same and you reapply, your application may be denied for the same reasons it was denied this time.”***

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to 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), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

October 27, 2020