

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

J's Fish & Chicken Market #1,

Appellant,

v.

Case Number: C0211857

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to withdraw the authorization of J's Fish & Chicken Market #1 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 Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of J's Fish & Chicken Market #1.

AUTHORITY

7 U.S.C. § 2023 and the 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

Following a routine reauthorization process, the Retailer Operations Division informed the Appellant by letter dated August 2, 2018 that the authorization of J's Fish & Chicken Market #1 to participate in the SNAP was withdrawn because the firm no longer met the definition of a retail food store under 7 CFR § 278.1(b)(1). Instead, the firm was found to be a SNAP ineligible restaurant because more than 50 percent of its total gross retail sales are from heated foods and/or prepared foods. The letter also informed the Appellant that it could not submit a new application to participate in SNAP for a period of six months from the effective date of the withdrawal as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter postmarked August 13, 2018, the Appellant requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request for review was granted and implementation of the withdrawal was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might 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 covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2018, and SNAP regulations at Title 7 Code of Federal Regulations (CFR) Parts 271 and 278. In particular, SNAP regulations at 7 CFR § 278.1(l) establishes the authority upon which FNS may withdraw an application from a retail food store or wholesale food concern.

7 CFR 278.1(n) states, in part

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.

7 CFR § 278.1(l) states in part, that:

- (1) 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 specifications of paragraph (b)

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

Ineligible firms. Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of SNAP shall not be eligible for program participation ... 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 [Emphasis added.]

7 CFR § 271.2, defines a retail food store, in part, 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 seven 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 three 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 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 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 under § 278.1(b)(1) of this chapter. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores. [Emphasis added.]

7 CFR § 278.1(k)(2) reads, in relevant part:

... 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. [Emphasis added.]

Regulatory Change

Foods heated after sale were at one time considered to be SNAP eligible. However, due to a recent change in Federal regulations, foods heated after sale are now considered to be SNAP ineligible in the same manner as foods sold hot at the point of sale. On December 15, 2016, FNS published a final rule entitled “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)” at 81 Federal Register 90675. This final rule added the language to existing regulations clarifying that foods heated or cooked after sale would be considered in determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

APPELLANT’S CONTENTIONS

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

- The firm will be increasing shelf space to increase the volume of staple food sales.
- The store charges a fee of \$1.00 to process the fish or chicken purchased if the buyer wants to do that.
- The firm is an area defined under the low-income census tract for accessibility.

The preceding may represent only a brief summary of the 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

The central issue in this case is whether J's Fish & Chicken Market #1 is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). In reaching its decision to withdraw the store's authorization, the Retailer Operations Division relied upon the reauthorization application and the store visit report. A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that J's Fish & Chicken Market #1 does not qualify for the SNAP as it is primarily a restaurant as that term is defined in the SNAP regulations.

It should be noted that the Criterion A and Criterion B eligibility provisions of the SNAP regulations do not apply to a firm that is a restaurant as defined under 7 CFR § 278.1(b)(1)(iv).

Reauthorization Application

As part of a routine reauthorization process, the Appellant submitted an online reauthorization form FNS-252-R, entitled "Supplemental Nutrition Assistance Program Reauthorization Application for Stores" on April 26, 2018. The FNS-252-R reported that only 23 percent of the firm's gross retail sales were in **staple** foods.

The Appellant reported that 77 percent of its gross retail sales were in SNAP ineligible hot, heated and cold prepared food not intended for home preparation and consumption. Based on the data submitted by the Appellant in its reauthorization application, J's Fish & Chicken Market #1 is by definition an ineligible restaurant under 7 CFR § 278.1(b)(1)(iv).

Store Visit Report

An FNS contractor conducted a store visit on May 18, 2018 to further assess the firm's eligibility for the SNAP. The store visit report documented that the interior footprint of the firm is largely devoted to the sale of SNAP ineligible hot, heated and cold prepared food not intended for home preparation and consumption. Specifically, the store pictures document that the firm is a takeout chicken and seafood restaurant with the majority of the square footage of the business dedicated to food service or food preparation. The firm has a large kitchen with commercial equipment for food preparation. Wall signs advertise the sale of family orders, sides, combos, desserts, fish and fried chicken. The sign on the building exterior indicates "You Buy We Fry" although there appears to be no uncooked fish or chicken available for the public to purchase. The store

pictures document the presence of “to go” containers and a tip jar. The store presents itself to the public primarily as a restaurant and store hours are consistent with those of a restaurant.

In summary, the store visit report and pictures are consistent with the information submitted by the Appellant in its reauthorization application that 77 percent of the firm’s sales are in hot, heated and/or cold prepared foods. Therefore, the store visit report supports that the firm is a primarily a restaurant as that term is defined under SNAP regulations.

Need for Access

The Appellant states that the firm is in an area defined under the low-income census tract for accessibility. SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether or not the Appellant firm is located in an area with significantly limited access to food when the firm fails to meet Criterion A or Criterion B **as long as it meets all other eligibility requirements**. This need for access review does not apply to a firm that is a SNAP ineligible restaurant as defined under 7 CFR § 278.1(b)(1)(iv). Therefore, whether or not the firm is in a low-income census tract for accessibility is irrelevant in this case.

Basis of Determination

The Appellant states that it intends to increase the volume of its staple food sales by increasing shelf space. Regarding this contention, 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. This review is limited to what circumstances existed at the time of the store visit which forms the basis of the Retailer Operations Division’s action. The store may reapply for the SNAP six (6) months from the effective date of the withdrawal and any changes in its business model or inventory will be taken into consideration at that time.

Summary

A preponderance of the evidence supports the Retailer Operation Division’s determination that the Appellant firm likely has 77 percent of its total gross retail sales in heated, hot and cold prepared food not intended for home preparation and consumption. SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, that “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” By definition these types of firms are considered restaurants and are ineligible for SNAP authorization.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP application of the Appellant, J’s Fish & Chicken Market #1, is sustained. In accordance

with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization for six months from the effective date of the withdrawal.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that 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 you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it 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.

RONALD C. GWINN
Administrative Review Officer

September 27, 2018