

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

**Capital Seafood Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0223745**

**FINAL AGENCY DECISION**

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to withdraw the authorization of Capital Seafood Market to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) due to its failure to cooperate in the reauthorization process. It should be noted that the term “failure to cooperate” in this context simply means that the Appellant did not submit sufficient information to enable the Retailer Operations Division to make an eligibility determination. It does not imply that the firm refused to provide the required information.

**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 the SNAP, when it withdrew the authorization of Capital Seafood Market.

**AUTHORITY**

7 U.S.C. § 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**

In a letter dated September 30, 2019, the Retailer Operations Division informed the Appellant that it was being withdrawn from the SNAP for failure to comply with a request for information. Specifically, the Retailer Operations Division sent a letter on September 17, 2019 requesting certain sales documents and inventory records in order to make an eligibility determination. The Appellant did not provide the requested information and the firm was withdrawn.

In a letter postmarked October 7, 2019, the Appellant, through counsel, requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request for review was granted and implementation of the withdrawal was held in abeyance pending completion of this review.

### 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.

### CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2018, and SNAP regulations at Title 7 Code of Federal Regulations (CFR) Parts 271 and 278. In particular, SNAP regulations at 7 CFR § 278.1(l) establishes the authority upon which FNS may withdraw an application from a retail food store or wholesale food concern.

7 CFR § 278.1(n) states, in part ....

**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.** [Emphasis added.]

7 CFR § 278.1(l) states in part, that:

- (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) ....

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

Ineligible firms. 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 ... 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 .... [Emphasis added.]

7 CFR § 271.2, defines a retail food store, in part, as:

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 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 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. [Emphasis added.]

## Regulatory Change

Due to a recent change in Federal regulations, foods cooked or heated after sale are now treated the same as prepared hot and cold food not intended for home preparation and consumption in determining whether a store is a restaurant under 7 CFR § 278.1(b)(1)(iv). On December 15, 2016, FNS published a final rule entitled “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)” at 81 Federal Register 90675. This final rule added the language to existing regulations clarifying that foods heated or cooked **after sale** would be considered in determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

## APPELLANT’S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- The firm has now provided supplemental information supporting the Appellant firm’s reauthorization as a SNAP retailer.

- The firm is eligible under Criterion B. A document submitted by the Appellant shows that 54.45 percent of gross retail sales are from the “MARKET.” The “Market” consists of staple foods which a store visit and available invoices will corroborate.

The preceding may represent only a brief summary of the 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 Appellant firm, Capital Seafood Market, was originally authorized to participate as a retailer in SNAP on October 13, 1999. In accordance with 7 CFR § 278.1(n), each SNAP-authorized firm is required to undergo a periodic reauthorization process to determine whether or not the firm still meets eligibility requirements.

Effective October 16, 2017, SNAP regulations at 7 CFR § 278.1(b)(1)(iv) were amended to clarify the types of stores that are considered restaurants for purposes of determining program eligibility. Prior to this regulatory change, FNS considered restaurants to be firms that had more than 50 percent of their gross retail sales from hot and/or cold prepared foods not intended for home preparation and consumption, including food items sold for carryout. This earlier regulation considered foods that were heated by the retailer **after** purchase to be staple foods for purposes of SNAP eligibility. However, the new rule changed the wording of the regulation to state that any foods cooked or heated on-site by the retailer **before or after** purchase must be counted toward the 50 percent threshold for SNAP ineligible restaurants as that term is defined under 7 CFR § 278.1(b)(1)(iv).

During its reauthorization process, Capital Seafood Market was identified by the Retailer Operations Division as a firm that could be affected by this change in the regulation. On August 10, 2019, an on-site visit was conducted by an FNS contractor in an effort to evaluate the firm’s infrastructure, operations and inventory. Although the firm sells raw and fresh seafood by the pound, the contractor’s report and photographs also indicated that the store had a large kitchen and food preparation area as well as a large menu of available hot seafood meals for take-out. The contractor also indicated in his report that customers could purchase fresh seafood and **have it cooked at the store.**

After reviewing the store visit report and photographs, the Retailer Operations Division concluded that further evidence was necessary to determine whether or not the firm would meet eligibility criteria under the new rule. On September 17, 2019, the Retailer Operations Division sent the firm a letter requesting the following information:

- Verification of actual retail sales for a representative week (actual sales receipts);
- An overview document such as a spreadsheet breaking down actual sales for a representative week into the following categories: 1) Staple Foods, 2) Accessory Foods, 3) Hot Prepared and Heated Foods, 4) Cold Foods Prepared on Site, 5) Charges for Food Heating Services; and 6) Nonfood items;

- Sales and Use tax filings for the last one-year period; and
- Copies of inventory receipts, purchase orders, delivery invoices, inventory logs, etc. for the last month.

After ten (10) days, the Appellant had not provided any response to the agency's request for information. In a letter dated September 30, 2019, the Retailer Operations Division sent the firm a letter stating that its SNAP authorization was withdrawn for failure to cooperate in the reauthorization process. Please note that "failure to cooperate" in this context simply means that the Appellant did not submit sufficient information to enable the Retailer Operations Division to make an eligibility determination. It does not imply that the firm refused to provide the required information.

During the administrative review process, the Appellant, through counsel, provided a four-page financial summary document for the period of January 1, 2019 through December 5, 2019. This document had various sales information broken down into miscellaneous categories but it did not break down gross retail sales into the specific categories requested by the Retailer Operations Division. The Appellant also has still not provided the other sales, tax and inventory documents requested by the Retailer Operations in its letter of September 17, 2019.

After reviewing the entire case record, this review finds that without the further documentation requested from the Appellant, the Retailer Operations Division could not make an appropriate eligibility determination. Therefore, a preponderance of the evidence supports that the Retailer Operations Division properly withdrew the authorization of Capital Seafood Market to participate in the SNAP due to the firm's failure to cooperate in the reauthorization process.

## **CONCLUSION**

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP application of the Appellant, Capital Seafood Market, is **sustained**. However, because there is not a required duration period for a withdrawal based on a failure to cooperate, a new application for SNAP authorization may be submitted at any time. Please note that if the firm remains unable to provide the type of documents requested by the Retailer Operations Division, its application may be denied for the same reason it was withdrawn this time.

## **RIGHTS AND REMEDIES**

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that 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 you 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, FNS is 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.

RONALD C. GWINN  
Administrative Review Officer

February 7, 2020