

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

Anastasi Seafood,

Appellant,

v.

Case Number: C0204364

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 Anastasi Seafood (hereinafter “Appellant”) from participation as a retailer in the Supplemental Nutrition Assistance Program (SNAP).

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 Anastasi Seafood.

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, Anastasi Seafood, was originally authorized to participate as a retailer in SNAP on November 20, 1987. 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.

Anastasi Seafood, a seafood market, restaurant, and bar, was identified by the Retailer Operations Division as a firm that could be affected by this change in regulation. On October 5, 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, 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 October 24, 2017, the Retailer Operations Division sent the firm a letter requesting the following information:

- Verification of gross sales for last 3 months (sales and income tax records);
- Verification of actual sales for last 3 months (actual sales receipts);
- Summary of actual sales for last 3 months (such as a total dollar amount of sales by category: hot or prepared foods; nonfoods; accessory foods; staple foods; any charges for heating food);
- Supply and inventory records (purchase orders, delivery receipts for suppliers/ wholesalers, inventory logs, etc.);
- An affidavit stating that any handwritten receipts submitted are an accurate reflection of actual sales. The affidavit must be notarized;
- All business licenses for the firm; and
- Federal business tax returns for the most recent filing year for all owners/officers/or members.

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

- Inventory sales report from Lawrence Street Seafood from June 2017 to October 2017;
- Accounts receivable history from Lawrence Warehousing Co., Inc. from July 2017 to September 2017;

- Transaction report from Frog Island Seafood Inc., from July 2017 to September 2017;
- Inventory sales report from American Mussel Harvesters, Inc. from June 2017 to September 2017;
- Accounts receivable history from Sea Salt LLC from July 2017 to October 2017;
- Transaction sales report from Chefs Mart, from July 2017 to September 2017;
- Inventory invoice summary report from B&A Seafood, Inc., from July 2017 to September 2017;
- A typed statement from Liberty Seafood indicating the amount of seafood purchased by Anastasi Seafood between July 2017 and September 2017;
- A gross sales report from Liscio's Bakery, showing gross sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) between July 2017 and September 2017;
- Inventory invoice summary from Pure Fish Seafood LLC for July 2017 to September 2017;
- Sales report from Samuels & Son Seafood showing total sales of specific seafood products between July 2017 and September 2017;
- Summary of the firm's sales tax payments from July 2017 to September 2017;
- Copies of checks for the firm's liquor tax for July, August and September 2017;
- Copies of merchant statement from Heartland Payment Systems, the firm's third-party processor. These statements show all EBT and credit card deposits for the months of July, August and September 2017;
- Bank statements from United Savings Bank for July to September 2017;
- U.S. Income Tax Return for Anastasi Seafood Inc., for tax year 2016, showing total gross sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C);
- Copies of four business licenses from the City of Philadelphia;
- Restaurant Liquor License from the Pennsylvania Liquor Control Board; and
- Transporter for Hire – Class B license from the Pennsylvania Liquor Control Board.

On November 8, 2017, the Retailer Operations Division contacted the Appellant and advised that in order to make an informed eligibility determination, the agency needed copies of the firm's sales register receipts for the past three months. The Appellant owner stated that she does not have such information.

After reviewing the store visit report and photographs as well as the Appellant's evidence, the Retailer Operations Division determined that without further documentation from the Appellant it could not make an eligibility determination. In a letter dated November 15, 2017, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it failed to cooperate in the reauthorization process. The letter stated that the withdrawal determination was based on regulations found at 7 CFR § 278.1(n).

In a letter postmarked November 16, 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(n) establishes the authority upon which FNS shall withdraw the SNAP authorization of any firm that fails to cooperate in the reauthorization process.

7 CFR § 278.1(n) reads:

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. Failure to cooperate in the reauthorization process will result in withdrawal of the firm's approval to participate in the program.

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:

¹ This definition, particularly in relation to Criterion A, was amended in regulation effective January 17, 2018.

