

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

**Bobo Seafood,**

**Appellant,**

**v.**

**Case Number: C0212497**

**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 improperly withdrew the authorization of Bobo Seafood (hereinafter “Appellant”) from participation 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 SNAP when it withdrew the authorization of Bobo Seafood as a SNAP authorized retailer.

**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 § 287.7... may file a written request for review of the administrative action with FNS.”

**CASE CHRONOLOGY**

The Appellant firm, Bobo Seafood, was originally authorized to participate as a retailer in SNAP on April 15, 2002. Due to a reported change in ownership, FNS required Bobo Seafood to undergo reauthorization in order to confirm the firm’s eligibility for continued SNAP authorization. Bobo Seafood submitted its reauthorization application on April 27, 2018.

On May 3, 2018, an on-site store visit was conducted by an FNS contractor in an effort to evaluate store conditions and inventory. The contractor's report and photographs indicated that the store has a large kitchen area and signs advertising hot seafood for carry-out. Several signs in the store indicated a separate price for seafood being sold cooked versus being sold live. Other signs displayed a separate price for food charged to SNAP benefits plus a \$1 fee for cooking that must be paid in cash. The store visit report and photographs also showed that the store sells raw, fresh seafood by the pound.

Based upon the store visit documentation and information submitted on the reauthorization application, Bobo Seafood was identified by the Retailer Operations Division as a firm that might be considered a restaurant, and therefore ineligible for authorization, under recently amended SNAP regulations which had been implemented after the firm's last reauthorization in 2013. To determine if the firm met current eligibility requirements, the Retailer Operations Division requested additional information from the firm by letters dated July 3, 2018, July 11, 2018, and August 8, 2018.

Through counsel, Appellant responded with correspondence dated August 1, 2018, and August 17, 2018. Appellant also provided extensive documentation, including the following:

- End-of-day sales summary reports that are electronically generated by the firm's register system for March through June 2018;
- An overview Excel spreadsheet of the end-of-day sales summary reports for March through June 2018 showing the total of daily sales of foods sold and the percentage of sales separated into the following categories: raw/staple food, prepared food, charge for cooking, non-food, and accessory food, with the totals of raw/staple food separated into food sold cooked and food sold raw and providing the weight and sales amount for these separately;
- A spreadsheet that provides the weight and percentage of raw food and the weight and percentage of cooked food sold by type of food sold (i.e., fish, shrimp, sausage, etc.);
- Bank account statements and copies of cleared checks for March through June 2018;
- Partial credit card statements for April and May 2018;
- Inventory purchase invoices and business expense bills for March through June 2018;
- A ledger of monthly expenses for March through June 2018;
- Sales and Use Tax Returns for the State of Georgia for January 2017 through July 2018;
- State and Federal Tax Returns for 2017; and
- Photographs of the firm.

After further reviewing the store visit report and photographs as well as the Appellant's written responses and evidence, the Retailer Operations Division withdrew the authorization of Bobo Seafood from participation as a SNAP-authorized retailer for failure to cooperate with the reauthorization process. The withdrawal letter, dated August 24, 2018, states that the Retailer Operations Division had sent the firm three letters requesting additional information, but that the firm submitted inadequate documentation in response and an eligibility determination could not be made on the basis of the documentation submitted. Specifically, the letter says that the Retailer Operations Division needed customer individual receipts to confirm how the product left

the firm's premises and that the cooked charge fee on documentation submitted does not give any indication of what percentage of the raw food is cooked. The withdrawal letter further noted that the decision to withdraw the firm was based on regulations found at 7 CFR § 278.1(n).

In a letter postmarked April 6, 2018, 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.

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, 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 §

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\* 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>.

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 § 271.2 defines *staple food* as:

...food items intended for home preparation and consumption in each of the following four categories: Meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products... Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility under § 278.1(b)(1) of this chapter... Accessory food items include foods that are generally considered snack foods or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar....

7 CFR § 278.1(b)(1)(i) states, in part:

An establishment...will 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]*<sup>\*</sup> 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 § 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 contentions, summarized below, in its request for administrative review, in relevant part:

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\* 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>.

- The store visit report was not based on facts showing that prepared foods constituted more than 50 percent of the firm’s total sales, but rather the store visit contractor was guessing and was determined to find the firm to be a restaurant;
- The store visit contractor saw that the firm sold a prepared food, “Low Country Boil,” and that the firm charges \$1.00 for cooking seafood after purchase, but saw no evidence of how much food cooked or prepared food was actually being sold;
- While the store has a cooking and waiting area, it does not have seating, tables, a stove, or fryers; there are only three pots on gas burners used to cook Low Country Boil and to boil shrimp and crab;
- Spreadsheets and written responses have been provided in response to request for information sent by FNS;
- Spreadsheets provided to FNS specified the sales of raw and cooked food by weight and dollar total, as well as the percentage and dollar amount of each type of food sold and demonstrate the amount of food sold that is not cooked or boiled by the firm;
- At no time did the percentage of cooked and prepared foods come anywhere near 50 percent of total sales during March, April, May, and June 2018;
- Daily register receipts provided were used to create the spreadsheets and to calculate the totals of weight and sales for each type of seafood sold, and to separate the amounts of cooked food from food sold uncooked;
- The Appellant’s firm is a small store, and like many other small stores, does not have a register system that produces duplicate receipts for each sale;
- If Appellant’s authorization is withdrawn, the low income neighborhood it is in will be deprived of an opportunity to get fresh seafood;
- The Retailer Operations Division made an arbitrary decision and did not analyze the documents carefully;
- There was no way the firm was selling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of cooked food each month, the equivalent of 5 tons of cooked food, using three pots on three gas burners;
- The County Health Department does not treat the firm as a restaurant; and
- The cooked food charge in the documentation provided covers a few hundred pounds of seafood, while the firm sells at least 15,000 pounds of seafood and hundreds of bushels of blue crab each month.

In support of its contentions, the Appellant submitted documentation previously submitted to the Retailer Operations Division plus documentation covering July, August, and September 2018 and additional store photographs. Appellant also submitted additional inventory purchase receipts.

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 also 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, which is the basis for the Retailer Operations Division's withdrawal determination.

As best as this review can determine, in the responses dated August 1, 2018, and August 17, 2018, the Appellant submitted all of the relevant information that was requested by the Retailer Operations Division in their three request letters. The only documentation the Appellant did not submit were 3 months of actual sales receipts. However, in this case, the end-of-day sales summary reports printed from the firm's register adequately capture these sales and together with the sales overview spreadsheet, identify the sales percentages and amounts of cooked and prepared food apart from the sales of other items. The written responses further explain the sales figures, as well as the cooking charges and what they apply to, making it clear what part of sales are in cooked or prepared foods.

The documentation submitted to the Retailer Operations Division was more extensive than that which was requested, covers more months than the time period requested, and is sufficient to make an eligibility determination. Further, nothing in the responses or documentation submitted indicate that the firm is attempting to withhold or falsify information.

## **CONCLUSION**

The contentions presented by the Appellant are sufficient to prove that the withdrawal decision made by the Retailer Operations Division was improper and not made in accordance with SNAP regulations. The firm cooperated in the reauthorization process by providing adequate documentation upon which an eligibility determination could be made. As a result, the withdrawal decision by the Retailer Operations Division is reversed.

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.

MICHELLE WATERS  
Administrative Review Officer

December 12, 2018