

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

**Fish & Chicken Affairs Food Market Inc,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0219597**

**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 Fish & Chicken Affairs Food Market Inc. (hereinafter referred to as “Fish & Chicken Affairs” or “Appellant”) to participate as a retailer in the Supplemental Nutrition Assistance Program (SNAP) due to its failure to cooperate in the reauthorization process as the firm provided inadequate, unclear or incomplete information. However, the Appellant firm may reapply for SNAP authorization at any time.

**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, when it withdrew the authorization of Fish & Chicken Affairs.

**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**

As part of a routine reauthorization process, the Appellant submitted form FNS-252-R, entitled “Supplemental Nutrition Assistance Program Reauthorization Application for Stores” on November 2, 2018. The Appellant reported that it met the minimum variety and stocking standards in all required staple food categories with perishables in all categories.

The Appellant also reported that **73 percent** of the firm’s gross retail sales were in **staple** foods. An additional ten (10) percent of its gross retail sales were reported as “accessory” food items such as snack foods, candy, ice cream, potato chips, carbonated and non-carbonated beverages, condiments and spices. The Appellant reported that 16 percent of its gross retail sales were in hot and cold prepared foods not intended for home preparation and consumption. The remaining one (1) percent of gross retail sales was in non-food items.

An FNS contractor conducted a store visit on November 12, 2018 to document the firm’s food inventory for the purpose of determining the continued eligibility of Fish & Chicken Affairs to participate in the SNAP. The store visit report and photographs cast doubt on the information provided by the Appellant in its reauthorization application as there were indications that the store was primarily a take-out restaurant. For example, among other indicators, store signage and menus advertised the business as a “you buy, we fry” establishment.

In three letters dated May 1, June 6, and June 20, 2019, the Retailer Operations Division requested various documents from the Appellant in order to accurately determine the percentage of gross retail sales from staple foods, accessory foods, hot prepared and heated foods, cold foods prepared on site, charges for food heating services and non-food items. Although the Appellant responded to these information requests, the documentation provided was inadequate to accurately identify and verify these percentages.

On July 11, 2019, the Retailer Operations Division sent the Appellant a letter withdrawing the authorization of Fish & Chicken Affairs for failure to cooperate as the documents provided by the firm were inadequate to make a determination as to the firm’s eligibility for the SNAP. The withdrawal letter was successfully delivered to the Appellant on July 12, 2019 as documented by a UPS receipt in the case record.

In a letter postmarked July 12, 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.

## **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 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(n) establishes the authority upon which FNS shall withdraw the SNAP authorization of any firm that fails to cooperate in the reauthorization process. 7 CFR § 278.1(n) reads:

**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.

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.]

## **APPELLANT'S CONTENTIONS**

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

- The Appellant mailed a box containing all requested information on June 20, 2019 to the representative of the USDA as referenced in said letter, and contained within the box which weighed 2 pounds 6.70 ounces were all of the receipts, accounting records, cash register slips, or other relevant documents requested on June 20, 2019.
- Due to the volume of materials, the representative of the USDA would not have been able to review and document the information contained in the box and thereafter make a decision that the records were inadequate, unclear, or incomplete.
- Through the aid of its accountant, the information was garnered believing same was satisfactory and compliant with the request dated June 20, 2019 and therefore, the firm is unable to address what is believed to be the deficiency in this matter.
- The firm believes that the requested information from the June 20, 2019 letter was intended to be cumbersome and was so ambiguous that it left the determination of adequacy to a reviewer's interpretation and not in such a manner that a person could address the request in full detail.

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 reported in its reauthorization application that 73 percent of its gross retail sales were in staple foods and that only 16 percent were in hot and cold prepared foods. However, the store visit conducted on November 12, 2018 gave the Retailer Operations Division a legitimate reason to question the accuracy of this information as the store had multiple characteristics of a takeout restaurant. Under SNAP regulations at 7 CFR § 278.1(b)(1)(iv), "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." By definition these types of firms are considered restaurants and are ineligible for SNAP authorization.

The store advertised through outside signage and menus that it offered "you buy, we fry" services in exchange for SNAP. 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.

