

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

Crab King II,

Appellant,

v.

Case Number: C0207441

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 Crab King II (Appellant or Crab King) 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

In a letter dated March 13, 2018, the Retailer Operations Division informed Appellant that its SNAP authorization was being withdrawn because it did not meet the necessary criteria to be eligible for SNAP participation.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. The letter stated that the withdrawal determination was based on 7 CFR § 271.2, § 278.1(b)(1), and § 278.1(k)(2).

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 eligibility. Prior to this regulatory change, FNS considered restaurants to be firms with more than 50 percent of their gross 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 and thus did not count toward the 50 percent threshold. 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. Crab King was identified by the Retailer Operations Division as a firm that could be affected by this change in regulation.

Crab King was originally authorized to participate as a retailer in SNAP on June 13, 2000. On February 7, 2018, an on-site store visit was conducted by an FNS contractor in an effort to evaluate store conditions and inventory. After reviewing the store visit report, 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 February 22, 2018, the Retailer Operations Division sent the firm a letter requesting verification of the firm's sales for the last three months, including a breakdown of hot foods, nonfoods, accessory foods, staple foods, and heating fees.

In response to this request, Appellant provided three-months of itemized daily sales totals and Product Reports generated by the cash register for three months based on these daily totals. After analyzing the documentation submitted by Appellant, 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 postmarked March 21, 2018, ownership 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 made the following summarized contentions in its March 19, 2018, administrative review request, and additional correspondence dated April 16, 2018, in relevant part:

- Appellant has been in business for 18 years and has been an approved retailer with no violations during that time period.
- Appellant was reauthorized in April 2017 and submitted current paperwork and had a store visit for the updated requirements.
- There has been no change in store ownership or operations in the last 18 years.
- Appellant cannot understand how it is being classified as a restaurant.
- Appellant is a Specialty Seafood Market, selling retailer only and no dine in facilities.
- The determination that Crab King is primarily a restaurant is a false statement since more than 50% of its staple foods are sold raw or frozen at time of purchase.
- Appellant serves the underserved area in a low to median income bracket with the closest supermarket located five miles away.
- Appellant's revenue will decrease by 40-50%.
- The withdrawal will cause a drastic reduction in work hours and possible termination for four female employees.
- It could possibly lead to the demise of a small locally owned business.
- EBT represents 48.2% of total revenue.
- There were cooking fees of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for the entire month.

In support of its contentions, Appellant provided copies of its February 13, and March 4, 2018, letters it previously submitted to the Retailer Operations Division. Appellant also provided two complete days of customer sales receipts, its March Revenue Report, as well as the cash register produced monthly Product Summary for March 2018.

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

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time the Retailer Operations Division rendered its decision.

Appellant contends that it is a Specialty Seafood Market with no dine-in facilities and that the determination that Crab King is primarily a restaurant is a false statement. However, according to 7 CFR § 278.1(b)(1) of the SNAP regulations, a store is considered a restaurant when the majority of foods are actually sold prepared and/or hot and ready-to-eat. The foods do not need to be consumed onsite thus, the fact that appellant does not have any tables and chairs does not preclude it from being considered a restaurant for SNAP purposes.

Appellant explains that its staple food items are more than 50% of its total gross sales. After analyzing the documentation submitted by Appellant, the Retailer Operation Division determined that the House Specialty trays alone exceed 50% of Appellant's revenue for the three months reported (December - 57%; January - 60%; February - 63%). These House Specialty trays are kept in the refrigerator and contain whole seafood dinners including corn and potatoes. They are listed on the menu for \$19.95. Although Appellant considered these trays staple foods, the Retailer Operations Division determined that these were prepared food items and more likely cooked or heated on-site by the retailer before or after purchase. Thus, the Retailer Operations Division determined that the firm was primarily a restaurant, and thus did not meet the definition and requirements of a retail food store for purposes of SNAP authorization.

The Retailer Operations Division also determined that Crab King is marketed as a restaurant by how it's described on the internet. The yellow book and Trip Advisor both list it as restaurant. Most, if not all, of Appellant's google reviews refer to its hot prepared food. Its Facebook page also categorizes it as Seafood Restaurant, with the majority of its posts showing prepared food items.

With its review request, Appellant submitted its Product Report for March 2018 and some daily receipts. It was clear that Appellant's categories changed slightly. The House Specialty Trays were now listed as frozen food items and other items were now categorized as frozen. It is more likely that these categories changed in an attempt to be found eligible for SNAP authorization. In addition, Appellant explained that the items are not sold hot at the point of sale. It is important to note that the newly implemented regulations items sold that any foods cooked or heated on-site by the retailer before **or after** purchase must now be counted toward the 50 percent threshold.

Previous Authorization

Appellant explains that it was reauthorized in April 2017 that there has been no change in store ownership or operations in the last 18 years. Appellant cannot understand how it is now being classified as a restaurant.

As explained previously 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 eligibility. Prior to this regulatory change, FNS considered restaurants to be firms with more than 50 percent of their gross 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 and thus did not count toward the 50 percent threshold. 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.

Economic Hardship

Appellant contends that the store could be put out of business if it loses its SNAP authorization. There is no provision in the SNAP regulations that would allow an otherwise ineligible firm to be authorized for the SNAP on the basis of possible economic hardship to either the owner personally or the firm. To allow an otherwise ineligible firm to be authorized for the SNAP based on a purported economic hardship would render virtually meaningless the eligibility provisions of the Food and Nutrition Act of 2008.

Hardship to SNAP Community

Appellant states Appellant serves the underserved area in a low to median income bracket with the closest supermarket located five miles away. Regarding this contention, there is nothing in the Food and Nutrition Act of 2008 or in SNAP regulations that would allow an ineligible restaurant as defined under 7 CFR § 278.1(b)(1)(iv) to be authorized for the SNAP due to a purported community hardship.

Summary

A preponderance of the evidence supports the Retailer Operation Division's determination that the Appellant firm likely has more than 50 percent of its total gross retail sales in hot and cold prepared food not intended for home preparation and consumption. The SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, that "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...." By definition these types of firms are considered restaurants and are ineligible for SNAP authorization.

CONCLUSION

Based on the discussion above, the initial decision by the Retailer Operations Division to withdraw the SNAP retailer authorization of Crab King 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 resides 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

June 26, 2018