

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

**Frank's Crab House,**

**Appellant,**

**v.**

**Case Number: C0204563**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the Retailer Operations Division's decision to withdraw the authorization of Frank's Crab House (Frank's Crab House or Appellant) 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 § 271.2 and § 278.1(b)(1) in its administration of the SNAP when it withdrew the authorization of Frank's Crab House 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 November 17, 2017, the Retailer Operations Division informed ownership that the authorization of Frank's Crab House to participate as an authorized retailer in SNAP was withdrawn because Appellant's firm does not meet the definition and requirements of a retail food store as set forth in Sections 271.2

and 278.1(b)(1) of 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 postmarked November 22, 2017, ownership appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a clear 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). Part 278.1(k) establishes the authority upon which the application of any firm to participate in the SNAP may be denied if it fails to meet established eligibility requirements.

7 CFR § 271.2 states, inter alia that Retail Food Store means: "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) . . . or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) . . . . 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)(iii) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion B, it must “. . . have more than 50 percent of . . . 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. . .”

7 CFR § 278.1(b)(1)(iv) reads, in relevant part: “[F]irms 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 as retail food stores under Criterion A or B.”

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(l) states, inter alia, “FNS shall withdraw the authorization of any firm that fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section.”

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, “A retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store or concern does not meet criteria for approval . . . may not, for at least 6 months, submit a new application to participate in the program.”

### **APPELLANT’S CONTENTIONS**

Appellant made the following summarized contentions in its November 22, 2017, administrative review request, in relevant part:

- Most of the food sold is not heated and is handed to customers to take home and heat.
- There is a huge sign that states “No Hot Food for EBT”.
- Appellant provided a response on November 14, 2017 as requested.

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**

According to 7 CFR § 278.1(b)(1) of the SNAP regulations, a store is considered a restaurant when the majority of foods are cooked or heated on-site by the retailer before or after purchase. Appellant's application for reauthorization estimated its hot food items to be 75% of its total gross retail sales. The Retailer Operations Division determined that this estimate was likely accurate based on a review of the store visit report and photos which indicated the store likely had a high percentage of hot food sales.

The Retailer Operations Division requested that Appellant provide documentation of its sales. In response, Appellant submitted some receipts, invoices, and tax records. A review of the information submitted reveals that Appellant does not sufficiently document that the store's staple food sales exceed 50% of its gross retail sales. Moreover, the record reflects that the local business tax license from Orange County describe the business as a restaurant/takeout establishment.

The store's Facebook page describe the firm as a restaurant and all photographs on the Facebook page are of hot prepared food items. If unprepared items constituted the majority of Appellant's sales, it would be likely that this would be indicated in its social media advertisements.

There is no credible evidence in the report and photographs of the October 24, 2017, store visit, or in the information provided by Appellant, that indicated that Frank's Crab House is anything other than primarily a takeout restaurant, a firm that generates more than 50 percent of its income from the sale of hot and/or prepared food. Although raw food items in Appellant's store may be available for sale, it is more likely true than not true that the majority of foods in the store are actually cooked or heated on-site by the retailer before or after purchase. 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 does not qualify as a retail food store for purposes of SNAP participation.

## **CONCLUSION**

The initial decision by the Retailer Operations Division to withdraw the authorization of Frank's Crab House to participate as a retailer in SNAP for a period of six months from the effective date of withdrawal is sustained. The withdrawal shall become effective 30 days after receipt of this letter. In accordance with 7 CFR §

278.1(k)(2), 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.

### **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

February 28, 2018