

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

Eddie’s Seafood Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0219289

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 deny the application of Eddie’s Seafood Market (Appellant or Eddie’s Seafood Market) 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) § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application 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 June 20, 2019, the Retailer Operations Division denied the application of Eddie’s Seafood Market to participate as an authorized retailer in SNAP because the firm is not a retail food store as defined by the SNAP regulations. The Retailer Operations Division determined that Appellant is primarily a restaurant because hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, either for carryout or on-premises consumption, and requiring no additional preparation, comprise more than 50% of the firm’s total sales. Restaurants are not eligible to participate in SNAP except in certain states that operate special restaurant programs allowing the elderly, disabled, and homeless participants to

use SNAP benefits in restaurants. Ownership was informed that the firm could not submit a new application to participate as a SNAP retailer for a period of six months as provided in § 278.1(k)(2).

In a letter dated postmarked June 27, 2019, ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a 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 June 27, 2019, administrative review request, and subsequent information postmarked August 1, 2019, in relevant part:

- The owner's father operated the same business and accepted EBT thirteen years ago.
- Appellant sent in Z tapes for the last five months of being open.
- Seventy-five percent of residents receive SNAP.
- Appellant has multiple receipts of canceled orders.
- Appellant requests reconsideration.
- If Appellant was authorized it would meet the 50% staple food requirement.

- There are three other seafood establishments in the same city that do not sell staple foods and sell hot cooked food which is unfair and against the guidelines.
- Appellant thinks that it is unfair and discriminating that it is unable to sell fresh staple foods.

In supports of its contentions, Appellant submitted the following documents:

- Three color photographs;
- Summary of owner's history and life;
- Menu of fresh seafood items;
- Two receipts of hot food sales from another retailer; and
- Summary of seven months of sales separated by hot food and staples foods.

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 66% of total gross retail sales at the business. The Retailer Operations Division also considered information obtained during a May 17, 2019, 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 Eddie's Seafood Market presents itself primarily as a seafood take out restaurant with a display menu of prepared foods. Although the firm has some fresh seafood sales, Appellant has a large kitchen and food preparation area along as well as tables and chairs.

Appellant states that if it was authorized to accept SNAP, it would sell more staple food sales. There are no provisions in the SNAP regulations for authorization on the basis of possible after-the-fact corrective actions implemented subsequent to a finding of ineligibility. It is not the authority of this review to consider what remedial actions may be undertaken so that a store

might begin to comply with program eligibility requirements after it has been determined to not meet the regulatory criteria.

The evidence submitted by Appellant 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.

Previous Authorization

Appellant stated that the firm was previously SNAP authorized under different ownership. It is beyond the scope of this review to evaluate whether the previous owner was correctly authorized or not. Instead, this administrative review is limited to an evaluation of whether or not the Retailer Operations Division acted in accordance with the statute and regulations when it denied the application of Appellant on June 20, 2019. Therefore, Appellant's contention concerning the authorization of the previous store owner is irrelevant to this review.

It is important to note that food heated after sale was at one time considered to be SNAP eligible. However, due to a recent change in Federal regulations, foods heated after sale are now considered to be SNAP ineligible in the same manner as foods sold hot at the point of sale. 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.

Eligibility of Other Firms

Appellant contends that a number of similar retailers are accepting SNAP in the area. This administrative review is limited solely to those circumstances concerning Appellant's eligibility and not for the purpose of determining the eligibility of one firm on the merits and eligibility of another that may be similar in nature. Each individual firm, applying to participate as a retailer in the SNAP, is held accountable against the applicable laws and regulations governing the SNAP as stated therein.

Discrimination

Appellant suggests that it was discriminated against because it was not authorized. Appellant presents no compelling rationale, and the record contains no evidence, to support the contention that the Retailer Operations Division engaged in disparate or discriminatory activity. If Appellant still believes that the investigation was somehow discriminatory, it has the right to pursue allegations of discrimination directly with that office of the USDA which handles such matters. Appellant may direct such complaint to the Director, Office of Civil Rights, USDA-FNS, 3101 Park Center Drive, Room 942, Alexandria, Virginia 22302. It is important to note that any allegations of discrimination are handled by the Office of Civil Rights independent of

this review, and that any findings or conclusions reached by that office have no bearing on the findings and conclusions rendered herein, nor do appeals based on allegations of discrimination constitute valid grounds for reinstating Appellant's SNAP authorization or otherwise staying this administrative action.

Summary

The authorization of a store 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. Although Appellant may sell a variety of staple food items, it is more likely true than not true that the majority of foods in the store are actually sold prepared and/or hot and ready-to-eat. According to 7 CFR § 278.1(b)(1) of the SNAP regulations, such a store is considered a restaurant and is not eligible for SNAP participation as a retail food store. Therefore, Appellant's store does not qualify as a retail food store for purposes of SNAP participation.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny the application of Eddie's Seafood Market to participate as an authorized SNAP retailer is sustained.

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 owner resides or is 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

September 12, 2019