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

Cajun Seafood #3,

Appellant,

v.

Case Number: C0211853

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service, finds there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of Cajun Seafood #3 (hereinafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Appellant to participate as a SNAP retailer by letter dated July 31, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, "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 July 31, 2018, the Retailer Operations Division withdrew Appellant's authorization to participate as a retailer in SNAP because the firm is not a retail food store as defined by the SNAP regulations. Specifically, the withdrawal letter states that firms that have more than 50 percent of their total gross sales in heated foods and/or prepared foods not intended for home preparation and/or consumption are not eligible to participate as retail food stores. The

letter states the firm is primarily a restaurant based on information provided in Appellant's reauthorization application and the contractor's store visit report of June 1, 2018. As the firm failed to meet the eligibility criteria 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 Section 9 of the Food and Nutrition Act of 2008, as amended.

Appellant appealed the Retailer Operations Division's decision by letter dated August 13, 2018, and requested an administrative review of this action. The appeal was granted and implementation of the withdrawal held in abeyance pending completion of this review. Subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.1(l)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if meets the definition of an ineligible firm.

7 CFR § 271.2 states, in part, that: Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat 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.

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv), Ineligible Firms, which states, in part, that: 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.

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, that: A retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store or concern does not meet criteria for approval . . . may not, for at least 6 months, submit a new application to participate in the program.

APPELLANT'S CONTENTIONS

The following may represent a 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:

- Over 50 percent of the firm's sales of items that would normally be considered hot or prepared food are intended for home preparation or consumption. A majority of the firm's sales derive from items that are initially cooked on location, however over 50 percent of those items are then cooled, packaged in bulk, and sold to customers to bring home for inclusion in their home-cooked and consumed meals. The most prevalent item in this category is bulk boiled seafood such as shrimp, crawfish, and crab. The firm does not operate as a restaurant as USDA suggests, but rather as a grocer providing fresh, local, and healthy seafood to residents that just happens to be partially cooked on the premises. Local dishes such as gumbo and etouffee require significant home preparation and families often outsource the boiling of seafood since it can be accomplished more efficiently and cost-effectively when done in bulk;
- The firm's current transaction management software lumps in hot and prepared foods with those that are intended for additional cooking and consumption at home. Although the precise percentage has not been provided, it is likely that the software limitations lead to this conclusion. The documents previously presented to USDA and the May 11, 2018, [sic] inspection certainly establish the fact that fresh seafood is sold to customers; and,
- Additionally, the items discussed above are cultural staples that account for the current dispute. Large purchases of boiled seafood might seem dubious in other locales, but they are a ubiquitous occurrence for families in this region. Accordingly, it is requested that the determination be reversed.

Appellant submitted no evidence or other rationales in support of these contentions.

ANALYSIS AND FINDINGS

The authorization of a store to participate in SNAP must be in accord with the Act and regulations, as amended. These requirements of law cannot be waived. Thus, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts and circumstances that existed at the time of the withdrawal determination.

Appellant contends that the firm is a not a restaurant. For the purpose of determining whether a firm is a restaurant under SNAP regulations, the issue is not whether the firm has available for sale SNAP-eligible food, the fundamental issue is whether the firm has more than 50 percent of total gross retail sales in the combined sales of heated and/or cold prepared foods. There is no doubt that staple food items may be delivered to the store fresh, raw, and unprepared, and are

available to customers that way. However, Appellant's SNAP retailer reauthorization application dated April 23, 2018, states that the majority of its sales are from hot and/or cold prepared foods. Specifically, the application shows total gross retail sales 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for 2017 with hot food sales accounting 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and cold prepared food sales accounting 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The hot and cold food sales combined equal 5 U.S.C. § 552 (b)(6) & (b)(7)(C) 54.0 percent of the firm's total gross retail sales. Since the firm has more than 50 percent of total gross retail sales in the sale of hot and/or cold prepared foods it is classified as a restaurant under SNAP regulations making it ineligible for SNAP retailer authorization. The store visit report and numerous photos from the June 1, 2018, visit showing the firm's layout, facilities, and available food items further supports the USDA determination that the firm is primarily a restaurant selling hot and/or cold prepared foods.

CONCLUSION

Based on a review of the evidence in this matter, the determination by the Retailer Operations Division to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal action 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 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 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.

ROBERT T. DEEGAN
Administrative Review Officer

February 19, 2019