As a result, the Retailer Operations Division sent the firm a letter dated May 1, 2019 which was received by the Appellant on May 2, 2019. The letter requested the following documents necessary to complete the reauthorization process:

- Federal business tax returns for the most recent filing year (if available) for all owners/officers/LLC members.
- End-of-day sales summary reports that are electronically generated by your firm's cash register system, such as Z-tapes, to verify 3 representative months of actual retail sales at your firm.
- An overview document (e.g., an Excel spreadsheet) that you create which totals the 3 months of end-of-day sales summary reports and breaks these actual retail sales down 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. If a food is both an Accessory Food and a Hot Prepared/Heated Food or both an Accessory Food and a Cold Food Prepared on Site, please count it in the "Hot Prepared and Heated Foods" or "Cold Foods Prepared on Site" categories respectively, and do not count it in the "Accessory Foods" category.
- Verification of total gross retail sales for the last 1 year period (State Sales and Use tax records, income tax records, or other records verifying total gross retail sales income).

In response to the May 1, 2019 letter, the Appellant sent a box of Z-reports to the wrong office, but these documents were eventually rerouted to the correct address. The documents were received by the Retailer Operations Division on May 15, 2019. The documents consisted entirely of Z-reports from December 6, 2018 through May 7, 2019, in addition to some miscellaneous Z-reports from June 2018. The Retailer Operations Division determined that these documents were inadequate to make a determination as to the firm's eligibility as they did not break down sales into staple foods, accessory foods, hot prepared and heated foods, cold foods prepared on site, charges for food heating services and nonfood items.

On June 6, 2019, the Retailer Operations Division sent a second letter requesting actual sales receipts and an overview document breaking down sales into staple foods, accessory foods, hot prepared and heated foods, cold foods prepared on site, charges for food heating services and nonfood items for one representative week. This letter was delivered to the Appellant on June 7, 2019. The Appellant sent a week of Z-reports and a spreadsheet covering the time period of June 10-16, 2019. The Retailer Operations Division determined that these documents were still inadequate as the spreadsheet figures could not be reconciled with the Z-reports. The spreadsheet figures also did not appear to adequately reflect the business model. For example, the store was, at least in part, operating as a "you buy, we fry" firm but did not document any charges for food heating services.

On June 20, 2019, the Retailer Operations Division sent a third letter requesting verification of actual retail sales for three representative weeks; an overview document for three representative weeks of actual sales; and supply and inventory records for the last three months. The Appellant submitted additional Z-reports dated May 22, 2019 through July 5, 2019; purchase invoices and

receipts from various vendors and food service suppliers dated from March 2019 through July 3, 2019; and a spreadsheet with a summary breakdown of sales from June 19 to July 2, 2019.

The Retailer Operations Division determined that all of the Z-report categories were generalizations and lacked adequate descriptions of what was actually sold. For example, some of the transactions coded as Grocery F were the same price as hot prepared food items which indicates that the actual transactions were not being coded correctly. One specific example of this is the Z-report containing order number 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Order number 5 U.S.C. § 552 (b)(6) & (b)(7)(C) shows 12 items all labeled Grocery F including one item for \$23.99. This is the same price as the combination meal with 10 pieces fish, 10 wings, and large fries on the firm's hot food menu. During the store visit, no staple or accessory food items were noted in the store with a retail purchase price of \$23.99.

In addition, the Retailer Operations Division noted that the firm has a large menu of hot prepared food items including meals and side orders. However, in the review of the 369 pages of Z-reports received on July 5, 2019, the Retailer Operations Division could only find a single instance documenting the sale of "sides."

The purchase invoices provided for review were primarily from Sysco, Sherman Food Distributors, Van Eerden Food Service and other food service companies that typically supply restaurants and stores preparing cooked foods. These purchase invoices document the purchase of items like chicken wing packs, bulk fish packs, sodas and occasionally a grocery item.

A complete review of the case record documents that the Retailer Operations Division properly determined that, without further detail and accurate labeling of the documents provided, it could not make an accurate assessment of the true operation and sales of the firm. The information that was provided by the Appellant does not appear to match the actual store circumstances as represented in the store visit report and photographs.

## **CONCLUSION**

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP authorization of Fish & Chicken Affairs Food Market Inc. is sustained. The regulations clearly state that a firm must cooperate in the periodic reauthorization process and a review of the documentation indicates that the Retailer Operations Division would not have been able to make a determination that the firm was eligible to be reauthorized for the SNAP based on what was provided by the Appellant. However, this decision does not impact the firm's ability to reapply for SNAP authorization at any 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

October 15, 2019