

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

House of Seafood Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0223560

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service finds there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of House of Seafood Market (hereinafter 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 Title 7 of the Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Appellant to participate in SNAP by letter dated September 16, 2019.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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 September 16, 2019, the Retailer Operations Division withdrew Appellant’s authorization to participate as an authorized retailer in SNAP because it did not meet the definition and eligibility requirements of a retail food store as established by Federal regulations at 7 CFR § 278.1(b)(1). This action was taken because the Retailer Operations Division had determined the Appellant firm was primarily a restaurant based on observations during an onsite store visit on May 20, 2019, as well as information provided on and in support of the firm’s SNAP retailer reauthorization application dated October 15, 2018, and as such failed to meet the definition of an eligible firm. Specifically, the withdrawal letter states that firms with more than

50 percent of their total gross sales in heated foods and/or prepared foods, cooked or heated by the retailer before or after purchase, are not eligible to participate as retail food stores.

Appellant appealed the Retailer Operations Division's decision by letter dated October 1, 2019, and requested an administrative review of this action. The appeal was granted and implementation of the withdrawal held in abeyance pending completion of this review. Subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.1(k)(1) and Part 278.1(l)(1) establish the authority upon which the application of any firm to participate in SNAP may be withdrawn if it fails to meet the definition of an eligible firm.

7 CFR § 271.2 states, in part, that: 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.

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv), Ineligible Firms, which states, in part, that: 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) states, in part, that: 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 specification 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...for the time period specified in paragraph (k)(2) of this section.

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, that: 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

The following may represent a summary of 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:

- The owner feels an error was made concerning the business being primarily a restaurant as the heated and/or cooked foods represent only 29 percent of total sales. EBT/SNAP is approximately 30 percent with the remaining sales from regular forms of payment;
- The business has been with SNAP for many years with no violations. The primary business is fresh seafood as well as dry goods, dairy, poultry, and vegetables. The business does offer a few cooked items that are kept in refrigeration at all times. There also is a small menu of cooked or prepared items that are not offered on SNAP; and,
- The owner is in the process of moving the kitchen to another location in Bogalusa and plans to transform the existing business into a location with fresh seafood, poultry, dairy, vegetables, produce, grains, seasonings, and spices plus other items for retail sale. The existing tables will be removed and replaced with retail areas and more refrigerated displays.

Appellant submitted a photo of the interior of the business, a photo of a page listing available food items, a photo of a menu board listing fresh seafood and prices, and a photo of the interior showing tables, and a photo of the interior without tables in support of these contentions.

ANALYSIS AND FINDINGS

The authorization of a firm to participate in SNAP must be in accord with the Act, as amended, and regulations. These requirements of law cannot be waived. Thus, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts and circumstances that existed at the time of the withdrawal determination.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) state, in part, that, "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 In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross retail 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." As previously noted in the Controlling Law section, 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 SNAP regulations.

For the purpose of determining whether a firm is a restaurant under SNAP regulations, the issue is not whether the firm has available for sale uncooked or raw SNAP-eligible food, the fundamental issue is whether the firm has more than 50 percent of total gross retail sales in the combined sales of heated and/or cold prepared foods, including foods cooked or heated after purchase. There is no doubt that uncooked or raw staple food items may be available to customers. However, the Appellant's SNAP retailer reauthorization application dated October 15, 2018, states that the majority of its sales are from hot and/or cold prepared foods. Specifically, the application shows 2017 total gross retail sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with hot and/or cold prepared food sales accounting for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or 88.4 percent of the firm's total gross retail sales. Since the firm has more than 50 percent of total gross retail sales in the sale of hot and/or cold prepared foods it is classified as a restaurant under SNAP regulations making it ineligible for SNAP retailer authorization. A review of the store visit documentation including a staple food inventory, store layout, and many photos confirms the firm is set-up primarily to sell hot and/or cold prepared foods that are consumed on the premises or sold for carryout and require no additional preparation. The store visit report and photographs show the firm has a large commercial kitchen/food prep area with a separate sandwich prep area with refrigerated storage and posted menus/signage featuring hot platters and baskets, hot and cold sandwiches, burgers, hot dogs, and hot sides. The store visit report and photos also show that the quantity and variety of staple food items offered for sale is extremely limited.

CONCLUSION

Based on a review of the evidence in this matter, the determination by the Retailer Operations Division to withdraw the authorization of the Appellant firm to participate as an authorized SNAP retailer is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and associated SNAP regulations, the withdrawal action will become effective 30 days after receipt of this decision.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

January 27, 2020