

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

D Town Fish & Soul Food,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0242275

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the Retailer Operations Division properly denied the application of D Town Fish & Soul Food (hereinafter “Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of denial.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it denied the retailer application of D Town Fish & Soul Food.

AUTHORITY

7 U.S.C. § 2023 and its 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 December 7, 2020, and delivered to the firm via e-mail on December 8, 2020, the Retailer Operations Division denied the Appellant’s application to participate as an authorized retailer in SNAP. This denial action was based on observations concerning the way the firm holds itself out to the public, as well as supporting information provided with the firm’s SNAP application dated October 22, 2020. Based on this information, the Retailer Operations Division determined that the firm was primarily a restaurant rather than a retail food store because more than 50 percent of its gross sales were from the sale of hot and/or cold prepared foods not intended for home preparation and consumption. As a result of being found ineligible

for participation in the program, the Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter postmarked December 9, 2020, the Appellant requested an administrative review of the Retailer Operations Division's decision. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

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 § 271.2 defines a retail food store as:

(1) 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 [three]* 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 [two]* 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 inventory or 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 cook or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

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.... [Emphasis added.]

7 CFR § 271.2 defines staple food as:

...food items intended for home preparation and consumption in each of the following four categories: Meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products... Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility under § 278.1(b)(1) of this chapter. Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will be included in the staple food category of the main ingredient as determined by FNS. Accessory food items include foods that are generally considered snack foods or desserts such as, but not limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar. Items shall not be classified as accessory food exclusively based on packaging size but rather based on the aforementioned definition and as determined by FNS. A food product containing an accessory food item as its main ingredient shall be considered an accessory food item. Accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm.

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

An establishment...will 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 § 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.]

* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

APPELLANT'S CONTENTIONS

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

- The store has accepted EBT since 2009. The owner has been working at the store since 2012, and at least 75 percent of the food sold at the store is staple and cold food. Now that the Appellant has become the owner, nothing has changed, but the application was still denied.
- FNS can check the photographs of the store and see what the store sells.
- The firm has customers that only have EBT benefits to purchase food. The store has lost customers to similar stores with fewer items. There are some stores that accept EBT and do not carry what the Appellant carries, such as bakeries, liquor stores, and gas stations.
- The Appellant took a loan from the government because of COVID-19 and added employees before the firm lost its EBT authorization. Now the store is selling less than half of its normal sales and may have to fire some employees, and does not know if it will be able to pay off the loan. FNS took away EBT at a very hard time.
- All the store sells is food. It does have some hot food and pizza, but the majority of sales are cold, staple foods.
- The store's customers are used to getting essential food items from D Town Fish & Soul Food. It sells bread, milk, eggs, vegetables, canned food, fish, chicken, deli meat, rice, sugar, flour, pasta, and almost everything that customers need.
- Since the EBT was cancelled, the business and its customers are hurting. The firm has wasted so much food because it has had to throw out food because people cannot buy it without EBT. Because of the pandemic, people do not have money, so they rely on EBT to help them buy food.
- FNS should send an officer to see what the firm has.

In support of its contentions, the Appellant submitted 15 color photographs of the store's inventory and a petition signed by 82 customers. The petition states that the customers shop at D Town Fish & Soul Food because it is the closest store to their homes and has the inventory they need, and urges FNS to reinstate the store's SNAP authorization so that they can continue shopping there.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or invalidate the denial determination made by the Retailer Operations Division. This review is limited to consideration of the relevant facts as they existed at the time the Retailer Operations Division rendered its decision.

After reviewing the Appellant's SNAP application and supporting documents, and after considering the contentions submitted by the Appellant in its request for administrative review,

this review finds, through a preponderance of the evidence, that the Appellant firm is primarily a restaurant and thus does not meet the definition of a retail food store for purposes of SNAP authorization. There are several reasons for this finding.

First, D Town Fish & Soul Food appears to hold itself out to the public as mainly a restaurant. Both its website and its Facebook page specifically identify itself as a restaurant, and an online menu shows a wide variety of prepared meals available for purchase, including fish, chicken wings, pizza, and other lunch and dinner options. Although online customer reviews are limited, all of the reviews speak as though the firm is a restaurant. None of them mention the additional grocery items available for purchase. This implies that the primary focus of the firm is its prepared meals.

Second, three documents provided by the Appellant point to the store as a restaurant: a December 2018 Bill of Sale identifies the firm as a “carry out restaurant business”; a business license issued by the Michigan Department of Agriculture & Rural Development indicates that the owner of D Town Fish & Soul Food is granted license “to operate a food service establishment”; and page 2 of the firm’s 2019 U.S. Income Tax Return for an S Corporation indicates that the firm’s business activity is “restaurant.” All of these suggest that a restaurant is the firm’s main business.

