

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

Bravo Seafood & Deli,

Appellant,

v.

Case Number: C0207028

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the authorization of Bravo Seafood & Deli (hereinafter “Appellant”) was properly withdrawn from the Supplemental Nutrition Assistance Program (SNAP) by the Retailer Operations Division, Retailer Operations Branch, hereinafter “ROD Office.”

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(k)(1) and (2) when it made the decision to withdraw Appellant’s authorization to participate in the SNAP.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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.”

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.

CASE CHRONOLOGY

The record reflects that on June 11, 2014 **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** signed as President an application for authorization for the above-named firm to participate in the SNAP. A visit to obtain information regarding the firm's eligibility was conducted on February 19, 2018. The firm also underwent the agency's periodic reauthorization process and submitted an reauthorization application signed on February 13, 2018. Appellant was subsequently advised in a letter dated February 20, 2018 of the Department's decision to withdraw the firm's SNAP authorization. The regulatory bases given for that denial were 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k). By a letter dated March 1, 2018, Appellant requested an administrative review of this action. The request was granted.

CONTROLLING LAW

The controlling statute in this matter is contained in the **Food & Nutrition Act of 2008**, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k) establish the authority upon which a retail food store or wholesale food concern may be denied authorization to participate in the SNAP.

7 C.F.R. § 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.

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 foods that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt and sugar. Accessory food items shall not be considered staple foods for the purposes of determining the eligibility of any firm.

7 C.F.R. § 278.1(a) states:

FNS shall approve or deny the application within 45 days of receipt of a completed application. A completed application means that all information (other than an on-site visit) that FNS deems necessary in order to make a determination on the firm's application has been received.

7 C.F.R. § 278.1(b)(1)(ii) further stipulates, in part:

Application of Criterion A. In order to qualify under this criterion, firms shall: Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, no fewer than three different varieties of food items in each of the four staple food categories with a depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least two staple food categories.

7 C.F.R. § 278.1(b)(1)(iii) states, in part:

Application of Criterion B: In order to qualify under this criterion, firms must have more than 50 percent of their total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees and entertainment/sports/games income.

7 C.F.R. § 278.1(b)(1)(ii)(C) states, in part:

...Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes.

...Accessory foods shall not be counted as staple foods for the purposes of determining eligibility to participate in the SNAP as a retail food store.

7 C.F.R. § 278.1(b)(1)(iv) states, in part, ineligible firms under this paragraph include:

...specialty doughnut shops or bakeries not selling bread.

...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 consumer on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B.

7 C.F.R. § 278.1(k)(1) and (2) state, in part:

FNS shall deny the application of any firm if it determines that: 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; or The firm has failed to meet the eligibility requirements...under Criterion A or Criterion B....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 C.F.R. § 278.1(l)(1)(ii) states, in part:

FNS shall withdraw the authorization of any firm that fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section.

APPELLANT'S CONTENTIONS

In its written request for review dated March 1, 2018, Appellant provided information in which it was argued that:

1. Seafood and deli products are more than 80% of sales.
2. If removal of both fryers and grill is required Appellant will do so.

ANALYSIS AND FINDINGS

The record reflects that a contracted store visit of the Appellant firm was conducted on February 19, 2018. Documentation generated as a result of that visit includes photographs of the firm's interior and exterior, a store layout diagram and an inventory survey indicating that the firm operates primarily as a carryout/restaurant. The following was noted during the store visit:

- Approximately 300 square feet of store space.
- No optical scanners.
- No shopping baskets or carts.
- 1 check-out counter.
- 2 cash registers.
- Storage coolers present.
- No food stored off site.
- Delivery offered.
- Most expensive items:
 - Lobster - \$24.99 per pound.
 - Dungeness crabs - \$19.99 per pound.
 - Snow crabs - \$15.99 per pound.
 - Shrimp - \$13.99 per pound.
- No significant amount of non-food items.
- Kitchen/food preparation area present. Prepared food menu offered numerous entrees, including sandwiches, wraps, salads and seafood platters. Menus on check-out counter. Posters advertised prepared food. A glass front display case held prepared salads and other prepared food items. An electronic marquee screen above the check-out area also advertised prepared food entrees. Prepared dessert items in glass front cooler. A table top poster states that food can be cooked for an additional \$1.00 that must be paid using cash or credit card. Photos: 4, 7, 9, 12, 15, 18, 19, 21, 22, 23, 24, 26, 27, 28, 29, 32, 33, 35, 38, 39 and 40.
- Hot food sold. Food sold for immediate consumption.
- Prepared salads offered.
- No meat/seafood bundles/specials and/or fruit/vegetable boxes.
- Comments: "the store has a walk-in cooler and freezer in the back of the store and a

small prep freezer in the kitchen. Cooking equipment includes fryers, steamers, grills and ranges. There were two chairs in a waiting area.”

As noted above, a firm that operates primarily as carryout/restaurant is not eligible to participate as retail food store in the SNAP and not subject to evaluation under either Criterion A or B; however, a restaurant may participate in one of the special restaurant programs that serve the elderly, disabled and homeless populations, under the auspices of the state in which the firm is located, as set forth in 7 CFR § 278.1(d)(3) and must meet a number of additional requirements. Further, the documentation indicated that the firm had ample varieties of staple food stock in only one of the four required staple food categories, thus additionally failing to qualify under Criterion A, as detailed above. The visit further confirmed that the firm’s staple food sales could not have reasonably exceeded 50 percent of its gross retail sales, rendering it ineligible for authorization under Criterion B, as staple food sales must exceed 50 percent of gross retail sales. Prepared hot or cold food cannot count toward a firm’s sales of staple food items. As noted, however, regardless of Criterion A or B considerations, a restaurant or carryout operation, with the exception noted above, is not eligible to participate in the SNAP.

In regard to contention 1 above, Appellant’s Reauthorization Application, signed by the Owner on February 13, 2018, generally comports with the contention; the application indicates that the firm operated primarily as a prepared food restaurant/carry-out. The firm’s gross retail sales were comprised predominately of hot and/or cold prepared food entrees.

Regarding contention 2 above, while removal of food preparation equipment may conceivably alter the firm’s sales such that it could at some future point qualify to participate in the SNAP, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the earlier decision of the SNAP Office and as such it is limited to consideration of the relevant facts and circumstances at the time of the decision. It is not within the scope of this review to consider actions Appellant may take to qualify for participation in the SNAP subsequent to that decision. Therefore, Appellants’ contention that it is now willing to take measures to qualify under Criterion A or B of the eligibility requirements is not a valid basis upon which to reverse the decision by the SNAP Office.

CONCLUSION

In view of the above, it is my determination that the ROD Office’s withdrawal of Appellant’s authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(k) and (l). The withdrawal, therefore, is sustained and will become effective upon the 30th day following Appellant’s receipt of this decision. As noted in the ROD Office’s Withdrawal Letter, the firm shall not be eligible to reapply to participate in the SNAP for a period of six months following the effective date noted above.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the provisions of the Freedom of Information Act (FOIA), FNS is releasing this information in a redacted format as appropriate and will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

DANIEL S. LAY
Administrative Review Officer

April 18, 2018