

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

**Louisiana Atlanta Seafood Market,**

**Appellant,**

**v.**

**Case Number: C0211952**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the Retailer Operations Division properly withdrew the authorization of Louisiana Atlanta Seafood Market (hereinafter “Appellant”) from participation as a retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it withdrew the authorization of Louisiana Atlanta Seafood Market.

**AUTHORITY**

7 U.S.C. § 2023 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**

The Appellant firm, Louisiana Atlanta Seafood Market, was originally authorized to participate as a retailer in SNAP on July 9, 2013. 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.

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 program eligibility. Prior to this regulatory change, FNS considered restaurants to be firms that had 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 prepared foods 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 other words, foods heated by the retailer after purchase are now considered prepared foods and are no longer counted as staple food items for the purpose of determining SNAP eligibility.

During its reauthorization process, Louisiana Atlanta Seafood Market was identified by the Retailer Operations Division as a firm that could be affected by this change in the regulation. On March 17, 2018, an on-site store visit was conducted by an FNS contractor in an effort to evaluate store conditions and inventory. The contractor's report and photographs indicated that the store had a large kitchen area as well as a menu of available hot seafood meals for carry-out. The store visit report also showed that the store sells raw, fresh seafood by the pound.

After reviewing the store visit report and photographs, the Retailer Operations Division concluded that further evidence was necessary to determine whether or not the firm would meet eligibility criteria under the new rule described above. On June 20, 2018, the Retailer Operations Division sent the firm a letter requesting the following information:

- Verification of gross retail sales for last 3 months (sales tax records; income tax records; or other records verifying total gross retail sales income);
- Verification of actual gross retail sales for last 3 months (actual sales receipts, etc.);
- Summary of actual gross retail sales for last 3 months (such as a total dollar amount of sales by category: heated or prepared foods; nonfoods; accessory foods; staple foods; and any charges for heating food);
- Supply and inventory records (purchase orders, delivery receipts for suppliers/wholesalers, inventory logs, etc.);
- Three months of sales summary reports and overview;
- Sales and Use Tax returns or other records that document one year of total gross sales;
- All business licenses/permits.

In response to this request, the Appellant submitted the following:

- Four pages of business licenses/permits;
- Sales and Use Tax Return for March 2018;
- Fifty-seven pages of inventory invoices from March, April, and May 2018;
- A spreadsheet showing monthly sales from January 2018 through May 2018. The spreadsheet is divided into five categories:
  - EBT Raw Sales Staple Foods
  - Raw Sales Wholesale
  - Raw Sales Staple Foods
  - Hot Foods/Heated Prepared Charge to Cook
  - Accessory Foods
- A three-month summary of inventory records from March, April, and May 2018.

After reviewing this information, the Retailer Operations Division concluded that the hot food sales amounts reported by the Appellant were unusually low. The agency believed that the firm was not accurately reporting its sales of food that was heated before or after the point-of-sale. On July 30, 2018, the Retailer Operations Division sent the Appellant another letter, this time requesting a breakdown of sales showing the percentage of staple food sales that leaves the premises cooked or heated.

Agency records indicate that on August 3, 2018, the Appellant submitted a new spreadsheet that further divided the category entitled “Hot Foods/Heated Prepared Charge to Cook.” This category was now split into two separate columns: “Hot Foods” and “Heated Prepared Charge to Cook.”

Unfortunately, this updated spreadsheet did not clarify the sales percentages that the Retailer Operations Division asked for in the July 30 letter. Based on the physical characteristics of the store, including what appeared to be a heavy emphasis on prepared foods, it seemed that the Appellant was likely miscalculating – deliberately or not – the amount of seafood that was initially sold raw but afterward heated by the firm for the customer. In short, the spreadsheets submitted by the Appellant did not provide a complete picture of how the firm conducted its business.

After further reviewing the store visit report and photographs as well as the Appellant’s evidence, the Retailer Operations Division determined that without clearer documentation from the Appellant it could not make an accurate eligibility determination. Accordingly, in a letter dated August 6, 2018, the Retailer Operations Division informed the Appellant that its SNAP 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” (emphasis added). 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).

Immediately after receiving the withdrawal letter, the Appellant sent a letter to the Retailer Operations Division apologizing for submitting the “wrong information.” He stated this was due to the fact that English was his second language. Along with this letter, the Appellant sent a copy of the same spreadsheets as before, but this time with two additional columns showing percentages rather than dollar amounts:

- Percentage Raw Seafood Cooked
  - Mar-18: 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
  - Apr-18: 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
  - May-18: 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- Percentage Raw Seafood Take Home
  - Mar-18: 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
  - Apr-18: 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
  - May-18: 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

It is noted that the Appellant offered no clear explanation as to how the percentages listed above were calculated, as the percentages do not seem to correspond to the dollar amounts in any of the categories listed on the spreadsheet.

