

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

Alaska King Crab House Inc,

Appellant,

v.

Case Number: C0205044

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the authorization of Alaska King Crab House Inc. (hereinafter “Appellant”) to participate in the Supplemental Nutrition Assistance Program (SNAP), was properly withdrawn by the Retailer Operations Division, Retailer Operations Branch, hereinafter “ROD Office.”

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(k)(1), (2) and § 278.1(l) when it made the decision to withdraw Appellant’s authorization to participate in the SNAP.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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.”

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.

CASE CHRONOLOGY

The record reflects that on October 26, 2011, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** signed as President an application for authorization for the above-named firm to participate in the SNAP. The firm underwent the agency's periodic reauthorization process in 2017; a visit to the store to obtain information regarding the firm's SNAP eligibility was conducted on September 26, 2017. Appellant filled out an FNS 252-R, Reauthorization Application for Stores, which was signed by said firm President on November 3, 2017. Appellant was subsequently advised in a letter dated December 6, 2017 of the Department's decision to withdraw the firm's authorization to participate in the SNAP. The regulatory bases given for that denial were 7 C.F.R. § 271.2, § 278.1(b)(1)(iv) and § 278.1(k). On December 12, 2017, Appellant requested an administrative review of this action. The request was granted.

CONTROLLING LAW

The controlling statute in this matter is contained in the **Food & Nutrition Act of 2008**, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k) establish the authority upon which a retail food store or wholesale food concern may be denied authorization to participate in the SNAP.

7 C.F.R. § 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 C.F.R. § 278.1(a) states:

FNS shall approve or deny the application within 45 days of receipt of a completed application. A completed application means that all information (other than an on-site visit) that FNS deems necessary in order to make a determination on the firm's application has been received.

7 C.F.R. § 278.1(b)(1)(ii) further stipulates, in part:

Application of Criterion A. In order to qualify under this criterion, firms shall: Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, no fewer than three different varieties of food items in each of the four staple food categories with a depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least two staple food categories.

7 C.F.R. § 278.1(b)(1)(iii) states, in part:

Application of Criterion B: In order to qualify under this criterion, firms must have more than 50 percent of their total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees and entertainment/sports/games income.

7 C.F.R. § 278.1(b)(1)(ii)(C) states, in part:

...Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes.

7 C.F.R. § 278.1(b)(1)(iv) states:

...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 consumer on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B.

7 C.F.R. § 278.1(k)(1) and (2) state, in part:

FNS shall deny the application of any firm if it determines that:
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; or The firm has failed to meet the eligibility requirements...under Criterion A or Criterion B....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.

7 C.F.R. § 278.1(l)(1)(ii) states, in part:

FNS shall withdraw the authorization of any firm that fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section.

APPELLANT'S CONTENTIONS

In Appellant's reply to the ROD Office's October 24, 2017 request for documentation, and in its written request for review dated December 12, 2017, Appellant provided information in which it was argued that:

1. The Appellant firm is not a restaurant, as the firm's hot and cold prepared food sales make up only 30% of its total sales. The majority of the firm's revenues come from the

sale of frozen seafood and fresh fish. Appellant provides register reports, sales tax reports, seafood purchase invoices/receipts and employee payroll information.

2. A large part of the firm's revenue comes from SNAP customers; if the SNAP was discontinued at the store, many customers will have a difficult time finding transportation to another SNAP-authorized seafood store.
3. The firm has nine employees from the surrounding community; if the SNAP were discontinued the firm would have to let go of many of them. Appellant provides employee payroll information in support thereof.

