

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

L & L Fresh Seafood, Inc,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0232623

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 Office of Retailer Operations and Compliance to withdraw the authorization of L & L Fresh Seafood, Inc. (hereinafter Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it withdrew the authorization of Appellant to participate as a SNAP retail store.

AUTHORITY

According to 7 U.S.C. § 2023 and the 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

The record shows that Appellant applied for reauthorization as a SNAP retailer store on October 23, 2019. On November 26, 2019, the Appellant firm was visited by an FNS contractor in an effort to determine whether or not the firm met eligibility requirements to be reauthorized in SNAP. During this visit, the contractor took photographs of the store and its inventory, spoke with store personnel, and completed a written report detailing its observations.

A review by the Office of Retailer Operations and Compliance found that Appellant's application and the store visit report and photographs indicated that the firm appears to operate primarily as a restaurant in that a majority of total gross retail sales are hot food (heated by the firm before or after purchase) and/or cold prepared foods. Firms that have more than 50 percent of their total gross sales in heated foods and/or prepared foods not intended for home preparation and/or consumption are not eligible to participate in the SNAP as retail food stores. In order to verify the eligibility of the firm as a retail food store, the Office of Retailer Operations and Compliance began the up to three step process of requesting information and supporting documentation needed to quantify the firm's sales breakdown by specific categories (i.e. staple foods, accessory foods, hot prepared and heated foods, cold foods prepared onsite, charges for food heating services, and nonfood items). It is also noted that, according to the contractor's written record, the firm had insufficient inventory in the dairy and in the fruit or vegetables staple food categories making the firm ineligible under Criterion A.

Information for step one was requested by FNS letter dated December 2, 2019, and Appellant responded by letter dated December 11, 2019. The information and documentation submitted by Appellant was insufficient to produce and validate a detailed sales breakdown. Subsequently, information for step two was requested by FNS letter dated June 10, 2020, with Appellant's June 18, 2020, response having similar results. Step three was not conducted based on the inability of the firm to produce complete documentation. The documentation provided by store ownership was not sufficient to enable the Office of Retailer Operations and Compliance to determine whether or not the firm is primarily a restaurant rather than a grocery establishment. Specifically, the firm was unable to produce actual cash register receipts for individual transactions for the specified period, detailed end-of-day daily sales reports for the specified period, and a summarization spreadsheet breaking the sales into specific categories.

In a letter dated July 1, 2020, and sent via email, the Office of Retailer Operations and Compliance informed Appellant that its SNAP retailer authorization would be withdrawn because it failed to cooperate in the reauthorization process. The letter further explained that the term "failure to cooperate" may include "non-response to a request for information, failure to submit information timely, or submission of unclear or incomplete information in response to a request". In this case, the Appellant was informed that the information it submitted was unclear or incomplete. The letter stated that the withdrawal determination was based on regulations found at 7 CFR § 278.1(n).

By letter dated July 1, 2020, Appellant appealed the Office of Retailer Operations and Compliance's decision and requested an administrative review of this determination. The appeal was granted and implementation of the withdrawal held in abeyance pending completion of this review. Subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means 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

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Parts 278.1(b)(1)(i)(B), 278.1(m), and 278.1(n) establish the authority upon which the authorization of any firm to participate in SNAP may be withdrawn if it fails to cooperate in the reauthorization process.

7 CFR 278.1(b)(1)(i)(B) reads: A retail food store must meet eligibility determination factors which may be based on, but not limited to, visual inspection, sales records, purchase records, counting of stockkeeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry. In determining eligibility, such information may be requested for verification purposes, and failure to provide such documentation may result in denial or withdrawal from the program.

7 CFR § 278.1(b)(1)(iv) reads: 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 and 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.

7 CFR § 278.1(m) reads: Refusal to accept correspondence or to respond to inquiries. FNS may withdraw or deny the authorization of any firm which: (2) Fails to respond to inquiries from FNS within a reasonable time.

7 CFR § 278.1(n) reads: 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 approval to participate in the program.

APPELLANT'S CONTENTIONS

The following 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:

- The July 1, 2020, FNS letter said that the reason for the withdrawal was that actual daily receipts were not submitted, but the owners sent Z reports for the six days (December 2- 7, 2019) by letter on June 18, 2020. The package also included an explanation letter and Excel spreadsheet for December 2019 sales, and the December 2019 sales tax report. Also included are December 2019 bank transactions to show matching totals compared to the Z reports;
- The owners described the business' background and that the same type of cash register had been used in the past with the data provided being accepted by USDA. The store's POS is an old model traditional cash register that does not keep a copy of individual transactions and the only printed receipt is given to the customers. The POS only keeps X and Z reports that are printed each day for the store's records. The owners didn't know the machine was not providing adequate information until they spoke to the USDA representative on July 8, 2020. The owners offered to submit copies of the receipts for July 9, 2020, and have included them and the daily Z report. The representative was also looking for a breakdown of each item sold and the owners found a new POS system that could fulfill this request and began using it on August 1, 2020; and,
- Losing the ability to accept EBT could result in the business failing because it is located in a low income area. Sales dramatically decreased when the business stopped accepting EBT on July 10, 2020, and may not make it with the EBT loss and the loss due to the pandemic. Another chance is requested to provide the new information.

Appellant submitted the June 10, 2020, FNS letter; the owner's reply; sales tax reports from January to December 2019; the new reports for August 1, 2020; the information submitted for July 9, 2020, December 2019 bank records, and the receipt for the new POS machine in support of these contentions.

ANALYSIS AND FINDINGS

With regards to Appellant's contentions listed above, it is important to clarify for the record that the purpose of this review is to validate or to invalidate the determination of the Office of Retailer Operations and Compliance, and as such it is limited to consideration of the relevant facts and circumstances that existed at the time of the decision. It must also be made clear that the objective 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 failed to cooperate with the reauthorization process, which is the basis for the Office of Retailer Operations and Compliance's withdrawal determination.

The authorization of a store to participate in the SNAP must be in accord with the Act and the Regulations, as amended; those requirements of law cannot be waived. SNAP regulations at 7 CFR § 278.1(b)(1)(iv) define restaurants as 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 and consumption, including prepared foods that are consumed on the premises or sold for carryout. Firms that are considered

to be restaurants are ineligible for SNAP authorization as retail food stores. Accordingly, Criteria A and B are not applicable to these firms.

The Office of Retailer Operations and Compliance must determine if applicant firms meet the definition of a restaurant which entails determining the firm's sales breakdown by specific categories. This process requires the submission of sales records and other supporting documentation to substantiate actual sales by category. Although Appellant was responsive to the agency's requests for information related to the firm's sales, it was unable to provide specific and clear documentation required to substantiate the sales data provided. Such clarification is critical in determining the firm's eligibility for SNAP retailer authorization. The documentation provided by Appellant was not sufficient to enable the Office of Retailer Operations and Compliance to determine whether or not the firm is primarily a restaurant rather than a grocery establishment.

It should be restated here that the term "failed to cooperate" in this case simply denotes that the Appellant did not submit sufficient or clear enough information to enable to the Office of Retailer Operations and Compliance to make an eligibility determination. It does not imply that the firm was unwilling or reluctant to provide the required information.

CONCLUSION

Based on a review of all of the evidence in this matter, the determination by the Office of Retailer Operations and Compliance to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained. Because evidence has not been provided that would definitively determine the Appellant's eligibility for continued SNAP participation, it is the determination of this review that the decision to withdraw the firm's authorization due to its failure to cooperate was appropriate and was made in accordance with SNAP regulations at 7 CFR § 278.1(n).

In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal action will become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted at any time. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

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

October 13, 2020