

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

Blazin Cajun Seafood, LLC,

Appellant,

v.

Case Number: C0216788

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 Blazin Cajun Seafood, LLC to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

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 in its administration of the SNAP, when it withdrew the authorization of Blazin Cajun Seafood, LLC.

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In a letter dated March 28, 2019, the Retailer Operations Division informed the Appellant that it was being withdrawn from the SNAP as it no longer met the definition of a retail food store under 7 CFR § 271.2 and 7 CFR § 278.1(b)(1) of the SNAP regulations. Specifically, the letter stated that the Appellant was primarily a restaurant as the evidence indicated that more than 50 percent of its gross retail sales are in heated, hot and cold prepared food not intended for home preparation and consumption. The letter also informed the Appellant 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).

In a letter postmarked April 3, 2019, the Appellant requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request for administrative review was granted and implementation of the withdrawal was held in abeyance pending completion of this review.

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 covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2018, and SNAP regulations at Title 7 Code of Federal Regulations (CFR) Parts 271 and 278. In particular, SNAP regulations at 7 CFR § 278.1(l) 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 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, defines a retail food store, in part, 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 qualifying staple food items on a continuous basis, evidenced by having no fewer than seven 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 three 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 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 application for authorization in the program for a minimum period of six months from the effective date of the denial. [Emphasis added.]

Regulatory Change

Due to a recent change in Federal regulations, foods 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). 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:

- Since the firm's opening in 2014, the City of Gulfport has always categorized Blazin Cajun Seafood as primarily a seafood market.
- Blazin Cajun Seafood meets the staple food requirements for Criterion A. In addition, Blazin Cajun meets Criterion B as over 50 percent of its total gross retail sales are in staple foods. That percentage does not include hot or heated food.
- The Appellant has provided USDA with the firm's tax returns, verification of gross retail sales for the past year, day-to-day sales for a three-month period, monthly sales by categories for a three-month period, and EBT receipts to prove that staple food sales are over 50 percent of the firm's gross retail sales.
- The Appellant has provided spreadsheets of the firm's calculations of staple food sales as compared to heated, hot and cold prepared foods sales.
- The firm's withdrawal from the SNAP will have a major negative impact on the firm and the local community.

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 Blazin Cajun Seafood, LLC is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). In reaching its decision to withdraw the store's application, the Retailer Operations Division reviewed the reauthorization 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 Blazin Cajun Seafood, LLC does not qualify for the SNAP as it is primarily a restaurant.

The Appellant states that the City of Gulfport considers the firm to be a primary use seafood market. However, it should be noted that the City of Gulfport's categorization of the business is irrelevant in this case as the definition of a restaurant for the purposes of the SNAP are defined by Federal regulations at 7 CFR § 278.1(b)(1)(iv) and the USDA-Food and Nutrition Service is responsible for making that determination.

Reauthorization

As part of a routine reauthorization process, the Appellant submitted an online reauthorization form FNS-252-R, entitled “Supplemental Nutrition Assistance Program Reauthorization Application for Stores” on October 15, 2018. The Appellant’s reauthorization application indicated that over 84 percent of its 2017 actual gross retail sales were in staple foods and that less than 15 percent were in hot and cold prepared food items.

On November 10, 2018, an FNS contractor conducted a store visit to assess the firm’s continued eligibility for the SNAP. The store visit documented that the firm sold prepared foods not intended for home preparation and consumption and some staple food including fresh and frozen seafood. After reviewing the results of the store visit, the Retailer Operations Division sent a letter dated February 26, 2019 to the Appellant noting that the store visit appeared to indicate that Blazin Cajun Seafood, LLC was operating primarily as a restaurant which would make the firm ineligible for SNAP reauthorization. The letter requested additional supporting documents from the firm including end-of-day sales summary reports for the months of November 2018, December 2018, and January 2019; an overview document breaking the actual retail sales down into certain categories; and verification of total gross retail sales for the prior year using records such as state sales and use taxes and income taxes. These documents were received by the Retailer Operations Division on March 14, 2019.

Store Visit Report

Although the Appellant’s reauthorization application stated that over 84 percent of the firm’s gross retail sales were in SNAP eligible staple food, the Retailer Operations Division appropriately questioned the accuracy of this information. The survey form and photographs from the FNS store visit conducted on November 10, 2018, indicates that the business 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.