ANALYSIS AND FINDINGS

The record reflects that a contracted store visit to the Appellant firm was conducted on September 26, 2017. Documentation generated as a result of that visit includes photographs of the firm's interior and exterior, a store layout diagram and an inventory survey indicating that the firm operated primarily as a carryout/restaurant. The following information was documented during the store visit:

- No shopping carts or baskets.
- One check-out area, two cash registers, two card readers.
- Estimated 800 square foot storage area as well as storage coolers/freezers.
- The firm accepted phone orders.
- Kitchen/food preparation area. Cooked crabs advertised and displayed behind the counter with signage advertising prices per dozen ranging from \$25.00 to \$55.00. Cooked seafood and salads in a display case priced from \$10.99 to \$17.99 per pound. A large part of the store space is devoted to food preparation and the display and advertising of prepared food items. Outdoor signage advertises "Alaskan King Crabs, Fresh Fish, Live Crabs, Steamed Shrimp, Fish Sandwich, Steamed Platters, Broiled Platters, Fried Platters, Lunch Specials, 11:00 AM to 3:00 PM, We Accept EBT Card," and "Half Bushel Crab \$39.99." Full commercial kitchen/food preparation area on site. Overhead marquees surrounding the food preparation and ordering area/check-out area and exclusively advertised prepared food entrees. Signage by the register reads "Cook Charge ½ bushel \$8.00, bushel \$15.00, EBT cook charge \$2.00 up." "Credit or Debit minimum \$10.00." Prepared food menu placard near register. Prepared food menu posted on front of check-out area. Most signage refers to cooked/prepared food entrees. Signage near check-out area read, "All customers must pay before the order gets cooked – Thank You." Relatively little space devoted to the display/advertising of uncooked seafood and even these items appear available for preparation for a cook fee. Photographs: 2, 3, 4, 6, 14, 19, 27, 29, 30, 31, 37, 39 and 40.
- Numerous take-out containers and sacks were stored behind the order counter/check-out area and under a table immediately adjacent. Photos: 2 and 18.
- The food preparation area runs most of the length of the building. Photos: 2, 3, 4, 14, 18, 19, 29, 30, 33, 35, 38 and 39.
- Chair seating (eight chairs) for customers waiting for orders to be prepared.
- Seafood sold is also used for prepared food sales.
- Reviewer Comments: "this store has several walk-in coolers and freezers located in the

back, and there is a dry goods storage area located under awning out back (soda mostly). There are a few chairs for customer waiting to be served (store operates on a number system).”

In regard to contention 1 above, the ROD Office notes that the firm’s signage, advertising, utilization of space (focusing on food preparation), menu and marquee boards strongly support the conclusion that the firm operated primarily as a restaurant. The ROD Office notes the scarcity of receipts containing menu codes, which tended to indicate that the firm had the capacity to track restaurant sales individually but did not consistently do so and appears to have added most or all SNAP sales, including sales of prepared food entrees, into a staple food category.

The firm’s register-report line-item for cook fees appears rarely; it is possible that the cooking fee didn’t apply to most SNAP purchases, particularly not those for menu-advertised prepared-food entrees. Most SNAP purchases at the firm approximate menu item prices (the average SNAP transaction at the Appellant firm during September was 5 U.S.C. § 552 (b)(6) & (b)(7)(C)). It appears likely that these fees were applied only when customers bought fresh seafood and paid extra to have it cooked, as opposed to simply buying prepared food entrees from the menu and/or marquee menu-boards and paying the menu price. How such fees were applied is not clear and Appellant provides no explanation.

Appellant provided a photograph that appeared to reflect signage posted on the firm’s customer-entry door that read, “Starting October 17, 2017, we cannot steam food on EBT. Food has to be taken cold and cooked at home. This is due to new EBT regulations affecting all stores.”

Appellant’s SNAP redemptions for the six-month period (including full months only) prior to the firm’s ending the policy of cooking food for SNAP customers (on or about October 16, 2017) averaged 5 U.S.C. § 552 (b)(6) & (b)(7)(C); however, the firm’s SNAP redemptions for the four-month period (including full months only) following October 2017 (after said policy was said to have ended) averaged 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This represents a decline of approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month. If this decline correlates with the ceasing of selling hot food entrees in exchange for SNAP benefits, this tends to indicate that approximately two-thirds of Appellant’s sales were derived from the sale of prepared food entrees. This and other evidence, outlined below, strongly indicates that the firm operated primarily as a restaurant and, on the basis thereof, is not eligible to participate in the SNAP.