² This definition, 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 Retailer Operations Division requested register tapes for the month of July, but the Appellant does not keep these.
- Appellant uses one register for cash sales only. This register does not separate sales by items sold.
- Appellant has all SNAP receipts and other credit card transactions that state the dates and amounts.
- Appellant has included a copy of the firm's Z tape so that it can be seen how things are rung up in the register.
- Appellant never had a reason to keep the register rolls, nor has any agency ever requested them, including the IRS, or the State of Pennsylvania.
- Appellant does have all printouts from the credit card machine and the actual sales slips from those sales, which it can send, if need be.
- Appellant accepts SNAP only in the fresh fish market, not in the restaurant or for take- out. The fresh fish is the bulk of all sales. The restaurant and bar is small, with less than 40 seats.
- Appellant owner is a fourth generation seafood merchant and has personally been in the seafood business for over 40 years. The firm has never received a violation and it is a staple in the community. It is one of the few markets in Philadelphia that sells fresh and live whole foods. There is nothing processed.
- Appellant requests that FNS visit the firm's website to get a better understanding of the services it provides.
- Any disruption to the firm's SNAP authorization would greatly affect the market and destroy the hundred years that the owner's family has been vending in the Italian Market.

In support of these contentions, the Appellant provided copies of sales tapes dated November 15, 2017, showing credit card and EBT sales for that day. Also provided is a tape listing cash transactions for November 15, 2017. None of the sales tapes show what items were purchased or whether or not the food was hot or cold at the time of the purchase.

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. It must be made clear that the purpose of this review is not

to determine the firm's eligibility for SNAP participation. Rather it is solely to determine whether or not the firm cooperated with the reauthorization process.

As best as this review can determine, the Appellant cooperated as much as its documentation would allow. As noted on Pages 2 and 3 of this document, the Appellant provided the Retailer Operations Division with a large amount of evidence in an attempt to show that the firm was eligible to remain authorized to accept SNAP benefits. However, agency policy in effect at the time of the Retailer Operations Division's withdrawal decision stated that three full months of sales receipt data was required to determine if a firm was primarily a restaurant or a retail food store. In this case, the Appellant has clearly acknowledged that it does not maintain such sales records. Because the Appellant did not provide the documentation as requested, it is the determination of this review that the decision to withdraw the firm's authorization was appropriate and was made in accordance with SNAP regulations at 7 CFR § 278.1(n).

It should be noted that in this case, the term "failed to cooperate" simply denotes that the Appellant did not submit sufficient information to enable the Retailer Operations Division to make an eligibility determination. It does not imply that the firm was unwilling or reluctant to provide the required information.

It should also be noted that the agency's policy regarding minimum documentation standards has been modified somewhat since the time the withdrawal decision for Anastasi Seafood was made. The modified policy no longer specifically states that a minimum of three months of sales data is required. A copy of the updated policy can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer/eligible>. Additionally, because there is not a required duration period for withdrawals made in accordance with 7 CFR § 278.1(n), a new application for SNAP participation may be submitted at any time.

As to the Appellant's claim that a withdrawal of the firm's SNAP authorization would negatively impact the firm, this contention has no relevance to this case as a firm may only participate in SNAP if it meet basic eligibility criteria as outlined in 7 CFR § 278.1(b)(1). In this case, the firm's ongoing eligibility has yet to be determined.

CONCLUSION

The contentions and evidence presented by the Appellant are not sufficient to prove that the withdrawal decision made by the Retailer Operations Division was inaccurate or that it should be reversed. The Appellant offered no evidence that it provided the sales receipt documentation which the Retailer Operations Division determined was necessary for an eligibility determination.

On the basis of the analysis above, the decision by the Retailer Operations Division to withdraw the authorization of Anastasi Seafood to participate as a retailer in SNAP is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of Anastasi Seafood shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted at any time.

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

May 29, 2018