

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

**Bobby's Fish Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0219581**

**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 Bobby's Fish Market (Bobby's Fish Market or Appellant) to participate as an authorized 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 Sunshine Food Mart to participate in SNAP.

**AUTHORITY**

7 USC § 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**

Appellant submitted an online reauthorization form FNS-252-R, entitled *Supplemental Nutrition Assistance Program Reauthorization Application for Stores* on October 11, 2018. The FNS-252-R reported that two percent of the firm's actual gross retail sales were in staple foods and that 98 percent were in hot and prepared food. On February September 23, 2018, an on-site store visit was conducted by an FNS contractor in an effort to evaluate the firm's conditions and inventory. After considering the available evidence, the Retailer Operation Division determined that the majority of Appellant's sales were from hot and prepared food items and thus, the firm was primarily a restaurant.

In a letter dated July 2, 2019, the Retailer Operations Division informed Appellant that its SNAP authorization was being withdrawn because it did not meet the necessary criteria to be eligible for SNAP participation. Specifically, the letter stated that the Appellant firm was a restaurant because more than 50 percent of its total sales were in the sale of hot and/or cold prepared, foods not intended for home preparation and consumption.

In a letter dated July 6, 2019, ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). In particular, 7 CFR § 278.1(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) reads, in part: FNS may 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 specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;
- (iii) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...for the time period specified in paragraph (k)(2) of this section.

7 CFR § 278.1(k)(1) Denying authorization, references 7 CFR § 278.1(b)(1)(iv) ineligible firms, which reads, in part:

Firms that are considered to be restaurants, that is, 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 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 § 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.... 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 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); or have more than 50 percent of the total gross retail sales of the establishment...in staple foods (Criterion B).

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.

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

Appellant made the following summarized contentions in its administrative review request dated July 6, 2019, in relevant part:

- The owner made the mistake on the application and placed the **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** on the incorrect line and it should have been on the fresh fish line.
- Appellant is the only local fish market in the community selling fresh sustainable fish.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced.

## ANALYSIS AND FINDINGS

The purpose of this review is to validate or to invalidate the decision of the Retailer Operations Division. Thus, it is limited to consideration of the relevant facts at the time the Retailer Operations Division rendered its decision as to this one Appellant. The authorization of a store to participate in the SNAP must be in accord with the Act and the regulations, as amended; those requirements of law cannot be waived.

Appellant indicated on the *FNS -252 Supplemental Nutrition Assistance Program Reauthorization Application For Stores* that 98% of its total gross sales come from the sale of hot and prepared food. According to 7 CFR § 271.2 and 278.1(b)(1)(iv), firms are considered restaurants if they have more than 50 percent of total gross sales from heated foods and/or prepared foods. 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. Restaurants are ineligible for SNAP authorization.

This review is limited to consideration of the circumstances at the time of the withdrawal action by the Retailer Operations Division. On the day of the store visit, the evidence supported that the store is primarily a restaurant, and firms that are primarily restaurants are not eligible to participate in SNAP. There were tables and chairs as well as an extensive menu board.

Appellant explained that made a mistake and it meant to put the **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** on the staple food category. However, this is not credible because the evidence does not support that 98% of Appellant's sales come from staple food. There is an extensive hot food menu, tables and chairs, and many online review for its hot food items.

Appellant likely sells some fresh fish. However, for the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has SNAP-eligible food available for sale. The issue is whether actual sales of prepared foods comprise more than 50 percent of the store's total gross retail sales. There is no evidence to suggest that the information provided on Appellant's application for reauthorization indicating that 98% of total gross sales is from the sale of hot and prepared food items was incorrect.

### Summary

Although Appellant may sell some fresh and seafood staple food items, it is more likely true than not true that the majority of foods in the store are actually sold prepared and/or hot and ready-to-eat. According to 7 CFR § 278.1(b)(1) of the SNAP regulations, such a store is considered a restaurant and is not eligible for SNAP participation as a retail food store. Therefore, Appellant's store does not qualify as a retail food store for purposes of SNAP participation.

## **CONCLUSION**

The Retailer Operations Division's decision to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2) Appellant will not be eligible to participate in the SNAP for a period of six months. The withdrawal of Bobby's Fish Market will become effective 30 days after receipt of this decision.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owner resides or is 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.

Mary Kate Karagiorgos  
ADMINISTRATIVE REVIEW OFFICER

October 21, 2019