

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

Fish Net Seafood,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0220086

FINAL AGENCY DECISION

The United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support that the Retailer Operations Division (Retailer Operations) properly imposed the withdrawal of the authorization of Fish Net Seafood (Appellant), to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.1(b)(1), in its administration of the SNAP when it withdrew the authorization of Appellant to participate as a SNAP retailer.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the FNS.

CASE CHRONOLOGY

FNS regulations require that firms be reauthorized on a set schedule. As part of this process, the owners were requested to complete a reauthorization application. A FNS-contractor conducted an onsite visit May 20, 2019, to ascertain Appellant's continued eligibility to participate in the SNAP. By letter dated June 28, 2019, the authorization of Appellant to participate in the SNAP was withdrawn because the firm is primarily a restaurant with more than 50 percent of total gross

retail sales from heated foods and/or prepared foods. Heated foods are foods cooked or heated by the retailer before or after purchase. 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.

One owner requested administrative review of the withdrawal action by letter dated August 2, 2019. The appeal was granted by letter dated August 19, 2019.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant, credible evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended, and 7 U.S.C. § 2018. The SNAP regulations at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008.

7 CFR § 271.2 states under Retail Food Store: “An establishment 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.” The SNAP regulations as currently implemented define continuous basis as offering for sale 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 on any given day of operation.

7 CFR § 271.2 states: “Staple food means those 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. 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: “(A) An establishment shall normally be considered to have food business of a nature and extent that 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 as defined in § 271.2 of this chapter, including perishable foods in at least three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).”

7 CFR § 278.1(b)(1)(ii) provides that for a retail store to qualify for authorization under Criterion A, a firm shall: “(A) Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, 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 and at least one variety of perishable foods in at least three staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement.” 7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis as offering for sale 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 on any given day of operation.

7 CFR § 278.1(b)(1)(ii)(B) states that in order to qualify under Criterion A firms shall: “Offer for sale perishable staple food items in at least three staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks.”

7 CFR § 278.1(b)(1)(ii)(C) states that in order to qualify under Criterion A firms shall: “Offer a variety of staple foods which means different types of foods within each staple food category. Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.”

7 CFR § 278.1(b)(1)(iii) provides that to qualify for authorization under Criterion B: “Firms must have more than 50 percent of their total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees, and entertainment, sports, games income. However, a fee directly connected to the processing of staple foods, such as raw meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B.”

7 CFR § 278.1(b)(1)(iv) states: “Ineligible firms: Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization and authorized firms will be withdrawn from program participation. 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 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.”

7 CFR § 278.1(l)(1) Withdrawing authorization reads in part: “FNS shall 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 specifications 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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section.”

7 CFR § 278.1(k)(2) deals with denying authorization and states FNS shall deny the application of any firm if it determines that 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.

APPELLANT’S CONTENTIONS

All contentions have been considered in rendering this decision.

- We are being classed as a restaurant. Fish Net Seafood is primarily a seafood market that sells raw seafood.
- Our SNAP sales are low compared to our gross sales. Our uncooked, raw seafood sales have always been our primary sales revenue item.

- When we did a review of our yearly records, our cooked sales were **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** more than our uncooked sales for the year 2018. It is such a small amount for us to be disqualified from the program that we feel we should get a review for re-determination.
- Our 2018 year sales were very close to 50% uncooked raw seafood and 50% cooked food.
- Out of the Uncooked Raw Seafood Sales, approximately 5% is from SNAP Sales. In previous years, our uncooked sales have always been higher. This past year, fish sales were down based on certain types of fish we could not catch or buy. That affected our uncooked revenue in a big way.
- Customers can buy a variety of locally-caught fresh or frozen seafood to prepare themselves or have the staff cook their order. There are two different counter service stations inside: one to purchase uncooked and one to purchase cooked items.
- The fish station has display coolers showing the available variety of fresh fish and seafood sold by the pound.
- Customers have the option to have their selected seafood cooked by the kitchen staff for an additional charge of \$2 per pound.
- There is a menu posted suggesting fried dinners, combination platters and sandwiches. Some of the seafood options are fish, shrimp, oysters, scallops, hard and soft crabs, and crab cakes. The seafood is breaded and deep fried when ordered.
- There are no tables or chairs for dining in. There is a long bench available for customers to sit and wait as their orders. The kitchen is open from 10:30 am until 6:30 pm.
- Most people come to purchase uncooked seafood because it is a fish and seafood market. It is not necessarily thought of as a restaurant. If a customer comes in to purchase uncooked specialty seafood and realizes that they can have it cooked for an additional \$2 per pound, that total sale ultimately ends up listed as “Prepared/Heated Food Sales” revenue although it is not a listed menu item. So in many ways, some revenue should be in a different category because you are only charged an extra \$2 per pound to have special selected raw seafood cooked.
- We have had to explain to SNAP participants that we cannot cook their purchases because it makes the purchase ineligible.
- For some of our customers this is the closest location they can afford to travel to buy groceries to prepare their dinners. With limited funds, many people cannot afford to buy raw seafood without SNAP benefits.
- The typical SNAP food stamp purchase **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** often consists of female crabs because they are cheaper. These seafood purchases are not jumbo or colossal male crabs that cost hundreds of dollars per bushel or huge, expensive fish or shrimp.
- We feel this decision is unfair to our customers and our community because on a daily basis we see the need for the program.

ANALYSIS AND FINDINGS

The reauthorization process is to ensure that authorized retailers continue to meet the eligibility criteria for SNAP authorization. The purpose of this review is to validate or to invalidate the

decision of Retailer Operations. Thus, it is limited to consideration of the relevant facts at the time Retailer Operations rendered its decision. 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.

The onsite visit report supports by a preponderance of the evidence, that Appellant is a restaurant and as such is an ineligible firm. The firm has on display extensive prepared foods menu. Exterior signage states “Hot Food to Go!” Appellant’s own reauthorization application indicated that hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption and require no additional preparation represent more than 50% of its total retail sales. Accessory foods are seen in the photos, and it should be noted that the owners did not properly account for accessory food sales on the reauthorization application.

On review, the owners provided no additional evidence to support the sale of staple foods as a percentage of total gross retail sales at Appellant as compared to cold and hot prepared foods and heated foods. Appellant has the burden to provide sufficient evidence within the timeframe granted, to support its contention that it is a retail food store rather than a restaurant. Please note that the definition of a restaurant in the regulations has no mention of tables and chairs for dining. The preponderance of the evidence supports that Appellant is an ineligible firm as defined in the cited regulations herein.

This review is of the the present business to ascertain if it meets the regulations for reauthorization. SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. When a firm is at least once granted authorization to participate in SNAP, this not an unencumbered right or entitlement, and it does not extend in perpetuity. USDA has the obligation to operate the program in accord with the statute enacted by Congress and the regulations promulgated to implement the provisions thereof.

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 Section 278.1(b)(1)(iv). Establishments that include separate businesses that operate under one roof and share the following commonalities: the same ownership, the sale of similar foods, and shared inventory, are considered and determined to be a single firm when determining eligibility to participate in SNAP as a retail food store.

CONCLUSION

Based upon a review of all of the evidence in this matter, the decision by Retailer Operations to withdraw the authorization of Appellant because the firm does not meet the requirements of a retail food store as set forth in Section 278.1(b)(1) of the SNAP regulations is sustained. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived.

If you have operational questions, please contact Lynn Farmer at (501) 350-6976. This determination shall take effect 30 days after the date of delivery of the decision to the firm.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to the regulations at 7 CFR § 279.7 with respect to applicable rights to a judicial review of this determination. Please note that if 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 owners 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, 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

September 17, 2019