

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review  
Alexandria, VA 22302**

**Don Don Inc d/b/a Broadview Seafood,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0205291**

**FINAL AGENCY DECISION**

It is the decision of the USDA that there is sufficient evidence to support a finding that the initial decision by the Food and Nutrition Service (FNS) Retailer Operations Division to withdraw the authorization of Don Don Inc d/b/a **Broadview Seafood** (hereinafter “Broadview Seafood” and/or “Appellant”) from participation as a Supplemental Nutrition Assistance Program (SNAP) retailer was properly imposed.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2 and 7 CFR § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew the SNAP retailer authorization of Broadview Seafood via letter dated November 30, 2017 because it was determined that Broadview Seafood did not meet the definition and eligibility requirements of a retail food store.

**AUTHORITY**

7 U.S.C. 2018 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a letter dated November 30, 2017, the Retailer Operations Division informed Appellant that Broadview Seafood was being withdrawn from continued participation as an authorized retailer in SNAP because it did not meet the definition of a retail food store as enunciated in the Federal regulations at 7 CFR § 271.2 and CFR § 278.1(b)(1).

The administrative record indicates that Broadview Seafood was initially authorized as a SNAP retailer effective December 30, 2013. FNS regulations require that stores be periodically reauthorized and the reauthorization process include the completion of a *Supplemental Nutrition Assistance Program Reauthorization Application for Stores* form FNS-252R; the completion of an FNS authorized store visit; and the provision of various materials, as requested from the authorized firm, for consideration of continued eligibility by the Retailer Operations Division.

In the instant case the record includes Appellant submitted Reauthorization Application FNS-252R received on November 9, 2017; a report provided by the FNS authorized agent recounting the results of an November 10, 2017 store visit that includes detailed photographs of the site together with an inventory assessment; and materials provided by Broadview Seafood including business licenses, bookkeeping records for January through September 2017; pricing information; and tax materials. The withdrawal determination in appeal is the result of a review of the materials as delineated.

Via letter dated December 13, 2017, received in the office of the Chief of the Administrative Review Branch on December 28, 2017, Appellant requested an administrative review of the action to withdraw authorization to participate as a SNAP Retailer. The appeal was granted and the withdrawal action has been held in abeyance pending the outcome of the appeal.

In a letter dated January 25, 2018 Appellant's owner provided the Administrative Review Branch with a letter of explanation together with additional materials for consideration. The letter and materials were forwarded to the Retailer Operations Division for consideration. In an e-mail dated June 14, 2018 the Retailer Operations Division affirmed review of the documents provided and indicated that those materials did not serve to influence the current determination of withdrawal for Broadview Seafood.

## **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 AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the "Act")<sup>1</sup>, 7 USC 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR).<sup>2</sup> Part § 278.1(l)(1)(ii) establishes the authority upon which the authorization of any firm to participate in the SNAP may be withdrawn if it fails to meet the definition of an eligible firm.

---

<sup>1</sup> Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment enacted February 7, 2014 through P. L. 113-79.

<sup>2</sup> Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at [https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab\\_02.tpl](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl)

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 seven [*three*]<sup>3</sup> 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 three [*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 accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in §278.1(b)(1) of this chapter. 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. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.”

7 CFR § 271.2 defines *Staple food* as:

“*Staple food* means those 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. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (*i.e.*, nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. 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. Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will be included in the staple food category of the main ingredient as determined by FNS. 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. Items shall not be classified as accessory food

---

<sup>3</sup> As implemented effective January 17, 2018 via SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 which can be accessed at: <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion> . References to implementation adjustments are identified with strikethrough of the number presented in the text of the regulation followed by [number] \* throughout the remaining document.

exclusively based on packaging size but rather based on the aforementioned definition and as determined by FNS. A food product containing an accessory food item as its main ingredient shall be considered an accessory food item. Accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm.”

7 CFR § 278.1(b)(1)(i)(A) relays specific program requirements for retail food store participation, which reads, in part,

“An establishment or house to house trade route shall normally be considered to have food business of a nature and extent that 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 three [*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).” [Emphasis Added]

7 CFR § 278.1(b)(1)(ii) Application of Criterion A. In order to qualify under this criterion, firms shall:

“(A) 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 seven [*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 and at least one variety of perishable foods in at least three [*two*]\* staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit. Failure to provide verifying information related to stock when requested may result in denial or withdrawal of authorization. Failure to cooperate with store visits shall result in the denial or withdrawal of authorization.”

