

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

JPS Seafood, LLC,

Appellant,

v.

Case Number: C0203020

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of JPS Seafood, LLC (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) § 271.2 and 278.1(l)(1)(iii), in its administration of the SNAP, when it withdrew the authorization of Appellant to participate as a SNAP retailer by letter dated September 18, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and its 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 18, 2017, the Retailer Operations Division informed Appellant that its authorization to participate as an authorized retailer in SNAP was

being withdrawn because the documentation in its possession indicated that the firm did not meet the definition and eligibility requirements of a retail food store established by Federal regulations at 7 CFR § 278.1(b)(1). This action was taken because the Retailer Operations Division had determined the Appellant business was primarily a restaurant and as such failed to meet the definition of an eligible firm. This withdrawal action was based on observations during an onsite store visit on June 3, 2017, and documents provided by Appellant. Specifically, the September 18, 2017, letter from the Retailer Operations Division to Appellant states the following, in relevant part:

“It is the determination of the Food and Nutrition Service that your firm is primarily a restaurant. 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 total sales at your firm. 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. Your Store is not located in a state with a restaurant program.”

Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in § 278.1(k)(2). Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action in a request dated September 25, 2017. The appeal was granted. Subsequent correspondence dated October 14, 2017, 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 denied if it fails to meet the definition of an eligible firm.

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, 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) . . . 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 sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter.”

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 the eligibility of any firm.

7 CFR § 271.2 define staple food, in relevant part, as “those food items intended for home preparation and consumption . . .”

Prepared, ready-to-eat foods cannot be counted as staple foods in determining if a store is eligible to participate in the SNAP . . . These are typically freshly made prepared foods, such as sandwiches and salads, which are ready-to-eat. They are usually prepared and/or found in the deli section of stores, but could be in other places such as salad bars or in the fresh vegetable section of the store.

- 7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv) which states, in part, “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. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from program participation. New applicant firms that are found to be ineligible will be denied authorization to participate in the program, and authorized retail food stores found to be ineligible will be withdrawn from program participation. 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 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 . . . This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.* (Emphasis added.) Such firms may qualify, however, under the special restaurant programs that serve the elderly, disabled, and homeless populations, as set forth in paragraph (d) 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

In the request for administrative review and in the subsequent correspondence, Appellant has stated as its position in the matter the following:

- On the last review the owner did not send the Total Sales Report because the accountant didn’t have them at that time and this may have influenced the determination to withdraw the business from SNAP. The report is attached as are copies of reports from the credit card processor showing that even though restaurant sales have ascended since opening in 2012, there is also a steady, but growing seafood market flow. The store is growing and the restaurant grew from the small seafood store. The owners want to separate the departments; however, space is limited and they may be moving the market elsewhere in the future;
- Even though the business is a restaurant and a market, the owners are not using SNAP inadequately as the reports show that EBT sales are not the top sales category. However, they do make a difference in the market sales. EBT sales are small, but significant in that department. Even though the credit reports show there are not many sales from SNAP, the SNAP program is something the owners want to offer to the clients that already use it and to potential new clients as well. It would be a misfortune to have that assistance removed from SNAP users that love the wild caught seafood for its taste and freshness. As well as the different varieties of salsas, canned products, and imported goods to accompany the seafood as well as the small produce section for people on the run;
- The owners’ purpose is to benefit all those looking for better eating lifestyles and food practices and especially those low-income families. The business specializes in seafood both uncooked and unprepared and ready to cook at home. The business is one of the few in the community to be a seafood market, carrying the products it does. All are fresh and wild caught products from the nearest beaches of the Sea of Cortez brought to Arizona. The owners’ purpose is to benefit those looking for a better eating lifestyle and food practices, especially to those low-income families. This is mainly why the prices are so low as they want to reach and benefit people of all incomes;
- SNAP users love the seafood for health reasons especially the elderly, children, and young, healthy adults trying to have better eating habits. Fish products are filled with minerals like Omega and it is an important source of protein and other nutrients. It would be inconvenient to have this assistance

removed for the people of this city being that the owners bring the best from the sea to the desert of Tucson. The business carries seafood that most supermarkets do not carry like unfarmed, fresh quality fish and crustaceans like sea bass, trigger fish, tuna, catfish, claims, etc. It would also be a misfortune to the community as this is one of the few, or maybe the only, seafood market located on this side of town carrying these products. In the past when SNAP was temporarily stopped, the owners had to deal with many irritated customers; and,

