

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

K's Buffalo Wings and Seafood,

Appellant,

v.

Case Number: C0211335

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), has decided that there is sufficient evidence to support a finding that the Retailer Operations Division (Retailer Operations) properly denied the application of K's Buffalo Wings and Seafood (Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(l)(1)(iii), in its administration of SNAP when it denied Appellant's retailer application to participate as a SNAP retail food store.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that a food retailer 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 July 18, 2018, Retailer Operations denied the Appellant's application to participate as an authorized retailer in SNAP. This denial action was based on observations made during a store visit on July 16, 2018, as well as information provided on the firm's application submitted by the Appellant.

Retailer Operations determined that the firm was primarily a restaurant because more than 50 percent of its gross sales came from the sale of hot and/or cold prepared foods not intended for home preparation and consumption.

As a result of being found ineligible for SNAP participation, Appellant's SNAP application was denied for a period of six months pursuant to regulation at 7 CFR § 278.1(k)(2).

In a letter dated July 25, 2018, Appellant requested an administrative review of Retailer Operations' decision. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, 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 not true.

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(k)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it meets the definition of an ineligible firm.

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv) which reads, in part:

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.

The definition of retail food store at 7 CFR § 271.2 states, in part:

Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores.

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 six months, submit a new application to participate in the program.

APPELLANT'S CONTENTIONS

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

- The contractor visited on a day that the seafood side of the store was closed. Appellant requests another store visit when it is open.
- The seafood store operates totally separate from the hot food service side of the firm. The seafood store is predominantly a fish market with grocery items that customers can purchase and has a separate point of sale register.
- USDA approved the business to sell raw fish, meats, fruits, and vegetables on July 13, 2018, and the building where food is cooked and served is under jurisdiction of the Department of Public Health. Appellant provided a copy of the Food Establishment Inspection Report from the Georgia Department of Agriculture.
- The store is a valuable resource to the community, providing fresh seafood to families who are unable to purchase fresh seafood with cash.
- The business is set up like a nearby store that is SNAP authorized.

The preceding may represent only a brief summary of Appellant's contentions presented in this matter. However, in reaching a final decision, full consideration was given to all contentions presented, including any not specifically summarized or explicitly referenced in this document.

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 Retailer Operations. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time of the contractor's store visit and at the time Retailer Operations rendered its decision.

After reviewing the contractor's store visit report and photographs, the retailer application submitted by Appellant, and evaluating the contentions submitted by Appellant, it is the determination of this review that Appellant firm is primarily a restaurant and thus does not meet the definition of a retail food store for purposes of SNAP authorization.

When Appellant applied for SNAP participation, it estimated that 59 percent of its annual retail sales came from the sale of hot food or cold prepared food. Specifically, Appellant estimated that its total annual sales 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As noted earlier, and detailed in 7 CFR § 271.2 and § 278.1(b)(1)(iv), any firm that has more than 50 percent of its total gross sales in hot and/or cold prepared foods is considered a restaurant and is not eligible for SNAP participation. This includes food items heated before or after purchase. Appellant has not provided any documentation, such as accounting records, to prove that the firm's hot and prepared food sales are less than 50 percent of its total sales.

There is no evidence in the inspection report and photographs of the July 16, 2018, store visit, nor in the information provided by Appellant, that indicates that Appellant is anything other than primarily a restaurant. The store visit photographs show that the firm does sell frozen seafood by the pound (i.e. not prepared for immediate consumption) and has some staple foods for sale, but

Appellant has not submitted any documentation to show that these items constitute more than 50 percent of its total sales for eligibility under Criterion B.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, in part “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.

Appellant contends that the store is a valuable resource to the community, providing fresh seafood to families who are unable to purchase fresh seafood with cash. Unfortunately, this contention does not provide a valid basis for reversal of Retailer Operations’ denial determination. A store may only accept SNAP benefits if it currently meets the minimum eligibility criteria for authorization.

Appellant contends that the store visit was conducted when the seafood side of its business was closed and requests a visit when it is open. Appellant states that the seafood side of the store operates totally separate from the hot food service and each has its own point of sale register. Appellant provided a copy of a food establishment inspection report to support its contention that there are two separate businesses. The evidence does not support that Appellant operates two independent businesses. According to the retailer application, the hours of operation as self-reported by Appellant are Monday-Sunday, 11:00am-10:00pm. The store reviewer stated that during the store visit staff began to stock the seafood display cases. The evidence supports that the “seafood side” and “hot food side” are integrated into the same firm – operating under the same roof, as well as sharing the same owners, similar foods, and shared inventory.

Lastly, Appellant stated that a nearby competitor with the same business model has been approved as an authorized SNAP retailer. This administrative review is limited solely to those circumstances concerning Appellant’s eligibility. Therefore, the firm’s contention regarding the other firm cannot be used to reverse the decision of Retailer Operations.

The regulations at 7 CFR § 278.1(k) states, in part, “FNS shall deny the application of any firm if it determines that . . . the firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B, as specified in paragraph (b)(1)(i) of this section . . . for a minimum period of six months from the effective date of the denial.” There is no agency discretion to impose a sanction of less than six months when a firm does not meet the eligibility requirements for authorization.

CONCLUSION

Based on the analysis above, the decision by Retailer Operations to deny the SNAP application of K’s Buffalo Wings and Seafood is sustained. The regulations clearly state the criteria that a store must meet in order to be authorized for SNAP. There are no exceptions to these requirements. In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to submit a new application for SNAP authorization until six months after July 18, 2018, which is the effective date of the denial decision.

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 7 CFR § 279.7. 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 Appellant owner(s) 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.

Kim Dameron
Administrative Review Officer

December 6, 2018