

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

Cajun Seafood #4,

Appellant,

v.

Case Number: C0211768

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of Cajun Seafood #4 (Appellant or Cajun Seafood #4) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

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, in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew the authorization of Appellant 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 August 2, 2018. The FNS-252-R reported that seven percent of the firm’s actual gross retail sales were in staple foods and that 72 percent were in hot and prepared food. On July 14, 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letter dated August 7, 2018, the Retailer Operations Division informed Appellant that its SNAP authorization was being withdrawn because it did not meet the necessary criteria to be eligible for SNAP participation.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 postmarked August 10, 2018, ownership, through counsel, 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 clear 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, through counsel, made the following summarized contentions in its August 10, 2018, administrative review request, and subsequent correspondence dated October 26, 2018, in relevant part:

- FNS' conclusion is factually inaccurate.

- Over 50% of Cajun Seafood’s sales of items that would normally be considered hot or prepared food are intended for home preparation and or consumption.
- Appellant acknowledges that a majority of its sales derived from items that are initially cooked on location; however, over 50% 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.
- Appellant does not operate a restaurant but is a grocer providing fresh, local, and healthy seafood to residents that just happen to be partially cooked on the premises.
- Appellant acknowledges that its transaction management software is inarticulate and lumps in hot and prepared foods with those intended for additional cooking and consumption at home.
- Appellant provided documentation to show that fresh seafood is sold to its customers.
- Large purchases of bulk and boiled seafood might seem dubious in other locals, but they are a ubiquitous occurrence in the region.

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.

SNAP regulations at 7 CFR §278.1(b)(1)(iv) states, in part “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. [Emphasis added.]

The application information provided by the owner indicates that the sale of hot and prepared food is 72% of total gross retail sales at the business. The Retailer Operations Division also considered information obtained during a July 14, 2018 store visit conducted by an FNS contractor to observe the nature and scope of the firm’s operation, stock and facilities. Through the store visit report and photographs, the Retailer Operations Division determined that the firm likely has the majority of its gross retail sales in hot, heated and cold prepared food not intended for home preparation and consumption. The store photographs document that Cajun Seafood #4 presents itself primarily as a take-out restaurant with a an extensive menu of prepared foods. Although the firm likely has some fresh seafood sales, Appellant has a large kitchen and food preparation area and hot prepared food ready to be served.

Appellant also submitted Louisiana Department of Revenue Sales Tax Return for April 2018, May 2018, and June 2018 to the Retailer Operations Division. This showed that the majority of the firm's sales (62%) was taxable.

Appellant did not provide any evidence to support its statements. The available evidence supports that the firm has more than 50 percent of its total gross sales in foods cooked or heated on-site 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. The evidence supports by a preponderance that Appellant is more likely a restaurant.

CONCLUSION

The initial decision by the Retailer Operations Division to withdraw the SNAP retailer authorization of Cajun Seafood #4 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 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 owners reside or are 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

December 10, 2018