

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

Blue Crab Trading Company,

Appellant,

v.

Case Number: C0213002

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 denied the application of Blue Crab Trading Company (hereinafter “Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of denial.

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 denied the application of Blue Crab Trading Company.

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

In a letter dated September 6, 2018, and received by the firm on September 12, 2018, the Retailer Operations Division denied the Appellant’s application to participate as an authorized retailer in SNAP. This denial action was based on observations made during a contractor’s visit to the store on July 3, 2018, as well as information provided on the firm’s SNAP application dated May 8, 2018, and a questionnaire dated September 6, 2018.

The Retailer Operations Division determined that the firm was operating primarily as a wholesale entity and did not meet the necessary criteria to be authorized as a co-located

wholesale/retail firm. As a result of being found ineligible for participation in the Program, the Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(b)(1) and (k)(2).

In a letter postmarked September 20, 2018, the Appellant requested an administrative review of the Retailer Operations Division's decision. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, 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(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)(2) reads, in relevant part:

FNS shall deny the application of any firm if it determines that:

(2) The firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B, as specified in paragraph (b)(1)(i) of this section; **or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section.** 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.]

7 CFR § 271.2 defines 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 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,

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

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 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...

7 CFR § 278.1(b)(1)(vi) states:

Co-located wholesale food concerns. No co-located wholesale/ retail food concern with 50 percent or less of its total sales in retail food sales may be authorized to redeem SNAP benefits unless it meets the criteria applicable to all retail firms and:

(A) It is a legitimate retail food outlet. Indicators which may establish to FNS that a firm is a legitimate retail food outlet include, but are not limited to, the following:

(1) The firm's marketing structure; as may be determined by factors such as, but not limited to:

(i) A retail business license;

(ii) The existence of sales tax records documenting retail food sales; and/or separate bookkeeping records; and

(2) The way the firm holds itself out to the public as evidenced by factors such as, but not limited to:

(i) The layout of the retail sales space;

(ii) The use of retail advertisements;

(iii) The posting of retail prices;

(iv) Offering specials to attract retail customers;

(v) Hours of operation for retail business;

(vi) Parking area for retail customers; and

(B) It has total annual retail food sales of at least \$250,000; or

(C) It is a legitimate retail outlet but fails to meet the requirements in paragraph

(b)(1)(vi)(B) of this section, and not authorizing such a firm would cause hardship to SNAP households. Hardship would occur in any one of the following circumstances:

(1) Program recipients would have difficulty in finding authorized firms to accept their coupons for eligible food;

(2) Special ethnic foods would not otherwise be available to recipients; or

(3) Recipients would be deprived of an opportunity to take advantage of unusually low prices offered by the firm if no other authorized firm in the area offers the same types of food items at comparable prices.

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The Appellant owner has been in the wholesale business for three years.
- The Appellant uses 30 percent of the building for wholesale and 70 percent of it for a retail store. Wholesale is not offered to the public. The firm has separate licenses for each type of business.
- Appellant believes it meets Criterion B of SNAP eligibility, as defined in 7 CFR § 271.2 and § 278.1(b)(1) because 100 percent of its retail sales are in the sale of staple foods.
- In the event that the firm does not meet the requirements in § 271.2 or § 278.1(b)(1), the Retailer Operations Division should have considered § 278.1(b)(1)(vi)(C), which allows for authorizing the firm if not authorizing the firm would cause hardship to SNAP households. The reason this is applicable is because the store is located in the middle of an area with low-income housing, and 50 percent of the residents walk to get what they need to eat.
- Appellant requests that FNS also consider 7 CFR § 278.1(b)(2), which states that FNS may consider such factors as the location of a store and previous food sales. The location where Blue Crab Trading Company operates has been a retail seafood store for over 40 years, and has always been able to accept SNAP benefits.

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 presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The key issue in this case is whether or not Blue Crab Trading Company can be authorized in its current configuration as a co-located wholesale/retail establishment. The regulations governing this type of firm are found in 7 CFR § 278.1(b)(1)(vi). *[See pages 3 and 4 of this document for the full text of this regulation.]*

According to this regulation, a co-located wholesale/retail firm with less than 50 percent of its total sales in retail food sales can only be authorized to accept SNAP if it is a legitimate retail food outlet (see Paragraph A) and has total annual retail food sales of at least 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (see Paragraph B). If the firm is a legitimate retail food outlet but does not have at least 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in annual retail food sales, it could potentially still be authorized if not authorizing the firm would cause hardship to SNAP households. The circumstances regarding whether or not hardship exists are detailed in Paragraph C.

