

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

Fisherman's Island,

Appellant,

v.

Case Number: C0205562

Retailer Operations Division,

Respondent.

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 Fisherman's Island (Appellant or Fisherman's Island) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

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

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In a letter dated December 20, 2017, the Retailer Operations Division informed Appellant that it was being withdrawn from the SNAP due to a failure to cooperate in the reauthorization process under 7 CFR 278.1(n). The letter noted that the Retailer Operations Division had not received information requested in a previous letter that was needed to complete the reauthorization process. The letter noted that Appellant could reapply at any time after its withdrawal by completing an online store application.

In a letter postmarked December 29, 2017, Appellant requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request

for administrative review was granted and implementation of the withdrawal was held in abeyance pending completion of this review.

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 covered in the Food & Nutrition Act of 2008, as amended, 7 USC § 2018, and SNAP regulations at Title 7 Code of Federal Regulations (CFR) Parts 271 and 278. In particular, SNAP regulations at 7 CFR § 278.1(n) establishes the authority upon which FNS may withdraw an application from a retail food store or wholesale food concern.

7 CFR 278.1(n) states

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:

(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 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

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

- Appellant provided all the documents available and it cooperated to the best of its ability.
- Individual cash register receipts do not seem to be required by the SNAP rules; but such documents were requested by the Retailer Operations Division.
- Appellant does not maintain cash register receipts and does not believe they were necessary to verify its compliance.
- Appellant is currently renovating to replace its old cash registers with modern POS machines and starting in early 2018 it will be able to produce and save such documentation.
- It will be clear that Appellant is not a restaurant.
- Appellant is a small business and values its ability to serve the community with healthy nutritious fresh seafood.
- Appellant requests a period of at least three months to address USDA's concerns, to complete its renovations, and to implement the new POS equipment.

By letter dated February 12, 2018, counsel provided a 19 page declaration of the store owner that contained the following summarized contentions:

- The markets are not restaurants.
- Customers do not eat at the market.
- Without SNAP authorization the firm will be forced to close and it will be a hardship for the firm and the community.
- On January 12, 2018, each of the markets received an e-mail that it was authorized.
- On August 29, 2017, an email was sent out to the store advising of the October 16, 2017, rule change and that FNS may request business records, involving the inventory and sales, and warned that failure to provide with result in withdrawal from the SNAP.

- On September 22, 2017, a contractor visited the store and concluded after a brief visit that Appellant was a restaurant.
- The October 25, 2017, letter stated that the store is operating primarily as a restaurant, in that more than 50% of the food sales are hot food.
- Over 50% of the gross sales at each market is raw seafood including fish, shrimp, lobster, crab, clams, mussels, and crawfish.
- Although Fisherman's Island no longer advertises steaming raw, fresh seafood as a courtesy to its customer, it intends to continue to steam the seafood upon request.
- This store has completed a renovation that will confirm it is not a restaurant.
- A new display freezer has been added and it sells additional grocery items.
- Appellant has replaced all signs including signs that made it appear to be a restaurant.
- The new POS will be implemented by the end of March 2018.
- There are other similar stores that continue to operate in the area.

In support of its contentions, Appellant provided nine photographs of the store interior.

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 central issue in this case is whether Fisherman's Island provided sufficient information to enable the Retailer Operations Division to make an eligibility determination during reauthorization under 7 CFR 278.1(n). A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that Fisherman's Island did not provide sufficient information to enable it to determine whether the firm is a SNAP eligible retail food store or a SNAP ineligible restaurant.

Reauthorization Application and Store Visit

The Food & Nutrition Service (FNS) initially authorized Fisherman's Island for the SNAP on March 16, 2016, as a seafood specialty store eligible under Criterion B. The firm was scheduled for a routine reauthorization and store visit in 2017 to confirm its continued eligibility to participate in the SNAP.

On October 25, 2017, the Retailer Operations Division informed Appellant that it was due for reauthorization and enclosed an application for reauthorization. The letter further stated that Appellant should provide, among other documents, "[v]erification of actual sales for the last 3 months (actual sales receipts, etc.)."

