

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

Poor Man’s Crawfish & Seafood,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0252280

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 denied the application of Poor Man’s Crawfish & Seafood (hereinafter “Appellant”) to participate as an authorized 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 denial.

ISSUE

The issue accepted for review is whether 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 denied the retailer application of Poor Man’s Crawfish & Seafood.

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

In a letter dated January 26, 2022, and delivered to the firm via e-mail on January 28, 2022, the Retailer Operations Division denied the Appellant’s application to participate as an authorized retailer in SNAP. This denial action was based on information submitted by the firm on its SNAP application dated November 19, 2021, and a subsequent store inspection which occurred on January 11, 2022. On its application, the Appellant indicated that its actual retail sales for the year 2020 were **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Of that amount, the Appellant reported that 80 percent of its sales were in the sale of hot and/or cold prepared foods intended for immediate consumption or carryout. The Appellant further reported that just 10 percent of its total sales

were in the sale of staple foods (fruits and vegetables, fresh meat and seafood, etc.), while 10 percent were in the sale of accessory foods (snacks, soft drinks, condiments, etc.).

SNAP regulations address the types of stores that are considered restaurants for purposes of determining program eligibility. The regulation at 7 CFR § 278.1(b)(1)(iv) states that firms that have more than 50 percent of their gross sales from the sale of hot and/or cold prepared foods not intended for home preparation and consumption, including food items sold for carryout, shall not qualify for SNAP participation under eligibility Criterion A or B. This includes any foods cooked or heated onsite by the retailer before or after purchase.

Based on the firm's self-reported sales data as well as information gathered during the store inspection, the Retailer Operations Division determined that the firm was primarily a restaurant rather than a retail food store because more than 50 percent of its gross sales were from the sale of hot and/or cold prepared foods not intended for home preparation and consumption. As a result of being found ineligible to participate in the program, the Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In an e-mail dated February 4, 2022, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, 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(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

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.]

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,

* 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>.

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...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, 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:

- Many people in the community are recipients of SNAP benefits, and it would be very beneficial to both the store and community if the store could be authorized.
- The store inspector who visited the store came during the firm's off-season, when it does not have much inventory.

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- Every season, the store carries a variety of different stock. During the fall, it carries pumpkins, corn stalks, etc. At Christmastime, the store has fruit baskets and fresh produce. The inventory changes regularly.
- The store is a fruit stand and also has frozen and fresh seafood that can be purchased. The store does not have everything available at one time all year long because it is seasonal. For example, after June, it does not have any crawfish to sell. During that time, the store is strictly produce and fresh shrimp.
- The firm is a small business, and the owner is trying to grow the business and believes that SNAP authorization would help.

In support of its contentions, the Appellant submitted several photographs of the firm's inventory over what appeared to be a period of several months, including pecans, shrimp, tomatoes, oranges, apples, pumpkins, watermelon, potatoes, and other fruits and vegetables.

The preceding may represent only a brief summary of the Appellant's contentions 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

The purpose of this review is to either validate or invalidate the denial determination made by the Retailer Operations Division. This review is limited to consideration of the relevant facts as they existed at the time the Retailer Operations Division rendered its decision.

The Appellant clearly estimated on its SNAP application that 80 percent of its gross retail sales were from the sale of prepared foods intended for immediate consumption or carryout (40 percent cold prepared foods; 40 percent hot foods). The application was electronically signed by the store owner on November 19, 2021. By signing the application, the owner certified that he had "provided truthful and complete information."

The store inspection report showed that the store sells fruits, vegetables, and nuts, as the Appellant asserts, but it also shows a large kitchen area with a sink, some large pots, and two roaster ovens. Also in the kitchen was a stack of Styrofoam take-out containers. The report does not clearly confirm that the bulk of the firm's sales are in the sale of hot and/or cold prepared foods, but does not disprove it either. As such, this review has little option but to accept the sales percentages from the Appellant's SNAP application as accurate, and the Appellant has not submitted any sales evidence to demonstrate that the percentages are different than what it reported. Thus, this review has no basis to reverse the agency's denial determination.

A firm cannot be authorized as a SNAP retailer if more than 50 percent of its gross retail sales come from the sale of hot and/or cold prepared food not intended for home preparation or consumption, including prepared foods that are sold for carryout. In an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. This means providing relevant and compelling evidence which would show that the Retailer Operations Division's determination was incorrect. In this case, the Appellant has not submitted any documentation to prove that its earlier sales claims were

inaccurate. This lack of sales evidence coupled with the information found in the store visit report suggests that the Appellant's original sales claims were likely correct. Thus, this review finds that the firm is operating primarily as a restaurant as defined in 7 CFR § 278.1(b)(1)(iv) and is not eligible for SNAP authorization.

As to the Appellant's claim that SNAP authorization would benefit the community and help the business grow, regulations do not permit this review to consider such factors when determining whether a store should be authorized. A store may only be authorized if it meets eligibility criteria.

CONCLUSION

Based on a preponderance of the evidence, it is the determination of this review that the Appellant firm is primarily a restaurant. In accordance with 7 CFR § 278.1(b)(1)(iv), the firm is not eligible for SNAP participation under Criterion A or B. Additionally, the contentions and evidence presented by the Appellant are not sufficient to show that the denial decision should be reversed. Accordingly, the decision by the Retailer Operations Division to deny the application of Poor Man's Crawfish & Seafood to participate as a retailer in SNAP is sustained.

In accordance with 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 January 28, 2022, which is the effective date of the denial.

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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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

March 10, 2022