

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

**Louisiana Atlanta Seafood Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0223668**

**FINAL AGENCY DECISION**

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to withdraw the authorization of Louisiana Atlanta Seafood Market to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply to participate in the SNAP for a period of six (6) months.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it withdrew the authorization of Louisiana Atlanta Seafood Market.

**AUTHORITY**

7 U.S.C. § 2023 and the 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In a letter dated September 27, 2019, the Retailer Operations Division informed the Appellant that it was being withdrawn from the SNAP as it no longer met the definition of a retail food store under 7 CFR § 271.2 and 7 CFR § 278.1(b)(1) of the SNAP regulations. Specifically, the letter stated that the Appellant was primarily a restaurant as the evidence indicated that more than 50 percent of its gross retail sales are in heated, hot or cold prepared food not intended for home preparation and consumption. The letter also informed the Appellant that it could not submit a new application to participate in SNAP for a period of six (6) months from the effective date of the withdrawal as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter postmarked October 7, 2019, the Appellant requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request for review was granted and implementation of the withdrawal was held in abeyance pending completion of this review.

### 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, might 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 covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2018, and SNAP regulations at Title 7 Code of Federal Regulations (CFR) Parts 271 and 278. In particular, SNAP regulations at 7 CFR § 278.1(l) establishes the authority upon which FNS may withdraw an application from a retail food store or wholesale food concern.

7 CFR 278.1(n) states, in part ....

**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.

7 CFR § 278.1(l) states in part, that:

(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) ....

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

Ineligible firms. 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 ... 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 .... [Emphasis added.]

7 CFR § 271.2, defines a retail food store, in part, as:

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 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 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. [Emphasis added.]

7 CFR § 278.1(k)(2) reads, in relevant part:

... Any firm that has been denied authorization on these bases shall not be eligible to submit a new application for authorization in the program for a minimum period of six months from the effective date of the denial.

## **Regulatory Change**

Due to a recent change in Federal regulations, foods cooked or heated after sale are now treated the same as prepared hot and cold food not intended for home preparation and consumption in determining whether a store is a restaurant under 7 CFR § 278.1(b)(1)(iv). On December 15, 2016, FNS published a final rule entitled “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)” at 81 Federal Register 90675. This final rule added the language to existing regulations clarifying that foods heated or cooked after sale would be considered in determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

## **APPELLANT’S CONTENTIONS**

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

- Documents submitted to the Retailer Operations Division prove that 93 percent of the firm's gross retail sales are in staple foods with five (5) percent in hot prepared food sales, one (1) percent in accessory food sales and one (1) percent in food heating charges after purchase.
- When the owner leased the building there were some old menus and deep fryers there, but the firm did not use them much. The owner has moved these items permanently which can be verified by another inspection.
- The firm is not a restaurant because it has a license from the Georgia Agriculture Department that doesn't allow anyone to eat there.
- The firm had a single table for the owner's personal use but it has been removed permanently which can be verified by another inspection.

The preceding may represent only a brief summary of the 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 central issue in this case is whether Louisiana Atlanta Seafood Market is a SNAP ineligible restaurant **as that term is defined under 7 CFR § 278.1(b)(1)(iv)**. In reaching its decision to withdraw the firm's application, the Retailer Operations Division reviewed the reauthorization application, the store visit report, and documents provided by the Appellant. A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that Louisiana Atlanta Seafood Market does not qualify for the SNAP as it is primarily a carryout restaurant.

### Reauthorization Process

As part of a routine reauthorization process, the Appellant submitted an online reauthorization form FNS-252-R, entitled "Supplemental Nutrition Assistance Program Reauthorization Application for Stores" on February 19, 2018. The Appellant's reauthorization application stated that over 99 percent of its 2017 actual gross retail sales were in **staple foods** with the remainder in accessory food sales. The reauthorization application did not report any sales of heated, hot or cold prepared food.

Accessory food items may be purchased with SNAP benefits but are **not** used in determining SNAP eligibility. 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.

## Store Visit Report

On July 31, 2019, an FNS contractor conducted a store visit to assess the firm's continued eligibility for the SNAP. Although the Appellant's reauthorization application stated that over 99 percent of the firm's gross retail sales were in SNAP eligible staple food, the Retailer Operations Division appropriately questioned the accuracy of this information after reviewing the store visit report. The store visit report and photographs showed that the firm did sell heated, hot and cold prepared foods that were not reported in the reauthorization application. In addition, the store visit photographs indicated that the firm likely sold a much larger amount of heated, hot and cold prepared foods and was most likely a carryout restaurant.

The store visit report and photographs document that the interior footprint of Louisiana Atlanta Seafood Market is largely devoted to the preparation and sale of SNAP ineligible heated, hot and cold prepared food not intended for home preparation and consumption. There is a wall bisecting and running the length of the store that separates the large commercial kitchen, food preparation and food storage areas from the checkout registers and seating area for customers. This food preparation area occupies approximately one-half of the interior footprint of the store. There are four (4) fryers in the kitchen, two (2) pots for boiling, and a food preparation area along with a large storage area containing frozen seafood. There are also Styrofoam containers for takeout and a wide variety of side items for preparation in the kitchen to accompany main entrees.

