

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

**Blue Crab Trading Company,**

**Appellant,**

**v.**

**Case Number: C0218157**

**Retailer Operations Division,**

**Respondent.**

**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 to deny the authorization of Blue Crab Trading Company (hereafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2 and § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied Appellant authorization to participate as a retailer in SNAP on May 9, 2019.

**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 May 9, 2019, Retailer Operations Division denied Appellant’s authorization to participate as a retailer in SNAP. This denial was based on evidence obtained during a firm visit conducted on April 22, 2019, as well as information provided on the firm’s retailer application.

Retailer Operations Division determined that the firm did not meet the definition and requirements of a retail food store as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations. The denial letter stated, in relevant part:

“It is the determination of FNS that your firm is primarily a restaurant, because more than 50 percent of your total gross retail sales are from "heated foods" and/or "prepared foods." "Heated foods" are foods cooked or heated by the retailer before or after purchase. "Prepared foods" are hot or cold foods not intended for home preparation and/or home consumption, including prepared foods that are consumed on the premises or sold for carryout. SNAP regulations, at 7 CFR 278.1(b)(1)(iv), provides that restaurants are not eligible to participate in SNAP, except in certain States that operate special restaurant programs allowing the elderly, disabled, and homeless participants to use SNAP benefits in restaurants. Your Store is not located in a state with a restaurant program.”

As the firm failed to meet eligibility requirements for approval, Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in 7 CFR § 278.1(k)(2).

In a letter postmarked May 17, 2019, Appellant appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal was granted.

### **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, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

### **CONTROLLING LAW**

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) reads, in relevant part: “FNS shall deny the application of any firm if it determines that: (1) 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 ....”

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 ....”

7 CFR § 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.” [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.”

## **Regulatory Change**

Foods heated after sale were at one time considered to be SNAP eligible. However, due to a recent change in Federal regulations, foods heated after sale are now considered to be SNAP ineligible in the same manner as foods sold hot at the point of sale. 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**

In response to the Retailer Operations Division denial letter and in the request for administrative review, Appellant has stated as its position in the matter the following:

1. My retail store meets the requirement. I was never asked for any receipts to prove this. I have enclosed a register printout of everything that has gone through my register since we opened in May of 2018.
2. Someone determined that my retail store was a restaurant which is not true. I do not offer customers to dine in or eat in my retail store. We do not have public restrooms or have a license to offer this type of service. I went with tables and chairs because it gives a more welcoming feel other than have customers waiting around to have their fish cut and cleaned.
3. Please consider 278.1(6)(c)(3)(2).

Appellant provided a register printout dated May 16, 2019 however the receipt did not show the breakdown for the period required during the application process therefore the information on the printout could not be evaluated.

The preceding may represent only a brief summary of 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

In regards to Appellant's contention, the record reflects that Appellant has outdoor signage, which reflects "Now Serving Cooked Seafood" as well as prominent menu boards inside the store which shows a hot bar, shrimp plates available at the register, cooked seafood and sides available for eat in or take out. Although Appellant appears to sell fresh uncooked seafood by weight, it has an in-house dining capacity of up to 20 customers, and the kitchen preparation area which consumes a large portion of its operating space. Moreover, Appellant has a hot bar area, fryers and carryout containers.

The register printout provided by Appellant did not provide sufficient evidence that its staple food sales (raw uncooked seafood) comprised more than 50% of its total gross sales during the application period. Appellant did not provide sufficient sales records or tax documentation to support its contention that its staple food sales comprise more than 50% of its total gross sales. It is important to note that Appellant reported on its SNAP application that 93 percent of its total gross sales were from cold and hot prepared foods.

Accordingly, the Retailer Operations Division correctly determined Appellant is not a retail food store as defined in §271.2 and operates as a restaurant, therefore, not eligible for authorization in the SNAP in accordance with §278.1(b)(1)(iv) of the SNAP regulations.

## CONCLUSION

Based on the discussion herein, the determination by the Retailer Operations Division to deny the authorization of Blue Crab Trading Company to participate as a retailer in SNAP is sustained. Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six months, effective May 9, 2019.

It is important to reiterate that the denial letter states ***"if your business model remains the same and you reapply, your application may be denied for the same reasons it was denied this time."***

## RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to 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 (FOIA), 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.

Monique Brooks  
ADMINISTRATIVE REVIEW OFFICER

August 29, 2019