That the firm’s SNAP redemptions dramatically declined suggests that much less of the firm’s SNAP sales after October 16, 2017 were due to the sale of prepared hot or cold food, yet this doesn’t provide any further information on the percentage of commercial credit/debit/cash sales derived from hot and cold prepared food sales. Appellant did not provide total sales or sales tax information for October through November, though the period covered by Appellant’s register reports covered September through November; one might argue that these totals could be ascertained by going through each register report and attempting to interpret what Appellant considers to be prepared food and what it considers to be uncooked fish, etc. However, as noted, the firm appears to have construed a large amount of prepared food as staple food (despite the fact that hot prepared food has never been considered staple food in the SNAP). Thus the

tabulation of Appellant's register reports would not shed any further light on the firm's percentage of gross sales comprised of staple food sales, as the firm's register reports appear to correspond inconsistently to accounting categories relevant to SNAP retailer eligibility.

Appellant provided more register reports for the time period December 26, 2017 through January 10, 2018; however, as noted, it is not clear from this information whether Appellant attributed restaurant sales to non-tax and/or SNAP sales categories, or in what proportions, so the information is not conclusive with regard to the firm's eligibility to participate in the SNAP. Appellant does not provide an explanation of how the register reports were used to arrive at the sale percentages it asserts.

As noted above, a firm that operates primarily as carryout/restaurant is not eligible to participate as retail food store in the SNAP and not subject to evaluation under either Criterion A or B; however, a restaurant may participate in one of the special restaurant programs that serve the elderly, disabled and homeless populations, under the auspices of the state in which the firm is located, as set forth in 7 CFR § 278.1(d)(3) and must meet a number of additional requirements. Further, the documentation indicated that the firm had ample varieties of staple food stock in none of the four required staple food categories, thus additionally failing to qualify under Criterion A, as detailed above. The visit further indicated that the firm's staple food sales would not likely have exceeded 50 percent of its gross retail sales; Appellant has not compellingly documented that staple food sales comprised more than 50% of the firm's gross sales, rendering it ineligible for authorization under Criterion B, as staple food sales must exceed 50 percent of gross retail sales. Prepared hot or cold food cannot count toward a firm's sales of staple food items. As noted, however, regardless of Criterion A or B considerations, a restaurant or carryout operation, with the exception noted above, is not eligible to participate in the SNAP.

Accordingly, for the reasons stated above, the documentation in the record does not allow a reliable conclusion that the firm qualified to participate in the SNAP at the time the decision was rendered. As such, the denial/withdrawal must be sustained.

In regard to contention 2 above, to the extent Appellant implies that a failure to reverse the withdrawal decision will work a hardship upon SNAP customers, there are no provisions in the Act or regulations allowing or requiring hardship to applicants and/or to SNAP households as considerations in determining eligibility for participation in the SNAP, with the exception of co-located wholesale/retail firms, which must meet a variety of additional requirements. Appellant's store is not a co-located retail/wholesale firm and such provisions therefore do not apply in the present case.

With regard to contention 3 above, likewise, there are no provisions in the Act or regulations or allowing or requiring hardship to an appellant firm's employees as a consideration in determining eligibility for participation in the SNAP.

CONCLUSION

In view of the above, it is my determination that the ROD Office's denial of Appellant's application for authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k). The denial, therefore, is sustained and will become effective on the 30th day following Appellant's receipt of this decision.

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 provisions of the Freedom of Information Act (FOIA), FNS is releasing this information in a redacted format as appropriate and will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

DANIEL S. LAY
Administrative Review Officer

March 8, 2018