

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review
Alexandria, VA 22302**

King Fish & Deli,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0206411

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support a finding that the initial decision by the Food and Nutrition Service (FNS) Retailer Operations Division to withdraw the authorization of **King Fish & Deli** from participation as a Supplemental Nutrition Assistance Program (SNAP) retailer was properly imposed.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2 and 7 CFR § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew the SNAP retailer authorization of King Fish & Deli via letter dated January 24, 2018 because it was determined that King Fish & Deli did not meet the definition and eligibility requirements of a retail food store.

AUTHORITY

7 U.S.C. 2018 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In a letter dated January 24, 2018, the Retailer Operations Division informed Appellant that King Fish & Deli was being withdrawn from continued participation as an authorized retailer in SNAP because it did not meet the definition of a retail food store as enunciated in the Federal regulations at 7 CFR § 271.2 and CFR § 278.1(b)(1).

The administrative record indicates that King Fish & Deli was initially authorized as a SNAP retailer effective December 24, 2015. FNS regulations require that stores be periodically reauthorized and the reauthorization process can include the completion of a *Supplemental Nutrition Assistance Program Application for Stores* form FNS-252 or a *Supplemental Nutrition Assistance Program Reauthorization Application for Stores* form FNS-252R; the completion of an FNS authorized store visit; and the provision of various materials, as requested from the authorized firm, for consideration of continued eligibility by the Retailer Operations Division.

In the instant case the record includes Appellant submitted Reauthorization Application FNS-252R received on October 18, 2017; Application FNS-252 dated January 26, 2018; a report provided by the FNS authorized agent recounting the results of an August 17, 2017 store visit that includes detailed photographs of the site together with an inventory assessment; and materials provided by King Fish & Deli including a business license, vendor invoices, sales information and affidavits of understanding the SNAP regulations relative to hot food sales. The withdrawal determination in appeal is the result of a review of the materials as delineated.

Via letter postmarked February 1, 2018, received in the office of the Chief of the Administrative Review Branch on February 5, 2018, Appellant requested an administrative review of the action to withdraw authorization to participate as a SNAP Retailer. The appeal was granted and the withdrawal action has been held in abeyance pending the outcome of the appeal.

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, 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)¹, 7 USC 2018 and 278 of Title 7 of the Code of Federal Regulations (CFR).² Part § 278.1(l)(1)(ii) establishes the authority upon which the authorization of any firm to participate in the SNAP may be withdrawn if it fails to meet the definition of an eligible firm.

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 seven

¹ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment enacted February 7, 2014 through P. L. 113-79.

² Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title07/7tab_02.tpl

[three]³ 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 [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 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.”

7 CFR § 271.2 defines *Staple food* as:

“*Staple food* means those 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. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (*i.e.*, nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. 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, 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.

³ As implemented effective January 17, 2018 via SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 which can be accessed at: <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion> . References to implementation adjustments are identified with strikethrough of the number presented in the text of the regulation followed by [number] * throughout the remaining document.

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)(A) relays specific program requirements for retail food store participation, which reads, in part,

“An establishment or house to house trade route shall normally be considered to have food business of a nature and extent that 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 three [*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).” [Emphasis Added]

7 CFR § 278.1(b)(1)(ii) Application of Criterion A. In order to qualify under this criterion, firms shall:

“(A) Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, no fewer than seven [*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 and at least one variety of perishable foods in at least three [*two*]* staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit. Failure to provide verifying information related to stock when requested may result in denial or withdrawal of authorization. Failure to cooperate with store visits shall result in the denial or withdrawal of authorization.”

“(B) Offer for sale perishable staple food items in at least three [*two*]* staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks; and...”

“(C) Offer a variety of staple foods which means different types of foods within each staple food category. For example: Apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk, soy yogurt, soft cheese, butter, sour cream, and cow milk yogurt in the dairy products category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken, beans, nuts, beef, pork, eggs, and tuna in the meat, poultry, or fish category. Variety of foods is not to be interpreted as different brands, nutrient values (e.g., low sodium and lite), flavorings (e.g., vanilla and chocolate), packaging types or styles (e.g., canned and frozen) or package sizes of the same or similar foods. Similar food items such as, but not limited to, tomatoes and tomato juice,

different types of rice, whole milk and skim milk, ground beef and beefsteak, or different types of apples (e.g., Empire, Jonagold, and McIntosh), shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any staple food category. Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.”

7 CFR § 278.1(b)(1)(iii) provides, in relevant part, that in order for a retail store to qualify for authorization under Criterion B, firms

“... must have more than 50 percent of their total gross retail sales in staple food staples. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees, and entertainment/sports/games income...”

7 CFR § 278.1(b)(1)(iv) defines Ineligible Firms as:

“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. 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 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. 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.