Another quarter of the store footprint consisted of a customer entry area containing eleven (11) seats and a small table where customers could wait on their prepared food orders. The Appellant contends that it cannot be considered a restaurant as food is not consumed on the premises and that its license from the Georgia Agriculture Department allegedly does not allow the consumption of food on the premises. Regarding this contention, whether prepared food is consumed on the premises **or carried out by customers** is not relevant as in either case it would still be a SNAP ineligible restaurant if heated, hot and cold prepared food sales exceeded 50 percent of the firm's gross retail sales.

The remaining quarter of the store appeared to be devoted to staple and accessory food items. There was a small glass display area with a limited amount of fresh seafood for sale which was visible upon entering the store. This would normally be considered staple food, but if heated before or after sale would be considered SNAP ineligible prepared food. In addition, the fresh seafood did not appear to be available in quantities sufficient to support more than 50 percent of the firm's gross retail sales. The store visit report and paper menus both document that the store does heat/cook food after sale for a fee. As noted above foods heated after sale are now treated the same as prepared hot and cold food in determining whether a store is a restaurant under 7 CFR § 278.1(b)(1)(iv). There were a shelf containing a limited amount of inexpensive seasonings. There was also a cooler with some carbonated and non-carbonated drinks.

## Supporting Sales Documents

After reviewing the store visit report, the Retailer Operations Division sent letters dated August 19, 2019 and September 16, 2019 to the Appellant requesting additional supporting documents

from the firm in order to make an eligibility determination. These requested documents included:

- Verification of actual retail sales through actual sales receipts;
- An overview document totaling actual retail sales into separate categories of 1) Staple Foods, 2) Accessory Foods, 3) Hot Prepared and Heated Foods, 4) Cold Foods Prepared on Site, 5) Charges for Food Heating Services, and 6) Nonfood items; and
- Supply and inventory records such as purchase orders, delivery receipts for suppliers/wholesalers, inventory logs, etc.

These documents were received by the Retailer Operations Division over a period of time between August 13, 2019 and October 22, 2019. A review of the case record documents that the Retailer Operations Division completed a detailed review of the receipts provided by the Appellant and determined that the firm is not consistently accounting for hot or heated food sales as there are numerous transactions that have a beverage, side, and seafood purchase that the Appellant claims as a staple food transaction. In addition, the hot food transactions had a similar pattern of a drink and side being purchased with cooked seafood. Based on the observations of the firm's inventory, infrastructure, menus and operations, it is more likely true than not true that the Appellant is not correctly annotating all hot and heated food sales on its receipts and therefore the firm's self-reported sales are greatly inflating the reported staple food sales.

## **Marketing**

The Retailer Operations Division reviewed the firm's marketing through its menus and a review of social media sites. The store has a heated and hot food menu consisting of 17 combo meals, platters, po'boy sandwiches, sides, gumbo, and offers seafood to be boiled for \$1 dollar a pound or fried for \$2 dollars per pound. Store hours are 11 am to 9 pm, which is also consistent with the operation of a restaurant.

This is further evidence that the firm is likely mistakenly counting food heated or cooked after purchase as staple food in its financial and accounting records. As noted above, on December 15, 2016, FNS published a final rule entitled "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)" at 81 Federal Register 90675. This final rule added the language to existing regulations clarifying that foods heated or cooked after sale would be considered in determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

Reviews by customers on websites such as Yelp and Google indicate that the firm is primarily considered by its customers as a "you buy, we fry" establishment offering heated and hot seafood for carryout. Customer reviews almost exclusively refer to the firm's hot food items "cooked to order" and include pictures of purchased hot seafood and sides in Styrofoam containers. Doordash and Grubhub also delivers hot prepared food items from the store menu. Lastly, the firm's own Facebook page states it is a "Seafood Restaurant" and prominently displays pictures of its hot prepared food menus.

## **Summary**

A preponderance of the evidence supports the Retailer Operation Division's determination that the Appellant firm likely has more than 50 percent of its total gross retail sales in heated and/or hot and cold prepared food. The SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, that "firms that have more than 50 percent of their total gross retail sales in heated, hot and/or cold prepared foods not intended for home preparation and consumption, shall not qualify for participation as retail food stores." By definition these types of firms are considered restaurants and are ineligible for SNAP authorization.

## **CONCLUSION**

Based on the analysis above, the decision by the Retailer Operations Division to withdraw the SNAP application of the Appellant, Louisiana Atlanta Seafood Market, is sustained. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization for six (6) months from the effective date of the withdrawal. However, please note that if the business model remains the same and you reapply, your application may be denied for the same reasons it was withdrawn this time.

## **RIGHTS AND REMEDIES**

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that 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 you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is 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.

RONALD C. GWINN  
Administrative Review Officer

February 7, 2020