Because the new spreadsheet failed to adequately clarify the firm's sales percentages, the decision to withdraw the firm's authorization remained in effect. At this stage, the Appellant elected to submit a request for administrative review. In a letter postmarked August 14, 2018, the Appellant's request for review was made. The request was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

It should be noted that on September 18, 2018, the Appellant submitted a large volume of information to the administrative review officer, including a copy of a Food Sales Establishment License from the Georgia Department of Agriculture; copies of the sales and inventory spreadsheets submitted previously; and more than 2,500 cash register receipts from the months of March, April, and May 2018.

### **STANDARD OF REVIEW**

In an appeal of adverse action, such as the withdrawal of a firm's SNAP authorization, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(n) establishes the authority upon which FNS shall withdraw the SNAP authorization of any firm that fails to cooperate in the reauthorization process.

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.

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 *[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, including at least one variety of perishable foods in at least *[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 inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter...

7 CFR § 271.2 defines *staple food* as:

...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... 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... 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....

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

An establishment...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 *[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).

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

...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**

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\* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

\* As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

**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...** [Emphasis added.]

### **APPELLANT'S CONTENTIONS**

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

- Appellant requests that the administrative review officer review all receipts and information sent previously to the Retailer Operations Division and in its request for review.

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

### **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 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 Retailer Operations Division's withdrawal determination.

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 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.

As best as this review can determine, the Appellant was responsive to the agency's requests for information related the firm's sales. However, for unknown reasons, the Appellant seems unable to provide specific and clear answers to questions related to hot food sales and foods that are purchased raw at the point of sale, but heated by the retailer before the customer leaves the premises. Such clarification is critical in determining the firm's eligibility for SNAP participation. The documentation provided by the Appellant, particularly the sales summary spreadsheets, are not clear and thus are not sufficient for determining whether or not the firm is primarily a restaurant rather than a grocery establishment.

For example, in March 2018, the Appellant claims the following sales:

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**

The Appellant claims that for the month of March 2018, the firm had 5 U.S.C. § 552 (b)(6) & (b)(7)(C) “raw seafood take home” and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) “raw seafood cooked.” But there is no data within the spreadsheet to identify how those percentages were calculated. Additionally, the firm’s physical characteristics, such as a large menu board and kitchen area strongly suggest that heated foods are a much larger percentage of the firm’s business than the Appellant is claiming.

Actual sales records could be used to help clear up this issue. Accordingly, in its request for administrative review, the Appellant provided more than 2,500 itemized cash register receipts supposedly representing the months of March, April, and May 2018. Unfortunately, these receipts do not clear up the issue.

The first problem with the receipts is that not a single one is dated, so there is no immediate way to identify when the transaction on the receipt actually occurred. The Appellant submitted three large envelopes with the name of the month handwritten on the envelope. Inside each envelope were several hundred receipts. Other than being located in a specific envelope, this review had no way of knowing whether the receipts actually belonged to the month in question or were even from the same year.

A second problem pertains to the store address listed at the top of each receipt:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The Appellant owner in this case actually owns two seafood stores with the same name. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The store address on each receipt appears to be a blending of the two addresses, so it cannot be definitively determined that the receipts came from the Atlanta location (which is the location of the store in this case) rather than the Stone Mountain location or whether the receipts are an accumulation of receipts from both stores. It should be noted that the Stone Mountain store is in neighboring DeKalb County – approximately 20 miles from the store in question.

It is the conclusion of this review that the Appellant’s documentation fails to adequately address questions surrounding the firm’s sales of heated or prepared foods. Thus, it remains impossible to make an accurate eligibility determination. If FNS cannot determine that a store meets program eligibility requirements in accordance with 7 CFR § 278.1(b)(1), the store cannot remain authorized.

## CONCLUSION

The contentions presented by the Appellant are not sufficient to prove that the withdrawal decision made by the Retailer Operations Division was inaccurate or that it should be reversed. It remains unclear whether the firm is primarily a restaurant or an eligible retail food store.

Because evidence has not been provided that would definitively determine the Appellant’s eligibility for 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).

On the basis of the analysis above, the decision by the Retailer Operations Division to withdraw the authorization of Louisiana Atlanta Seafood Market to participate as a retailer in SNAP is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of Louisiana Atlanta Seafood Market shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted at any time.

### **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 in Section 279.7 of the SNAP regulations. 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 the Appellant owner 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.

JON YORGASON  
Administrative Review Officer

February 27, 2019