The first step is to determine the firm's retail food sales percentages. In this case, the Appellant's evidence clearly shows that retail food sales constitute less than 50 percent of the firm's total sales. On September 6, 2018, the Appellant submitted a completed questionnaire showing that the firm had 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in wholesale sales from February 2018 to

September 6, 2018. This is a period of approximately seven months, meaning that the firm's average monthly wholesale sales were 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant also indicated that in its first three months of retail business, it had total retail sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), or a monthly average of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Adding the two monthly averages together results in total monthly sales (both wholesale and retail) of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of that amount, the retail portion is approximately 18 percent of the firm's total sales. Because the firm's retail sales are less than 50 percent of its total sales, the firm's eligibility for SNAP participation must conform to the regulations at 7 CFR § 278.1(b)(1)(vi).

It is evident to this review that in addition to its wholesale business, the firm is also a legitimate retail food outlet as described in Paragraph A of the above regulation. As such, the requirement in Paragraph A has been met.

However, the firm does not meet the requirement of Paragraph B, which states that a co-located wholesale/retail firm which has less than 50 percent retail food sales must have annual retail sales 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In this case the firm's annual sales are approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (this is derived by annualizing the firm's first three months' retail sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C)).

Because the firm does not meet the criteria in Paragraph B, the hardship conditions described in Paragraph C must be considered. This paragraph explains that a firm may be authorized if not authorizing it would cause hardship to SNAP households. The Appellant contends that hardship is a valid consideration in this case because Blue Crab Trading Company is located in the middle of an area with low-income housing and 50 percent of the residents walk to get their food.

According to Paragraph C, hardship is found in any one of the following circumstances:

- 1) Program recipients would have difficulty in finding authorized firms to accept their SNAP benefits for eligible food;
- 2) Special ethnic foods would not otherwise be available to recipients; or
- 3) Recipients would be deprived of an opportunity to take advantage of unusually low prices offered by the firm if no other authorized firm in the area offers the same types of food items at comparable prices.

As for Item (1), there is no evidence that SNAP recipients would have difficulty locating other SNAP-authorized stores. According to agency records, there are at least 10 other authorized stores located within a one-mile radius of the Appellant firm, including a store that specializes in the sale of seafood. Regarding Item (2), the contractor's store visit report did not reveal the presence of any special ethnic foods that would only be available at the Appellant store. Regarding Item (3), there is no evidence that the firm's prices are unusually low in comparison with other authorized stores in the area. As such, Program authorization under the provisions of Paragraph C cannot be granted.

Because Blue Crab Trading Company does not meet the eligibility requirements found in Paragraphs B and C of Section 278.1(b)(1)(vi) of the SNAP regulations, the firm is not eligible for participation in the Program.

Consideration of Appellant's Remaining Contentions

As to the contention that the Appellant uses 70 percent of the building for its retail business and just 30 percent for its wholesale business, it must be stated that building usage has no bearing in this matter. Required percentages are in sales, not building usage.

As to the Appellant's belief that it meets the requirements of Criterion B as found in 7 CFR § 271.2 and § 278.1(b)(1)(i), it is very likely that the firm does meet this element of program eligibility. However, when a firm is a co-located wholesale/retail firm and has less than 50 percent of its total sales in retail food sales, it must also meet eligibility requirements found at § 278.1(b)(1)(vi), which the Appellant does not.

As to the Appellant's request that FNS also consider 7 CFR § 278.1(b)(2), which states that FNS may consider such factors as the location of a store and previous food sales, there is no evidence in the case record that the Retailer Operations Division failed to consider this paragraph before making its denial decision. Additionally, the fact that prior stores at the same location have been authorized to accept SNAP does not outweigh the Appellant's failure to meet eligibility requirements and thus does not provide a valid basis for reversing the denial determination.

CONCLUSION

Based on the analysis above, it is the determination of this review that the Appellant firm, as presently constituted, does not meet established eligibility criteria for co-located wholesale/retail firms as outlined in 7 CFR § 278.1(b)(1)(vi). The evidence shows that while the firm may be a legitimate retail food outlet, less than 50 percent of its total sales come from retail food sales and it has less than 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in annual retail sales. Additionally, there is no evidence that SNAP households would experience hardship as a result of the firm not being authorized. Accordingly, the decision by the Retailer Operations Division to deny the application of Blue Crab Trading Company to participate as a retailer in SNAP is sustained.

In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from September 6, 2018, which is the effective date of the denial.

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

November 2, 2018