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

Crab Shack 2,

Appellant,

v.

Case Number: C0204801

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 Shack 2 (hereafter Appellant), for a period of six-months, to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2, § 278.1(b)(1), § 278.1(l)(1)(iii) , and §278.1(k)(2) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew the application of Appellant to participate in SNAP in a letter dated November 30, 2017.

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

The FNS requires that stores be reauthorized on a set schedule. Appellant submitted an electronic reauthorization application dated November 8, 2017. In a letter dated November 30, 2017, Retailer Operations Division withdrew Appellant's authorization to participate as a retailer in SNAP. This withdrawal was based on information obtained during a store visit on October 7, 2017, as well as information provided on the firm's reauthorization application.

Retailer Operations Division determined that the firm was primarily a restaurant and did not meet the definition of a retail store. The withdrawal letter stated it is the determination of the FNS that your firm is primarily a restaurant, because more than 50 percent of your total gross sales are from "heated foods" and/or "prepared foods" are hot or cold foods not intended for home preparation and/or home consumption, including prepared foods that are consumed on the premises or sold for carryout. Your store is not located in a state with a restaurant program.

As the firm failed to meet either eligibility criterion 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 at 7 CFR § 278.1(k)(2).

In a letter dated December 6, 2017, Appellant appealed 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, Appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means 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 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k)(2) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it meets the definition of an ineligible firm.

7 CFR § 271.2 states "…Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on premises consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores…"

7 CFR § 278.1(l)(1)(iii) states in relevant part: "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 requirement of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section;"

7 CFR § 278.1(b)(1)(iv) states in relevant part: "…In addition, firms that are considered to be restaurants, that is, firms that have mort h an 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…"

7 CFR § 278.1(k)(2) states in relevant part: "The firm has failed to meet the eligibility requirement 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;"

APPELLANT'S CONTENTIONS

In response to the Retailer Operations Division withdrawal letter and in the request for administrative review, Appellant has stated as its position in the matter the following:

1. We are not a restaurant and have never been a restaurant.
2. We are a retail seafood store selling fish and crabs and therefore qualify under Criterion B.
3. We stopped the practice on October 16, 2017 as per the SNAP Retailer Notice we received in August 2017 and completely changed how we do business in that we do not heat up any food that is bought on the EBT card after the sale to comply with the new definition of a restaurant.
4. I have been doing business and collecting food stamps and EBT for over 40 years with no violation.
5. The overwhelming majority of our sales can be attributed to three items: cold Maryland crabs, cold Alaskan crabs, and cold shrimp. All three of these items, when sold cold, as they almost always are as of October 16th, are Staple foods. This puts our percentage well above the 50 percent needed to qualify for Criterion B.
6. I have looked up and enclosed a copy of our food and prep license for you.

The preceding may represent only a brief summary of Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated or referenced herein.

ANALYSIS AND FINDINGS

With regards to Appellant's contentions, for the purpose of determining whether a firm is a restaurant, the issue is not whether the firm sells cold precooked seafood; the central issue is whether actual sales of prepared foods comprise more than 50 percent of the firm's total gross retail sales. Invoice receipts provided by Appellant indicate that more than 50% of Appellant's sales were in hot food or cold prepared foods not intended for home preparation or consumption. Appellant stated that he received the notification from FNS in August 2017 but did not change its sales practice until October 16, 2017, which is after the contracted store visit.

Appellant indicated that he changed his business model to comply with the October 16, 2017 implementation of the enhanced rule on retailer eligibility for restaurants. However, SNAP regulations have not changed regarding firms that are considered restaurants. Restaurants, except those participating in the State option SNAP Restaurant Meals Program, are ineligible for SNAP authorization. Program regulations, at 7 CFR §§ 271.2 and 278.1(b)(1)(iv), provide that, for the purposes of SNAP, restaurants are firms with more than 50 percent of total gross sales in

(i) foods cooked or heated on-site by the retailer before or after purchase; and (ii) 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.

A verification of the Philadelphia Department of Health/Office of Food Protection inspection report indicates that the establishment type is listed as a **Restaurant: Take-Out Only**. Moreover, when a search for Philadelphia, PA license type was performed the result indicated that "Food Preparing and Serving - A licenses is required to serve or prepare food and/or drink within the city of Philadelphia. The license is required of anyone operating a food establishment where food is prepared or served for public consumption. This includes restaurants, delis, caterers, bars and grocery stores making sandwiches and serving beverages…" The record reflects that ownership provided the Sales and Use Tax License, Scale Permit and the 2016 Individual Income Tax Return. The record also indicates that ownership failed to provide all requested licenses and the Sales and Use Tax Returns.

Documentation provided appears insufficient and does not support the firm's contention that 81% of its total gross retail sales are in staple foods. In addition, Appellant has a prominent menu board displaying prepared seafood by the order or platter, and cooked crabs by the pound, signs showing side items, cooked bushels of crabs, sandwiches and soups. The display case shows cold precooked crabs, crab legs, shrimp and prepared salads and other prepared foods. The store visit photographs showed very few fresh seafood items on display for sale. Additionally, a review of the internet and social media, as well as customer reviews, indicates that the firm presents itself to the public as a Seafood Restaurant serving prepared foods and fresh seafood and also lists the firm as a takeaway seafood cuisine establishment serving alcohol.

The authorization of a firm to participate in SNAP must be in accord with the Food and Nutrition Act and regulations, as amended. Those 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 decision of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the withdrawal action by the Retailer Operations Division. On the day of the contractor visit, the evidence supported that the firm is primarily a restaurant, and firms that are primarily restaurants are not eligible to participate in SNAP.

The establishment is set up primarily to sell hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption or for carry-out, and require no additional preparation. Although food items in Appellant's firm may be available for sale fresh, it is more likely true than not true that the majority of foods in the establishment are actually sold prepared and/or hot and ready-to-eat. Pursuant to 7 CFR § 278.1(b)(1) of the SNAP regulations, such a firm is considered a restaurant and is not eligible for SNAP participation as a retail food store. Therefore, Appellant's firm does not qualify as a retail food store for purposes of SNAP participation.

The Food and Nutrition Act of 2008, as amended, states in part, "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." There is no agency discretion to impose a sanction less than six months when a firm does not meet the aforementioned eligibility requirements for authorization.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to withdraw the application of Crab Shack 2 to participate as an authorized SNAP retailer is sustained. Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six months, effective November 30, 2017.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to 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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

March 15, 2018