Third, and most important, the Appellant’s own sales data confirms that the store is primarily a restaurant. In response to a request from the Retailer Operations Division, the Appellant provided a copy of a spreadsheet showing a week’s worth of sales data, dividing sales into the following categories: staple food, accessory food, hot prepared and heated food, cold foods prepared on site, charges for heating services, and nonfood items. According to the Appellant’s spreadsheet, the firm had total sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for the week of August 23-29, 2020. Of that amount, the Appellant indicated that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was in the sale of hot prepared and heated food, and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was in the sale of cold foods prepared on site. An additional 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were fees collected for heating food. All told, the firm’s sales of hot and/or cold prepared foods and heating fees totaled 5 U.S.C. § 552 (b)(6) & (b)(7)(C), or 63 percent of the firm’s total sales. Just 5 U.S.C. § 552 (b)(6) & (b)(7)(C), or 29 percent of the firm’s sales, were sales of staple food.

SNAP regulations at 7 CFR § 271.2 and § 278.1(b)(1)(iv) state that any firm which has more than 50 percent of its total gross sales in hot and/or cold prepared foods is considered a restaurant and is not eligible for SNAP participation under eligibility Criterion A or B. This 50 percent sales threshold includes food items heated before and after the point of sale.

In its request for administrative review, the Appellant provided photographic evidence of its available inventory as well as a petition signed by its customers in an effort to show that the firm sells mostly staple foods. However, such evidence does not prove that the Appellant’s prepared food sales are less than 50 percent of its total sales. Following its submission of the aforementioned spreadsheet, the Appellant has not offered any evidence or documentation to prove that the data listed on the spreadsheet was inaccurate. By every reasonable indicator and according to its own evidence, D Town Fish & Soul Food’s main business model is the sale of

prepared foods, and thus is primarily a restaurant as defined by SNAP regulations at 7 CFR § 271.2 and § 278.1(b)(1)(iv). Therefore, the firm is not eligible for SNAP participation.

Previous Owner Authorized

As for the Appellant's argument that the store has been accepting SNAP benefits since 2009, this fact cannot be taken into consideration by this review. Upon a change of ownership, a new owner must apply for SNAP authorization under his or her ownership and be authorized on his or her own merits. The fact that the previous owner was authorized to accept SNAP has no bearing on the new owner's application.

It may be worth noting that on 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. This amended rule changed the wording of the regulation to state that any foods cooked or heated on-site by the retailer before or after purchase, and any hot or cold prepared food not intended for home preparation or consumption, including foods that are consumed on the premises or sold for carryout, must be counted toward the threshold for determining whether or not a store is a restaurant. Such food items are no longer counted as staple foods. If more than 50 percent of a firm's sales come from the sale of these hot or cold prepared foods, regardless of whether the food is heated before or after purchase, and regardless of where the food is consumed, the store is not eligible for SNAP participation. To this regard, it is likely that the previous owner of this store had prepared food sales in excess of 50 percent of its total sales, and was likely operating its business in violation of current SNAP regulations.

Hardship to SNAP Households and Appellant

The Appellant has offered a number of contentions relating to hardship the firm has experienced and will continue to experience if its SNAP application is not approved. For example, the Appellant argues that it may have to fire employees and may not be able to repay a government loan if customers using EBT cards are unable to shop at the store. It also argues that it has lost customers to other similar stores and has had to throw away large amounts of food because people cannot buy the food without EBT.

Similarly, the Appellant contends that the store's customers, who have become accustomed to purchasing essential food items from the store, are hurting because the EBT was cancelled with the change in ownership.

Unfortunately, these contentions do not provide a valid basis for reversal of the Retailer Operations Division's denial determination. A store may only accept SNAP benefits if it meets minimum eligibility criteria. In this case, a preponderance of the evidence shows that D Town Fish & Soul Food is primarily a restaurant. As such, it does not meet basic eligibility requirements for SNAP authorization. Considerations related to hardship cannot be given in such circumstances.

On a related note, the Appellant indicates that other nearby stores with less inventory, such as liquor stores or gas stations, are authorized to accept SNAP. While this may be true, every store

is evaluated individually based on eligibility requirements. It is possible that stores with lesser inventory are authorized because they meet the minimum depth of stock requirements of Criterion A and because they do not sell large volumes of prepared foods. Regardless of the reasons for other stores' eligibility or authorization, D Town Fish & Soul Food must be evaluated on its own merits and not in comparison to other businesses.

CONCLUSION

Based on the analysis above, it is the determination of this review that the Appellant firm is primarily a restaurant. In accordance with 7 CFR § 278.1(b)(1)(iv), the firm is not eligible for SNAP participation under Criterion A or B. Additionally, the contentions presented by the Appellant are not sufficient to show that the denial decision should be reversed. Accordingly, the decision by the Retailer Operations Division to deny the application of D Town Fish & Soul Food to participate as a retailer in SNAP is sustained.

In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from December 8, 2020, which is the effective date of the denial.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

JON YORGASON
Administrative Review Officer

February 16, 2021