“(B) Offer for sale perishable staple food items in at least three [*two*]\* staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks; and...”

“(C) Offer a variety of staple foods which means different types of foods within each staple food category. For example: Apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk, soy yogurt, soft cheese, butter, sour cream, and cow milk yogurt in the dairy products category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken, beans, nuts, beef, pork, eggs, and tuna in the meat, poultry, or fish category. Variety of foods is not to be interpreted as different brands, nutrient values (e.g., low sodium and lite), flavorings (e.g., vanilla and chocolate), packaging types or styles (e.g., canned and frozen) or package sizes of the

same or similar foods. Similar food items such as, but not limited to, tomatoes and tomato juice, different types of rice, whole milk and skim milk, ground beef and beefsteak, or different types of apples (e.g., Empire, Jonagold, and McIntosh), shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any staple food category. Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.”

7 CFR § 278.1(b)(1)(iii) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion B, firms

“... must have more than 50 percent of their total gross retail sales in staple food staples. 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 CFR § 278.1(b)(1)(iv) defines Ineligible Firms as:

“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. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from program participation. 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 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. Such firms may qualify, however, under the special restaurant programs that serve the elderly, disabled, and homeless populations, as set forth in paragraph (d) of this section.

7 CFR § 278.1(l) Withdrawing authorization. (1) “FNS shall 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 specifications 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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section;
- (iv) The firm fails to maintain the necessary business integrity to further the purposes of the program, as specified in paragraph (b)(3) of this section. Such firms shall be withdrawn

for lack of business integrity for periods of time in accordance with those stipulated in paragraph (k)(3) of this section for specific business integrity findings;

- (v) The firm has failed to pay in full any fiscal claim assessed against the firm under §278.7 or any fines assessed under §§278.6(l) or 278.6(m) or a transfer of ownership civil money penalty assessed under §278.6(f); or
- (vi) The firm has failed to pay fines assessed under §278.6(l) or §278.6(m); or
- (vii) The firm is required under State and/or local law to charge tax on eligible food purchased with coupons or to sequence or allocate purchases of eligible foods made with coupons and cash in a manner inconsistent with 272.1 of these regulations.

7 CFR § 278.1(k)(2) speaks to reapplication of a denied or withdrawn firm stating that:

“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;”

7 CFR § 278.1(n) requires a SNAP authorized retailer to cooperation in the reauthorization process stating:

*“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.”

### **APPELLANT'S CONTENTIONS**

In the request for administrative review Appellant, through its ownership, indicates that:

- At the time of the store visit two (2) refrigerated coolers located in the front area of the firm were not operational therefore meat and seafood was stored in the back which was shown to the inspector.
- Appellant has been operating with a very old cash register system which does not list and separate staple foods, and meat or seafood specials in order to support reporting of the different categories of sales as requested by the Retailer Operations Division. A new cash register with advanced capabilities will be installed.
- Z tapes and monthly spread sheets clearly divide SNAP eligible vs ineligible items.

The January 25, 2018 materials includes a letter reviewing SNAP eligible items available at Broadview Seafood, annotated for reference; together with one (1) week of Z Tapes again highlighted by “staple food reference” providing that more than 50 percent of the sales of Broadview Seafood are from the sale of staple foods; and, photographs of shelves and stock room to show the products sold.

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**

The record reflects that Retailer Operations Division considered the nature and scope of Broadview Seafood to determine whether it qualifies as a retail food store as per Sections §§ 278.1 (b)(1) and 271.2 of the SNAP regulations. Retailer Operations Division found the information provided by Appellant to indicate Broadview Seafood operates as primarily a restaurant, therefore does not meet the definition of a retail food store; and, as a result is subject to withdrawal in accordance with SNAP regulations.

The administrative record indicates that the Retailer Operations Division based their decision on consideration of the materials provided by Appellant in response to the October 19, 2017 request for materials together with the additional materials submitted during the administrative review process.