The store visit report and photographs document that the interior footprint is largely devoted to the preparation and sale of SNAP ineligible hot and cold prepared food not intended for home preparation and consumption. The firm has a full commercial kitchen, occupying approximately a third of the interior footprint, which includes a large meal preparation area, industrial stove, industrial fryers, toaster ovens and microwave. There was also a freezer in the food preparation area with frozen seafood that was not accessible to customers. It is likely that this food was used in the kitchen to make prepared food items.

Another third of the store footprint was devoted to dine-in customers. There was a fully stocked buffet with 16 ready to serve dishes. In addition, a prominently displayed menu board advertised over 50 prepared food items including seafood platters served with fries, hush puppies and toast; fried chicken plates served with fries or fried rice; po’boys; fried and boiled side orders; and fresh salads. There were also other displays offering Chinese food plates and cups of gumbo. A large customer seating area had two (2) tables with four (4) chairs each and four (4) booths able to seat approximately 4-6 people. There was also a soda fountain in the dining area.

The remaining third of the store appeared to be devoted to staple and accessory food sales. There were some shelves containing a limited amount of bread, bananas, rice, canned and package goods, juice. There was a cooler with sodas and other drinks (the firm was out of milk), and a cooler with frozen vegetables and seafood. There was also a fresh seafood display with shrimp, crab, mullet and trout for sale.

Supporting Documents

In order to verify the continued eligibility of the firm, the Retailer Operations Division letter dated February 26, 2019 requested various documents including verification of gross retail sales broken down by heated or prepared foods, non-foods, accessory foods, staple foods and charges for food heating services for a three-month period.

In reviewing the documents provided by the Appellant, the Retailer Operations Division determined that the firm had two (2) different registers and point-of-sale (POS) devices. One register and POS device was used only for SNAP transactions, and the register and POS device was used for all other forms of payment. The EBT daily register receipts and sales receipts do not itemize what was purchased and only provide the transaction amounts, date and times. Therefore, these documents did not provide the Retailer Operations Division with the evidence needed to confirm the Appellant's claim that the majority of its gross retail sales are in staple food.

The Appellant provided a three-month summary table of staple food (broken down into the categories of seafood items, seafood sales, grocery sales, and EBT sales) and prepared food sales (broken down by categories of fried chicken plates, modifiers, fresh salad, boiled side orders, and po'boys). This summary report indicates that 84 percent of the firm's gross retail sales during the three-month period were in staple foods which is consistent with what the firm reported on its FNS-252-R; however, the Appellant did not provide any documents containing the itemized underlying data on which the summary reports are based. Therefore, the Retailer Operations Division appropriately determined that none of the summary documents submitted by the Appellant were sufficiently reliable to disregard the visual evidence of the firm's business model obtained during the store visit.

Social Marketing

In addition, the Retailer Operations Division determined that the firm primarily markets itself as a restaurant through social media. The firm's Facebook page states that it is a seafood restaurant and Chinese restaurant that serves lunch and dinner. In addition, the firm's Instagram page, as well as other social media sources such as Yelp, all indicate that the business is a restaurant and all of the pictures, postings, and reviews focus on the firm's hot and cold prepared ready-to-eat foods.

Summary

A preponderance of the evidence supports the Retailer Operation Division's determination that the Appellant firm likely has more than 50 percent of its total gross retail sales in heated, hot and cold prepared food not intended for home preparation and consumption. The SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, that "firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption, shall not qualify for participation as retail food stores." By definition these types of firms are considered restaurants and are ineligible for SNAP authorization.

Hardship to Firm and the Community

The Appellant contends that it will suffer an economic hardship if it is not authorized for the SNAP. With regard to this contention, there is no provision in the SNAP regulations that would allow an ineligible restaurant to be authorized for the SNAP on the basis of possible economic hardship to either the ownership personally or the firm. To allow an ineligible restaurant to be reauthorized for the SNAP based on a purported economic hardship would render virtually meaningless the eligibility provisions of the Food and Nutrition Act of 2008

The Appellant also contends that the involuntary withdrawal will create a hardship for the SNAP community that relies upon the firm. With regard to this contention, there is no provision in the SNAP regulations that would allow an ineligible restaurant to be reauthorized for the SNAP on the basis of hardship to the SNAP community.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP application of the Appellant, Blazin Cajun Seafood, LLC, is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization for six months from the effective date of the withdrawal.

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, 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.

RONALD C. GWINN
Administrative Review Officer

May 15, 2019