7 CFR § 278.1(l) Withdrawing authorization. (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), (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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section;

- (iv) The firm fails to maintain the necessary business integrity to further the purposes of the program, as specified in paragraph (b)(3) of this section. Such firms shall be withdrawn for lack of business integrity for periods of time in accordance with those stipulated in paragraph (k)(3) of this section for specific business integrity findings;
- (v) The firm has failed to pay in full any fiscal claim assessed against the firm under §278.7 or any fines assessed under §§278.6(l) or 278.6(m) or a transfer of ownership civil money penalty assessed under §278.6(f); or
- (vi) The firm has failed to pay fines assessed under §278.6(l) or §278.6(m); or
- (vii) The firm is required under State and/or local law to charge tax on eligible food purchased with coupons or to sequence or allocate purchases of eligible foods made with coupons and cash in a manner inconsistent with 272.1 of these regulations.

APPELLANT'S CONTENTIONS

In the request for administrative review Appellant, through its ownership, indicates that:

- Over 80 percent of the people in the area rely on SNAP and without SNAP the business will have to close down.
- Other fish markets are operating as “you buy we fry” and have not had problems.
- The age of the owners makes it difficult to find other jobs.
- Ownership would appreciate delay of the disqualification for a couple of months in order to begin the hot meals program application process.

The preceding may represent only a brief 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

The record reflects that Retailer Operations Division considered the nature and scope of King Fish & Deli to determine whether it qualifies as a retail food store as per Sections §§ 278.1 (b)(1) and 271.2 of the SNAP regulations. Retailer Operations Division found the information provided by Appellant indicate King Fish & Deli operates as primarily a carry-out restaurant, therefore does not meet the definition of a retail food store; and, as a result is subject to withdrawal in accordance with SNAP regulations.

The administrative record indicates that the Retailer Operations Division based their decision on consideration of:

- the information made available from the applications received on October 18, 2017 and January 26, 2018;
- materials resulting from the contracted store visit conducted on August 17, 2017;
- a San Bernardino County, Division of Environmental Health Services, Non-Transferable Permit issued to King Fish & Deli for a “1620 Public Eating Pl (0-24 Seats)” expiring June 30, 2018; and,

- sales materials provided including vendor invoices, Z1 cash register receipts, and a 2016 sales report.

Together the application materials report that King Fish & Deli derives a majority of its annual gross sales from the sale of staple foods in each of the four (4) staple food groups as well as “you buy we fry” seafood and a full cooked meal menu. Hot/Prepared foods are indicated to represent less than 50 percent of Appellant’s total gross sales.

The contracted store visit inspection of August 17, 2017 indicates Appellant is operating out of an 800 square foot retail space located in a strip mall arrangement; during the hours of 7AM until 9PM, seven (7) days per week. The store visit photographs reveal tables and booths in an open area. King Fish & Deli is identified as operating with a commercial kitchen from which food items are sold across a counter equipped with one (1) cash register. The posted menus advertise items such as appetizers, lunch and dinner specials, combo platters, family combo meals, rolls and bowls, hot and cold deli sandwiches, and made to order smoothies.

Appellant provided printed menu advertises “you buy we fry” identifying fish by the pound and meat and cheese by the pound, however it is noted that the August 17, 2017 store visit materials do not identify any fish, meat, or cheese inventory for sale and the menu board on site does not reference the “you buy we fry” option or the available fish or deli items.

As indicated above 7 CFR § 278.1(b)(1)(iv) defines **Ineligible firms** as those “... 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.

Economic Impact:

As noted by Appellant the withdrawal of King Fish & Deli from SNAP participation will likely result in closure because over 80 percent of the area customers rely on SNAP; and, it is difficult to find alternative employment given the age of the owners. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, 7 CFR §278.1(l) of the SNAP regulations is specific and does not provide for agency discretion in its requirement 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 specifications of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;

In the instant case the Retailer Operations Division found that King Fish & Deli’s continued SNAP authorization would not further the purposes of the program because it met the definition of an ineligible firm in accordance with 7 CFR § 278.1(b)(1)(iv).

It is unfortunate that Appellant believes that alternative employment upon closure of King Fish & Deli will be hampered by the age of the owners; however, the SNAP regulations do not allow for special considerations such as these in the determination of eligibility or continued eligibility for SNAP retailer authorization.

You Buy We Fry:

Notably on review Appellant's ownership did not dispute the nature of the withdrawal, but states that other "you buy we fry" establishments appeared to be operating with no problem. In response it can only be explained that the rules of USDA SNAP retailer authorization are consistent not only in the area where Appellant operates but across the nation, therefore absent information regarding specific retailers it can only be considered that the other retailers have distinct operating systems that meet the SNAP retailer authorization eligibility conditions.

Request for Delay in Withdrawal:

In the request for review Appellant requested consideration for one (1) or two (2) months prior to the implementation of the withdrawal, in order to support the initiation of application for the hot meals program. Although the SNAP regulations do not support delays specific for the allowance of Appellant's request it is noted that King Fish & Deli has remained authorized during the pendency of this review from the February request and therefore has been afforded an opportunity to begin the hot meals program application program.

CONCLUSION

Based on the discussion above, the initial decision by the Retailer Operations Division to withdraw the SNAP retailer authorization of King Fish & Deli is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery 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.

NANCY BACA-STEPAN
Administrative Review Officer

June 15, 2018