

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

**King Seafood Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0218796**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), 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 King Seafood Market (“Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

**ISSUE**

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(n), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew Appellant’s authorization to participate as a retailer in SNAP on June 4, 2019.

**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**

Appellant was originally authorized to participate as a retailer in SNAP on February 22, 2011.

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 eligibility. Prior to this regulatory change, FNS considered restaurants to be firms with 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 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.

In a letter dated March 25, 2019, the Retailer Operations Division requested additional information from Appellant. 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. Appellant provided additional documents in a subsequent submission to the Retailer Operations Division.

In a letter dated June 4, 2019, the Retailer Operations Division withdrew Appellant's authorization to participate as a retailer in SNAP. This withdrawal was based on failure to provide sufficient information to determine the firm's eligibility for continued authorization.

On June 14, 2019, Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action. The appeal was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

### **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 § 278.1(m) establishes the authority upon which the authorization of any firm to participate in SNAP may be withdrawn if it fails to meet established eligibility requirements.

7 CFR § 278.1(b) relays specific program requirements for retail food store participation, which reads, in part:

An applicant shall provide sufficient data and information on the nature and scope of the firm's business for FNS to determine whether the applicant's participation will further the purposes of the program. Upon request, an applicant shall provide documentation to FNS to verify information on the application. Such information may include, but is not limited to, State and local business licenses, Social Security cards, drivers' licenses, photographic identification cards,

bills of sale, deeds, leases, sales contracts, State certificates of incorporation, sales records, invoice records and business-related tax records. Retail food stores and wholesale food concerns and other entities eligible for authorization also shall be required to sign a release form which will authorize FNS to verify all relevant business related tax filings with appropriate agencies. In addition, they must obtain corroborating documentation from other sources as deemed necessary to ensure the legitimacy of applicant firms, as well as the accuracy of information provided by the stores and concerns. Failure to comply with any request for information or failure to sign a written release form shall result in denial of the application for authorization or withdrawal of a firm or concern from the program...

7 CFR § 278.1(m) states:

FNS may withdraw or deny the authorization of any firm which: (1) Refuses to accept correspondence from FNS; (2) Fails to respond to inquiries from FNS within a reasonable time; or (3) Cannot be located by FNS with reasonable effort.

7 CFR § 278.1(n) states:

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 reauthorization process will result in the withdrawal of the firm's approval to participate in the program.

### **APPELLANT'S CONTENTIONS**

Appellant's contentions regarding this matter are essentially as follows:

- Appellant is a seafood market that has been authorized since 2012. Appellant charges a cooking fee. This fee is included on all receipts prior to June 6, 2019 that included prepared foods. On all receipts since June 6, 2019, the receipts differentiate between cooked seafood, and uncooked/staple foods.
- Appellant has participated in the reauthorization process.
- Appellant provided receipts showing that its prepared food sales are less than 50% of its total sales.

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

- Three pages of sales summaries.
- 89 pages of receipts from October 2018
- 73 pages of daily summaries from March 2019
- 267 pages of receipts from February 2019
- 25 pages of Sale and Use Returns for 2018
- ~31 bundles of receipts from December 2018

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

## **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 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.

Appellant provided a great deal of additional information in response to the Retailer Operations Division's letter. Appellant stated it changed its receipts in June 2019, but provided various documents from the period October 2018 to March 2019. Appellant indicated its receipts would permit an analysis of what percentage of Appellant's sales are derived from prepared foods. In particular, Appellant stated it included a cooking fee on receipts that included cooked seafood. However, it is clear that this cooking fee was included on only a portion of the receipts that included prepared foods. Receipts with the designation "seafood EBT" do not include cooking fees, even when the items purchased appear to be prepared foods. Consequently, an accurate analysis of the staple food sales was not possible with the information provided.

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 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.

Because there is not a required duration period for withdrawals made in accordance with 7 CFR § 278.1(m), a new application for SNAP participation may be submitted at any time.

## **CONCLUSION**

Based on the discussion above, the determination by the Retailer Operations Division to withdraw the authorization of King Seafood Market to participate as an authorized SNAP retailer is sustained. Appellant is eligible to submit a new application for the subject store at any time. 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 letter.

## **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 Appellant desires a judicial review, 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.

RICH PROULX  
ADMINISTRATIVE REVIEW OFFICER

August 13, 2019