

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

Fresh Fish House #2 Inc,

Appellant,

v.

Case Number: C0208111

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 Fresh Fish House #2 Inc. (hereinafter “Fresh Fish House” or “Appellant”) from participation as a retailer in the Supplemental Nutrition Assistance Program (SNAP).

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 Fresh Fish House.

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, Fresh Fish House, was originally authorized to participate as a retailer in SNAP on March 30, 2004. 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 that had 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 to be staple foods for purposes of SNAP eligibility and thus did not count toward the 50 percent prepared foods 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.

During its reauthorization process, Fresh Fish House was identified by the Retailer Operations Division as a firm that could be affected by this change in the regulation. On February 13, 2018, an on-site store visit was conducted by an FNS contractor in an effort to evaluate store conditions and inventory. The contractor's report and photographs indicated that the store had a large kitchen area as well as a menu of available hot seafood meals for carry-out. Two large signs on the premises advertise the firm as a "You-Buy-We-Fry" enterprise. The store visit report also showed that the store sells raw, fresh seafood by the pound.

After reviewing the store visit report and photographs, the Retailer Operations Division concluded that further evidence was necessary to determine whether or not the firm would meet eligibility criteria under the new rule. On March 8, 2018, the Retailer Operations Division sent the firm a letter requesting the following information:

- Verification of gross sales for last 3 months (sales tax records; income tax records; or other records verifying total gross retail sales income);
- Verification of actual gross retail sales for last 3 months (actual sales receipts, etc.);
- Summary of actual gross retail sales for last 3 months (such as a total dollar amount of sales by category: heated or prepared foods; nonfoods; accessory foods; staple foods; and any charges for heating food);

After 20 days, the Appellant had not provided any response to the agency's request for information. In a letter dated March 28, 2018, the Retailer Operations Division sent the firm a letter stating that its SNAP authorization would be withdrawn for failure to cooperate in the reauthorization process.

On March 30, 2018, the Appellant faxed to the Retailer Operations Division a copy of a spreadsheet from December 2017 to February 2018 breaking down its sales into the following categories:

- Staple Food (Raw)
- Heating Service Charge
- Accessory Food
- Non-Food
- Resale Raw Seafood
- Cooked Seafood

It is noted that the Appellant did not submit any sales receipts, sales tax records, or other sales verification from the period December 2017 to February 2018. After further reviewing the store visit report and photographs as well as the Appellant's evidence, the Retailer Operations Division determined that without further documentation from the Appellant it could not make an eligibility determination. It should be noted that an additional withdrawal letter was not sent; rather, the Retailer Operations Division concluded that the information in the March 28, 2018, letter was still applicable because the Appellant did not submit all of the previously requested information. The withdrawal letter further noted that the decision to withdraw the firm was based on regulations found at 7 CFR § 278.1(n).

In a letter postmarked April 6, 2018, the Appellant 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.

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(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 § 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...

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... 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....

7 CFR § 278.1(b)(1)(i) states, in part:

An establishment...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...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,**

* 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>.

* 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>.

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

- The Appellant firm is a family business that opened its doors in 2004. The store's manager has been in the business for over 40 years.
- Most of the fish sold at the store comes in fresh-caught from Canada. Catfish is fresh from Mississippi. The fish display case is 28 feet long, which is the largest in the metro Detroit area. The store also has an 8-foot long frozen seafood case.
- The area where the store is located is constantly struggling with crime and abandoned houses and buildings. All of the major grocery stores have left and have been replaced by stores selling only low-quality frozen products. Fresh Fish House is one of the last fish markets in the area and is the only one with a quality product.
- Despite these problems, there are many great people in the area and these residents need a quality fish market at which to shop.
- Appellant hopes that this background gives a strong basis for the firm's continued SNAP authorization. It does not know how long it would be able to stay open without it.

In support of its contentions, the Appellant provided five color photographs: three of the store and its inventory and two of the neighborhood.

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. It must also be made clear that the purpose of this review is not to determine the firm's eligibility for SNAP participation. Rather it is solely to determine whether or not the firm cooperated with the reauthorization process, which is the basis for the Retailer Operations Division's withdrawal determination.

As best as this review can determine, the Appellant did not submit all of the information that was requested by the Retailer Operations Division in its letter dated March 8, 2018. While the Appellant did provide a summary spreadsheet of its sales, it did not submit sales receipts, tax

records, or other official documents to back up the sales claims found on the summary spreadsheet.

As noted earlier, the spreadsheet indicated sales in the following six categories:

- Staple Food (Raw)
- Heating Service Charge
- Accessory Food
- Non-Food
- Resale Raw Seafood
- Cooked Seafood

When adding the sales totals from the “Heating Service Charge” and “Cooked Seafood” categories, it appears that the firm’s hot food sales are less than 50 percent of its total sales, which would make the firm eligible for continued SNAP authorization. However, the firm clearly markets itself as a you-buy-we-fry operation. In this business format, it is very common for a firm to classify a sale of seafood as “raw” at the point of sale, but then heat the food for the customer – either for free or for a nominal fee – after the transaction is complete. According to the updated regulation cited earlier, any food sold in this manner is considered a prepared food and cannot be considered a staple food item for purposes of SNAP eligibility. Unfortunately, the Appellant’s spreadsheet, by itself, does not provide enough information for FNS to determine if the firm should be considered a restaurant or a grocery establishment. For example, does all of the firm’s raw food leave the store raw, or is it possible that some of the food from that category gets heated before the customer leaves the premises? Additionally, the category “Resale Raw Seafood” is offered with no further explanation. How is that category different from the “Staple Food (Raw)” category?

Because the Appellant has not submitted additional information as requested by the Retailer Operations Division, these questions remain unanswered. As such, it is not possible to make an eligibility determination.

As for the Appellant’s contentions, none of them address whether or not the firm meets eligibility criteria as outlined in 7 CFR § 278.1(b)(1), specifically whether or not the firm’s sale of heated or prepared foods exceed 50 percent of the firm’s total gross sales. Because evidence has not been provided that would definitively determine the Appellant’s eligibility for SNAP participation, it is the determination of this review that the decision to withdraw the firm’s authorization due to its failure to cooperate was appropriate and was made in accordance with SNAP regulations at 7 CFR § 278.1(n).

It should be noted that in this case, the term “failure to cooperate” simply denotes that the Appellant did not submit sufficient information to enable the Retailer Operations Division to make an eligibility determination. It does not imply that the firm was unwilling to provide the required information.

It should also be reiterated that the withdrawal action taken in this case does not have a minimum duration period. Therefore, if the Appellant has documentation that would clear up the

heated/prepared food question, such evidence should be provided to the Retailer Operations Division for an eligibility analysis.

CONCLUSION

The contentions presented by the Appellant are not sufficient to prove that the withdrawal decision made by the Retailer Operations Division was inaccurate or that it should be reversed. It remains unclear whether the firm is primarily a restaurant or an eligible retail food store.

On the basis of the analysis above, the decision by the Retailer Operations Division to withdraw the authorization of Fresh Fish House #2 Inc. to participate as a retailer in SNAP is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of Fresh Fish House shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted at any time.

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

October 3, 2018