

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

A & J Seafood,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0223575

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 (Retailer Operations) to withdraw the authorization of A & J Seafood (hereinafter Appellant), for a period of six months, to participate as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278 in its administration of SNAP, when it withdrew the authorization of Appellant to participate as a SNAP retail food store.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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In a letter dated September 25, 2019, Retailer Operations informed Appellant's owner that it was being withdrawn from SNAP, as it no longer met the definition of a retail food store under 7 CFR § 271.2 and 7 CFR § 278.1(b)(1) of SNAP regulations. The letter stated that Appellant was primarily a restaurant as the evidence indicated that more than 50% of its gross retail sales are from heated and/or hot or cold prepared foods not intended for home preparation and

consumption. The letter also informed ownership that it could not submit a new application to participate in SNAP for a period of six months from the effective date of the withdrawal, as provided by SNAP regulations at 7 CFR § 278.1(k)(2). However, if your business model remains the same and you reapply, your application may be denied for the same reasons it was withdrawn this time.

In a letter dated October 1, 2019, Appellant's owner requested an administrative review of Retailer Operations' decision to withdraw its SNAP authorization. The request for review was granted by letter dated November 8, 2019, and implementation of the withdrawal was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse action, Appellant bears the burden of proving by a preponderance of the 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 not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is contained in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2018, and SNAP regulations at 7 CFR Parts 271 and 278. In particular, 7 CFR § 278.1(1) establishes the authority upon which FNS may withdraw an application from a retail food store or wholesale food concern.

7 CFR §278.1(n) states, in part....

Periodic reauthorization. At the request of FNS a retail food store or wholesale food concern will be required to undergo a periodic reauthorization determination by updating any or all of the information on the firm's application form.

7 CFR § 278.1(l) states in part, that:

- (1) FNS shall 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 specifications of paragraph (b)

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% 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, defines a retail food store, in part, as currently implemented*:

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 qualifying staple food items on a continuous basis, evidenced by having no fewer than three* different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety, including at least one variety of 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 accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. Entities that have more than 50% 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.

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.

Regulatory Change

Due to a change in Federal regulations, foods cooked or heated after sale are now treated the same as prepared hot and cold food not intended for home preparation and consumption in determining whether a store is a restaurant under 7 CFR § 278.1(b)(1)(iv). FNS published a final rule entitled “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)” at 81 Federal Register 90675 on December 15, 2016. 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

Appellant's responses regarding this matter are essentially as follows:

- I respectfully ask you to review all of the documents and reconsider the withdrawal.
- All the information that was submitted to your office shows that more than 50% of our sales is raw food, all of our daily sales reports clearly show more than 50% is raw food, actual customer receipts show more than 50% in raw food.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

This review is to validate the determination by Retailer Operations and is limited to consideration of the relevant facts at the time of the decision. The authorization of a store to participate in SNAP must be in accord with the Act and the regulations, as amended; those requirements of law cannot be waived.

For the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has available for sale SNAP-eligible food. The central issue is whether actual sales of prepared foods comprise more than 50% of the store's total gross retail sales. There is no doubt that staple food items may be delivered to the store fresh, raw and unprepared, and are available to customers that way. The decision to withdraw Appellant from SNAP participation was based on information obtained from an onsite visit by FNS-contracted staff and an analysis of the documentation provided by Appellant to Retailer Operation

The report and photos from the October 9, 2018, store visit show Appellant is set up primarily to sell hot and/or cold prepared, ready-to-eat foods, that are intended for immediate consumption or for carry-out and require no additional preparation. Appellant has a kitchen and food prep area that contains large refrigerators, microwaves, steam pots, and deep food fryers. Appellant sells a large variety of hot/prepared foods. There are large menu display boards, signage, and a website that advertises delivery, pickup, and You Buy Here -We Cook Here.

Appellant contends more than 50% of its sales are raw food. The case record shows that Retailer Operations reviewed the documents submitted by Appellant and found the Z-tapes and sales receipts are for raw seafood; however, the Z-tapes show Appellant charges raw cook fees. Based on the sales information provided, Retailer Operations determined that 98% of Appellant's total sales are from hot/prepared foods. Although Appellant may have raw food for sale, it is more likely true than not true that the majority of food in the store are actually sold prepared and/or hot and ready-to-eat.

There is sufficient evidence to support Retailer Operations' determination to withdraw the authorization of Appellant to participate as an authorized retailer in SNAP because it did not meet the necessary criteria to be eligible for SNAP participation. In accordance with the regulations under §278.1(b)(1)(iv), firms that are considered to be restaurants, that is, firms that have more than 50% 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.

CONCLUSION

This review is to ascertain if Appellant meets the regulations for reauthorization. SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. Based on a review of the evidence, the determination by Retailer Operations to withdraw the authorization of Appellant to participate as a SNAP retailer is sustained. Appellant does not meet the requirements of a retail food store as set forth in § 278.1(b)(1) of SNAP regulations. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived.

In accordance with 7 CFR § 278.1(k)(2), ownership will not be eligible to reapply for participation as a SNAP retail food store for a minimum period of six months from the effective date of the withdrawal. However, if the business model remains the same, it may be denied for the same reasons it was withdrawn this time. In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery of this letter.

General questions regarding the application process can be handled by contacting 877-823-4369 and by consulting the USDA website. Operational questions regarding the withdrawal should be directed to the office that initially took the action to withdraw Appellant; please contact Karla Morris at Karla.Morris@usda.gov or (972) 454-1856 with questions about operations.

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 7 CFR § 279.7. 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 Appellant's owner resides or is 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 30 days of receipt of this Decision. Please note that the judicial filing timeframe is specified in the Act, and this office is unable to grant an extension.

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.

KIM DAMERON
Administrative Review Officer

June 24, 2020