The owner of Fisherman's Island submitted a Form FNS-252-R "Supplemental Nutrition Assistance Program Reauthorization Application for Stores" on December 15, 2017. The completed reauthorization application stated that 70 percent of the firm's gross retail sales were in staple foods with five percent in "other food items" such as snack foods, soft drinks and

condiments. The remaining 25 percent of gross retail sales was reported to be in SNAP ineligible food that was hot at the point of sale.

A store visit was conducted by an FNS contractor to assess the firm's continued eligibility for the SNAP. The store visit documented that the firm sold both raw seafood intended for home preparation and consumption and cooked made to order seafood not intended for home preparation and consumption. Signs in the store also indicated that the firm would cook or steam food purchased raw with SNAP benefits after the sale for a \$1.00 cooking fee.

Regulatory Change

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.

Store Visit

The store owner stated that on September 22, 2017, a contractor visited the store and concluded after a brief visit that Appellant was a restaurant. It is important to clarify that the contractor does not make any determinations. The contractor provides a report and photographs from the store visit to the Retailer Operations Division. The Retailer Operations Division uses the information provided as well as other information available to make an eligibility determination. In this case, the Retailer Operations Division requested additional information from the firm to determine where or not it was a restaurant as defined by SNAP regulations.

Supporting Documents

Appellant provided several pieces of documentation to the Retailer Operations Division but did not provide everything requested. By letter dated November 30, 2017, the Retailer Operations Division sent the firm a second letter stating that the firm could be withdrawn if it did not provide the required information within ten (10) days of receipt of the letter. The documents missing included "[v]erification of actual sales for the last three months (actual sales receipts, etc.)" During a telephone conversation with the retailer, the Retailer Operations Division explained that it would accept handwritten receipts or guest checks. Appellant did not provide the documentation of actual sales with the guest checks or cash register receipts.

On December 20, 2017, the Retailer Operations Division informed Appellant that its SNAP application will be withdrawn according to 7 CFR 278.1(n) which requires FNS to withdraw the authorization of any firm which fails to cooperate in the reauthorization process. The documents submitted did not include the required three months of data to determine whether the firm is eligible for SNAP reauthorization or is a SNAP ineligible restaurant. Therefore, Appellant has

not met its burden to provide sufficient information for the Retailer Operations Division to make an eligibility determination.

Appellant Objects to Determination of Failure to Cooperate

Appellant states that it did attempt to cooperate in providing the information requested by the Retailer Operations Division and that it provided all that it was capable of providing. Regarding this contention, failure to cooperate in this sense merely means that Appellant did not provide sufficient information to enable the Retailer Operations Division to make a decision to determine the firm's continued eligibility for the SNAP. Due to the recent regulatory change regarding food heated after the point of sale, the Retailer Operations Division was correctly following FNS procedures to determine if the firm was or was not an ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). In addition, the determination of "failure to cooperate" was actually advantageous to Appellant because it allows the firm to immediately reapply. In contrast, if the firm had been determined to be ineligible it would not be allowed to reapply for a period of six months as provided by 7 CFR § 278.1(k)(2).

Corrective Action

Counsel explained that Appellant renovated the firm to ensure that it meets the requirements. In addition, it is implementing a new POS device to allow it to provide the necessary three months of sales receipts. It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. Therefore, Appellant's contention that it will be able to provide to required documentation in the future does not provide any valid basis for reversing the withdrawal of the firm's SNAP authorization.

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.

Eligibility to Submit New Application

SNAP regulations at 7 CFR § 278.1(k)(2) states, in part, that "any firm that has been denied authorization . . . 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 withdrawal." Because the Retailer Operations Division did not determine that the firm was ineligible, Fisherman's Island may reapply immediately. However, the firm should note that the Retailer

Operations Division will still require 90 days of data to determine what portion of the firm's gross retail sales consist of staple foods and what portion consists of non-food, accessory food and SNAP ineligible food either hot at point of sale or heated after sale.

CONCLUSION

A review of the entire case record indicates that it is more likely true, than not true, that the Appellant was properly withdrawn for failure to cooperate. Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP application of Appellant, Fisherman's Island, is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 USC § 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 the 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

April 10, 2018