

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

Fish Express Inc,

Appellant,

v.

Case Number: C0209442

Retailer Operations Division,

Respondent.

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 withdrew the authorization of Fish Express Inc. (hereinafter “Appellant”) from participation as a 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 withdrawal.

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 withdrew the authorization of Fish Express Inc.

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

The Appellant firm, Fish Express Inc., was originally authorized to participate as a retailer in SNAP on January 13, 2015. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization process to determine whether or not the firm still meets eligibility requirements.

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 Program 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 (e.g. you-buy-we-fry) to be staple foods for purposes of SNAP eligibility and thus did not count toward the 50 percent restaurant 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.

Fish Express Inc., a seafood store and restaurant, was identified by the Retailer Operations Division as a firm that could be affected by this change in regulation. On March 26, 2018, an on-site store visit was conducted by an FNS contractor in an effort to evaluate store conditions and inventory. Additionally, the firm was required to submit Form FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*.

After reviewing the store visit report and photographs and evaluating the information from the Appellant's reauthorization application, the Retailer Operations Division determined that the firm was operating primarily as a restaurant and thus did not meet the definition and requirements of a retail food store for purposes of SNAP authorization.

In a letter dated May 15, 2018, the Retailer Operations Division informed the 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).

In a letter postmarked May 25, 2018, the Appellant, through counsel, requested an administrative review of the withdrawal determination. The request was granted and implementation of the withdrawal has been held in abeyance pending completion of this review. It should be noted that along with its request for review, the Appellant requested case file information from FNS in a request submitted under the Freedom of Information Act (FOIA). The agency completed its FOIA response on June 19, 2018. On July 19, 2018, the Appellant submitted a seven-page brief detailing its contentions in this case along with six exhibits of evidence.

STANDARD OF REVIEW

In an appeal of adverse action, such as the withdrawal of a firm's SNAP authorization, 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(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)(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 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.]

* 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>.

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...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 § 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

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

- There is insufficient factual basis to support a conclusion that Fish Express Inc. is primarily a restaurant.
- The firm is primarily a retail fresh fish, seafood, and poultry market. The contractor's store visit report confirms that the firm is a seafood business.

- Included in the firm's operation is a you-buy-we-fry concept. Customers are given the option of selecting fresh or frozen foods and then paying an additional fee to have it fried. For SNAP customers, the customer pays for the food with their EBT card. If the customer wants to have the products cooked or fried, an additional fee would then be charged. The cooking or frying fee would not be paid for with the EBT card.
- The firm maintains a sufficient stock of qualifying staple foods to be eligible under both Criterion A and Criterion B. The contractor's photographs show the various food items that are available in the store under Criterion A.
- Regarding Criterion B, more than 50 percent of the firm's gross retail sales are in the sale of eligible staple foods. In 2017, the firm reported gross sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of that amount, taxable sales were 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Taxable sales represent hot food. The total percentage of hot food sales are 48.3 percent. Therefore, hot, prepared foods constitute less than 50 percent of the firm's total sales. As such, the firm is not primarily a restaurant.
- The fish and poultry offered to SNAP recipients is fresh and frozen. It is sold by weight or by the piece. Some customers buy the product fresh and take it home. Others opt to have the product cooked at the store, but only after the fresh product is presented at the point of sale and the cooking fee is paid separately.
- While 48.3 percent of the firm's sales come from its hot, carry-out operation, 51.7 percent comes from tax exempt food sales, which are eligible food items. Therefore the firm does not fit the definition of a restaurant.
- This type of business has been recognized by FNS as being an acceptable business, and is specifically addressed in the Benefit Redemption Division Compendium, formerly known as the FNS Handbook 318. Chapter 2 of the Handbook specifically addresses foods cooked or heated after purchase: "Foods that are not hot when presented at the point-of-sale, but that are cooked or heated after they are purchased, are eligible items provided that they are not sold for consumption on the premises of the firm..."
- The firm fully understands that cooking fees are not to be paid for with SNAP benefits and has complied with this regulation.
- The firm also recognizes that SNAP recipients cannot consume their food products on the premises. For that reason, it has a policy of not allowing recipients to consume any food on the premises. This includes cold prepared foods and foods cooked after purchase. The store visit contractor was in error when he indicated that the benches inside the store were for on-site consumption of food. Instead these benches are for people waiting for service.

In support of its contentions the Appellant submitted the following documentation:

- Pages 2, 3, 4, and 7 of the contractor's store visit report.
- Twelve (12) photographs taken by the contractor, showing the store's food inventory and one photo of benches in the waiting area.
- A spreadsheet showing a summary of gross and taxable sales for 2017 and the first quarter of 2018.
- Two pages from Chapter 1 and Chapter 2 of the FNS 318 Policy Handbook.
- Signage inside the store showing that any food purchased at the store may not be consumed onsite.

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 submitted, including any not specifically summarized or explicitly referenced herein.

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.

Based on a review of all evidence in this case, this review finds that the firm is primarily a restaurant based on current SNAP regulations that have been in effect since October 2017. By all appearances, the Appellant's entire argument appears to be based on regulations and policies that were in place prior to October 2017, but have since changed.

According to the Appellant's reauthorization application, the firm had 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in total sales in 2017. Of that amount, the Appellant claimed that 5 U.S.C. § 552 (b)(6) & (b)(7)(C), or 43.6 percent, was in the sale of hot foods. An additional 5 U.S.C. § 552 (b)(6) & (b)(7)(C), or 13.8 percent, was in the sale of cold prepared foods. Based on this information, the firm's hot and/or cold prepared food sales comprise 57.4 percent of its total sales. Pursuant to regulation at 7 CFR § 271.2 and § 278.1(b)(1)(iv), this means the firm is a restaurant:

7 CFR 271.2, under the heading *Retail Food Store*:

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 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.

The policy citations referenced by the Appellant are obsolete and have been since October 2017. In fact, 5 U.S.C. § 552 (b)(7)(E) and any references to it in the context of this case are meaningless. It should be noted that the regulatory wording changes regarding restaurants were first made public in a proposed rule in December 2016. Online materials outlining the changes were made publicly available shortly after that.

Firms that are largely hot-food or you-buy-we-fry operations or a combination of both are no longer eligible for SNAP participation under Criterion A or B. It no longer matters that the food is cold at the point-of-sale and heated up after purchase. If the food is cooked or heated onsite before or after purchase (regardless of where the food is consumed), then it is not considered a staple food item for purposes of determining SNAP eligibility.

Additional information regarding hot and cold prepared foods can be found on the FNS public website at www.fns.usda.gov/snap-retail-merchants/retailer-eligibility-prepared-foods-and-heated-foods.

CONCLUSION

The evidence presented by the Appellant is not sufficient to prove that the withdrawal decision made by the Retailer Operations Division was inaccurate or that it should be reversed. In fact, the opposite is true. The Appellant's evidence strongly suggests that Fish Express Inc. is primarily a restaurant and as such, is not eligible for SNAP participation under Criterion A or B. Therefore, the withdrawal decision is sustained.

Pursuant to 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 the date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of Fish Express Inc. shall become effective 30 days after receipt of this decision.

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.

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

November 7, 2018