

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

J & K Seafood Shack,

Appellant,

v.

Case Number: C0205145

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 J & K Seafood Shack (hereinafter “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 J & K Seafood Shack.

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, J & K Seafood Shack, was originally authorized to participate as a retailer in SNAP on May 23, 2008. 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.

J & K Seafood Shack, a combination seafood market and restaurant, was identified by the Retailer Operations Division as a firm that could be affected by this change in the regulation. On October 26, 2017, 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 kitchen area, where hot meals are prepared. The report further indicated that prepared food is sold for both carry-out and on-site consumption. The report also showed that the store sells raw, fresh seafood by the pound.

After reviewing the store visit report, 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 November 2, 2017, the Retailer Operations Division sent the firm two letters (the letters were dated October 25, 2017, but were not sent to the firm until after the store visit was completed by the contractor). The letters requested the following information:

- Verification of gross sales for last 3 months (sales tax or income tax records);
- Verification of actual sales for last 3 months (actual sales receipts);
- Summary of actual sales for last 3 months (such as a total dollar amount of sales by category: heated or prepared foods; nonfoods; accessory foods; staple foods; any charges for heating food);
- Supply and inventory records (purchase orders, delivery receipts for suppliers/wholesalers, inventory logs, etc.);
- An notarized affidavit stating that any handwritten receipts submitted are an accurate reflection of actual sales;
- Completed Form FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*.

In response to this request, the Appellant submitted the following documentation:

- Handwritten spreadsheets for the months of August, September, and October 2017. On each spreadsheet are six columns. There are no column headings, but judging by an additional spreadsheet provided, it appears that one column represent total sales of "fish/smoked," another represents "Fish/Crabs," another represents "alcohol," and another represents "tax." It is unknown what the first column represents. The last column appears to be the total sales for each day from all categories.
- Nine pages of computer-generated spreadsheets (from August to October 2017) representing daily sales from eight different categories: "Fish/Spread," "Alcohol," "Fish/Smoked," "Fish/Crabs," "Cooked Food," "Fish/Stones," "Fish," and "Misc/Spices." The spreadsheets also show tax and total sales amounts. Using the figures

from these spreadsheets, the “Cooked Food” category represents approximately 18.4 percent of the firm’s total sales.

- Forty (40) pages of cash register tapes, one for each day from August 1, 2017, through October 31, 2107. The figures on the register tapes appear to correspond to the daily sales identified in the spreadsheets described above.
- 256 pages of inventory invoices and receipts, showing the purchase of primarily seafood inventory for the months of August, September, and October 2017.
- A completed form FNS-252-R reauthorization application, signed by store owner **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** on November 14, 2107. On this application, the Appellant indicates that 22 percent of the firm’s total retail sales come from the sale of hot food.

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. In a letter dated December 7, 2017, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it failed to cooperate in the reauthorization process. The letter stated that the Retailer Operations Division had sent the firm a letter requesting information that was needed to complete the reauthorization, but the firm had not submitted the requested information. According to the letter, the withdrawal determination was based on regulations found at 7 CFR § 278.1(n).

In a letter postmarked December 15, 2017, 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.

At the time of the withdrawal decision, 7 CFR § 271.2 defined 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, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including 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... [Emphasis added.]¹

At the time of the withdrawal decision, 7 CFR § 271.2 defined *staple food*, in part, as:

...food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products.... Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices shall not be considered staple foods for the purpose of determining eligibility of any firm.²

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

An establishment...shall...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)³; 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:

¹ This definition, particularly in relation to Criterion A, was amended in regulation effective January 17, 2018.

² This definition, particularly in relation to accessory food items, was amended in regulation effective January 17, 2018.

³ Eligibility for Criterion A was amended in regulation effective January 17, 2018.

- The Appellant provided the information as requested in the original letter.
- The Appellant understands the difficulty of dealing with a small mom-and-pop business and would welcome a second onsite inspection to help resolve the matter.
- J & K Seafood Shack appreciates its SNAP customers, as they are a core of the business.
- All sales are recorded on a cash register that uses only a cash register tape as a receipt. When a customer purchases goods, the only written record of the transaction is the cash register tape. These are provided to the customer upon request and then discarded. Only credit card and EBT credit slips are retained.
- The purchase of uncooked food is entered into the cash register as one of several types of transactions.
- For cooked items, a transaction ticket is created only for registering the item in the cash register. The transaction tickets are discarded after the food is prepared for the customer.
- At the end of each day, the firm prints a Z report, which shows the total sales for each food category. This is how the firm identifies its daily sales figures.
- All record-keeping is done manually. The firm does not have a computer program to do this, and the cash register is a basic, no-frills register. An upgrade to the register is expected sometime in 2018.

In support of its contentions, the Appellant provided the following:

- A copy of a Marine Fisheries Trip Ticket, which shows the amount and value of some of the seafood items obtained by the firm;
- A blank copy of a Sales and Use Tax Return slip from the Florida Department of Revenue;
- A Sales and Use Tax Credit Memo, dated December 8, 2017, from the Florida Department of Revenue;
- Eight undated color photographs showing the firm's seafood inventory, menu board, packaged foods and drinks, and a photo of the cash register.

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 cooperated as much as its documentation would allow. For the most part, this review does not agree with the statement in the withdrawal letter which states that the Retailer Operations Division has "not received the updated

information requested.” When the Retailer Operations Division requested verification of sales for the last three months, the Appellant provided it. When it requested a summary of sales for the last three months, the Appellant provided Z reports and spreadsheets showing a breakdown of actual sales by category. When it requested inventory records, the Appellant provided them.

Based on this information, the firm’s hot food sales comprise approximately 18.4 percent of its total gross sales. If this is accurate, then the firm would likely remain eligible for SNAP participation. However, the firm’s “Cooked Food” category remains unclear. According to agency notes, the Retailer Operations Division contacted the Appellant by telephone on December 7, 2017. During that call, the Appellant reportedly explained that its food is sold uncooked and then customers are charged a \$1.00 per pound preparation fee.

Does the “Cooked Food” category count only those foods that are hot at the point of sale, or does it also include raw foods that are then heated up after purchase? The Appellant’s evidence provided to the Retailer Operations Division does not clear up this question. As noted earlier, the new regulations state that any food that is cooked by the retailer, whether before or after purchase, must be counted as a hot/prepared food item. If a firm’s hot and/or cold prepared food sales exceed 50 percent of its total sales, the firm is considered a restaurant and is not eligible for SNAP participation.

Unfortunately, the Appellant’s explanations and evidence submitted with its request for review do not shed additional light on the hot/prepared food issue. 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 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 “failed to cooperate” simply denotes that the Appellant did not submit sufficient information to enable to the Retailer Operations Division to make an eligibility determination. It does not imply that the firm was unwilling or reluctant 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 hot/prepared food question, such evidence should be provided to the Retailer Operations Division for an eligibility analysis.

CONCLUSION

The contentions and evidence 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 a retail food store.

On the basis of the analysis above, the decision by the Retailer Operations Division to withdraw the authorization of J & K Seafood Shack 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 J & K Seafood Shack 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

June 25, 2018