- The month of October has been a misfortune to SNAP customers who have been denied the ability to pay for seafood with EBT. It is also a misfortune to JPS staff as well since many customers have left the store very disappointed at this notice since they can't afford otherwise and the owners have had to deal with many irritated customers since the notice that we don't offer SNAP and it's really been a hardship.

Appellant submitted a Total Sales Report by Category for each month of the period August 2016-August 2017 and banking statements for September 2016-August 2017 in support of these contentions.

The preceding 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.

ANALYSIS AND FINDINGS

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 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." As previously noted in the Controlling Law section, the sales of hot and/or cold, ready-to-eat prepared foods cannot be included in determining if staple foods account for more than 50 percent of overall sales since these items do not count as staple foods.

The FNS store visit conducted on June 3, 2017, confirms the business is set-up primarily to sell hot and/or cold prepared, ready-to-eat foods that are intended for carry-out and require no additional preparation. The store visit report and photographs show the business is primarily an eat-in restaurant with table seating for approximately 40 customers, a large commercial kitchen/food prep area, and large storage coolers/freezers that are out of public view as well as menus and signage advertising a wide range of hot and/or cold prepared, ready-to-eat foods. Although

the business has a very small section containing a few grocery items, the quantity and variety of staple foods offered for sale is extremely limited with the business being deficient in all four staple food categories. Businesses such as seafood markets may qualify as SNAP authorized specialty stores selling only one food type under Criterion B if their sale of staple foods exceeds 50 percent.

For the purpose of determining whether a firm is or is not a restaurant, the issue is not the percentage or dollar value of SNAP eligible versus ineligible food sales or even the amount of the firm's SNAP redemptions, the central issue is whether the actual sales of prepared ready-to-eat foods, that includes cold salads, comprise more than 50 percent of the store's total gross retail sales. A review of the documentation provided to the Retailer Operations Division and the documentation provided by store ownership in support of the Administrative Review request shows that the sale of hot and/or cold prepared foods during the months of January 2017-August 2017 accounts for more than 50 percent of total gross sales thereby making the business ineligible for SNAP retailer authorization.

This determination is further supported by a review of internet sites such as the business's web site, the business's facebook.com page, the owners' claimed page on yelp.com, and google.com. An examination of the content of these sites, including reviews and photographs, shows they focus almost exclusively on the restaurant part of the business and the sale of hot and/or cold foods. Based on the business's layout, food inventory, interior/exterior signage, and internet presence, the business appears to be primarily a restaurant selling hot and/or cold foods for dining-in and the business does portray itself to the public as a restaurant. Restaurants are not eligible to participate as SNAP retailers. Based on this documentation and pursuant to 7 CFR § 278.1(b)(1) of the SNAP regulations, the Appellant business is considered a restaurant and is not eligible for SNAP participation as a retail food store.

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." There is no agency discretion to impose a sanction less than six months when a firm does not meet the aforementioned eligibility requirements for authorization. Therefore, requests to be reinstated as a SNAP retailer may not be granted.

CONCLUSION

The authorization of a business 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 that it is limited to what circumstances existed at the time of the withdrawal action by the Retailer Operations Division.

After review of the pertinent documentation, and based on the discussion above, the determination by the Retailer Operations Division to withdraw the authorization of Appellant to participate as an authorized SNAP retailer for a period of six months from the effective date of withdrawal is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and the SNAP regulations issued pursuant thereto, this withdrawal action shall become effective 30 days after receipt of this letter and will continue for a period of six (6) months. A new application to participate as a SNAP authorized retailer may not be submitted until 10 days prior to the expiration of the six-month withdrawal period. When eligible, Appellant may reapply for SNAP retailer authorization using the application instructions contained in the FNS web site at fns.usda.gov/snap/retailer-apply.

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

December 28, 2017