The application material reports that Broadview Seafood derives a majority (65 percent of the 2016 total sales) of its annual gross sales from the sale of staple foods in each of the four (4) staple food groups. The materials indicate that Broadview Seafood is licensed by the City of New Orleans and the State of Louisiana to sell alcoholic beverages (beer); holds a City of New Orleans Occupational License as a Fish & Seafood Market; is licensed to sell tobacco products with the State of Louisiana; holds permits to operate from the State of Louisiana Department of Health and Hospitals/Office of Public Health both as a Seafood Market and a Food Service Establishment; and, holds State of Louisiana official licenses as a wholesale/retail operation and to transport fish/seafood.

The contracted store visit inspection of November 10, 2017 indicates Appellant is operating out of a retail space measuring approximately 1,320 square feet, in a street-front arrangement; during the hours of 11AM until 7PM, six (6) days per week (closed on Sunday). The store visit photographs reveal tables in an open area. Broadview Seafood is identified as operating with a commercial kitchen from which food items are sold across a counter. Appellant reports the use of a single cash register in the November 9, 2017 reauthorization application however the store visit materials report two (2) cash registers and point-of-sale devices. The posted menus and signs advertise items such as:

- meat and seafood packages ranging in price from \$24 to \$299 sold "raw/uncooked";
- boiled crab;
- plates such as fried chicken wing plates, seafood platters, Chinese plates, and Po-boys and sandwiches sold as a meal with French fries and soft drinks;
- party trays;
- boiled side orders including corn, potatoes, pig feet, smoked sausage, and turkey necks;
- sides such Gumbo, fried rice, French fries, egg rolls and crawfish pies;
- meat and poultry sold by weight; and

- frozen seafood(mussels, shrimp; crawfish, snow crabs, crabs, and yellow fin tuna packs) sold by the box or bag.

To Appellant's contention that at the time of the store visit two (2) of the refrigerated cases/coolers were inoperable, noting that the meat and seafood products were shown to the inspector as held in back area storage; whether or not the seafood and meat offerings were visible in the front area of Appellant, is not a major consideration as noted by the Retailer Operations Division for the decision to withdraw Appellant as principally a restaurant.

Although Appellant provided substantial materials for consideration it is clear from those materials that there is some confusion regarding which products are SNAP eligible, effective with the January 17, 2018, SNAP regulatory changes. Additionally, the materials and information did not clearly (as referenced by Appellant) delineate sales by staple foods or prepared ready For example, Appellant provided documents were highlighted to report each category of staple food, indicating that the materials show that more than 50 percent of Appellant's sales come from the sale of staple foods together with pictures of shelves and inventory. The meat, poultry and fish category listed by Appellant included per the listing "Live crawfish, live crabs, frozen snow crabs, sliced ham, turkey, roast been, frozen shrimps, catfish filters [sic fillets], oyster by the gallon, boxes of turkey, D& D sausages/patties, seasoned wings, meat/red beans packages, lump crab meat."

The week's sale percentage materials grouped sandwiches, plates and boiled seafood in the meat, poultry fish category, which are potentially ineligible items. Notably no hot or prepared food percentages were provided for consideration in the monthly summaries, Z Tape documents, or tax materials.

Understandably the limited cash register system has hindered the ability of Appellant to provide full and complete materials as required by the Retailer Operations Division for consideration in reauthorization. Add to that the research of the Internet that identified Broadview Seafood as primarily a "restaurant" with a customer comments exclusively noted to speak to the quality of the prepared food options it can only be surmised, by a preponderance of the evidence that Appellant principally operates as a restaurant.

As indicated above 7 CFR § 278.1(b)(1)(iv) defines **Ineligible firms** as those "... 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.

## CONCLUSION

Based on the discussion above, the initial decision by the Retailer Operations Division to withdraw the SNAP retailer authorization of Broadview Seafood is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery of this decision.



## **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.

As provided in the November 30, 2017 withdrawal notification in accordance with 7 CFR § 278.1(k)(2) firms that are withdrawn from program participation shall not be eligible to re-apply for SNAP participation for a minimum period of six (6) months from the effective date of this withdrawal.

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.

NANCY BACA-STEPAN  
Administrative Review Officer

June 15, 2018