

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

**Louisiana Seafood And Fish Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0219573**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support the determination by the Retailer Operations Division to withdraw the authorization of Louisiana Seafood And Fish Market (Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) part 278, in its administration of the SNAP when it withdrew the authorization of the Appellant to participate in the SNAP as an authorized retailer.

**AUTHORITY**

7 USC § 2023 and the 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**

The Appellant submitted an online reauthorization form FNS-252-R, entitled *Supplemental Nutrition Assistance Program Reauthorization Application for Stores* which it signed on October 29, 2018. The information provided to the Retailer Operations Division reports that 58 percent of the firm's gross retail sales were in staple foods and that 39 percent were in hot and prepared foods. On December 12, 2018, an on-site store visit was conducted by an FNS contractor in an effort to evaluate the firm's conditions and inventory. The store visit observations indicate that the Appellant firm is more likely a restaurant than a fresh seafood specialty market. In a letter dated February 20, 2019, the Appellant provided the Retailer Operations Division with its bank

card processing statements for November 2018 and December 2018. In an e:mail dated February 28, 2019, the Retailer Operations Division requested that the Appellant provide proof/breakdown of sales, such as summary reports (i.e., z-tapes for three representative months of actual sales) and the Appellant's most recently filed business taxes. However, the Appellant did not provide the Retailer Operations Division with the requested sales information. After considering the available evidence, the Retailer Operation Division determined that the majority of Appellant's sales were from hot and prepared food items and thus, the firm was primarily a restaurant.

In a letter dated June 28, 2019, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it did not meet the necessary criteria to be eligible for SNAP participation. Specifically, the letter stated that the Appellant firm was a restaurant because more than 50 percent of its total sales were in the sale of hot and/or cold prepared foods not intended for home preparation and consumption.

In a letter postmarked July 8, 2019, the Appellant appealed the Retailer Operations Division's decision and requested an administrative review of this action. The request for review was granted by letter dated July 30, 2019, and implementation of the withdrawal has been held in abeyance pending completion of this review. The Appellant provided additional information in support of its case to FNS in a letter postmarked August 19, 2019.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). In particular, 7 CFR § 278.1(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 278.1(l)(1) reads, in part: FNS may withdraw the authorization of any firm authorized to participate in the program for any of the following reasons:

- (A) The firm's continued participation in the program will not further the purposes of the program;
- (B) The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;
- (C) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...for the time period specified in paragraph (k)(2) of this section.

7 CFR § 278.1(k)(1) Denying authorization, references 7 CFR § 278.1(b)(1)(iv) ineligible firms, 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 under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

7 CFR § 278.1(k)(2) reads, in relevant part: FNS shall deny the application of any firm if it determines that:

(2) 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.... 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.

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

An establishment...shall...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 § 271.2 states, in part:

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.

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 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 following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the request for administrative review and in a subsequent correspondence to FNS, the Appellant argued that:

- The Appellant disagrees with the decision to withdraw the store from the SNAP as in some months, the store may sell more than 50 percent of its gross sales in uncooked foods. The store has more products available for purchase with SNAP benefits than products that are not allowed to be purchased with SNAP benefits. Some months the Appellant sells more in SNAP sales than cash and credit card sales.
- Other stores, such as 5 U.S.C. § 552 (b)(6) & (b)(7)(C), sell more in cash and credit card sales during some months than they do in SNAP sales and they still continue to participate in the SNAP.
- The Appellant always follows the rules of the SNAP and has a good record.
- The Appellant requests that FNS reconsider its decision to withdraw the store from the SNAP and allow it to help the community by providing a good fresh product that customers can go home and cook for their families.

In support of these contentions, the Appellant submitted ten (10) photos of food stock for review.

### ANALYSIS AND FINDINGS

The purpose of this review is to validate or to invalidate the determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts at the time of the decision. 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.

The Appellant contends that it disagrees with the decision to withdraw the store from the SNAP as in some months, the store may sell more than 50 percent of its gross sales in uncooked foods. The store has more products available for purchase with SNAP benefits than products that are not allowed to be purchased with SNAP benefits. Some months the Appellant sells more in SNAP sales than cash and credit card sales. Other stores, such as 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and others, sell more in cash and credit card sales during some months than they do in SNAP sales and they still continue to participate in the SNAP. In support of its contentions, the Appellant submitted ten (10) photos of its food stock for review.

With regard to the Appellant's arguments, for the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has available for sale SNAP eligible foods. The

central issue is whether actual sales of prepared foods comprise more than 50 percent of the store's total gross retail sales. There is no doubt that the firm sells staple food items, such as fresh seafood. However, the store presents itself and is set up primarily as a restaurant; thus, it is reasonable to expect that staple foods do not outsell prepared and cooked food products at this establishment.

The Appellant argues that in some months, the store may sell more than 50 percent of its gross sales in uncooked foods. The store has more products available for purchase with SNAP benefits than products that are not allowed to be purchased with SNAP benefits. However, the documentation presented does not support that the majority of the firm's business is in the sale of fresh foods for home preparation and consumption. There is no evidence in the inspection report and photographs of the December 12, 2018 store visit, nor in the information provided by the Appellant, that indicates that Louisiana Seafood And Fish Market is not primarily a restaurant. The large menu display boards and signage show that the store sells a large variety of hot foods, prepared foods, and meals. The store also has a large number of tables with chairs for customers to utilize while eating in-store cooked/hot and prepared foods.

In a letter dated February 20, 2019, the Appellant provided the Retailer Operations Division with its bank card processing statements for November 2018 and December 2018. In an e:mail dated February 28, 2019, the Retailer Operations Division requested that the Appellant provide proof/breakdown of sales, such as summary reports (i.e., z-tapes for three representative months of actual sales) and the Appellant's most recently filed business taxes. However, the Appellant did not provide the Retailer Operations Division with the requested sales information.

Therefore, the information provided by the Appellant concludes that the majority of its sales are from hot and prepared foods. The evidence supports that the firm has more than 50% of its total gross sales in foods cooked or heated on-site 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. The evidence supports by a preponderance of evidence that Louisiana Seafood And Fish Market is more likely a restaurant than a fresh seafood specialty market. The photos provided for review are current and cannot be used to assess inventory of required items at the time the withdrawal decision was rendered.

This decision was based on information on the application submitted by the owner, an onsite visit by FNS contracted staff, and analysis by the Retailer Operations Division. There is sufficient evidence to support the Retailer Operations Division's determination to withdraw the authorization of Louisiana Seafood And Fish Market to participate as an authorized retailer in the SNAP because it did not meet the necessary criteria to be eligible for SNAP participation. In accordance with the regulations, 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.

### **First Time Violator**

The Appellant contends that it always follows the rules of the SNAP and has a good record. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges. As such, the Appellant's compliance history is not a relevant consideration in the present case.

### **Customer Hardship**

The Appellant requests that FNS reconsider its decision to withdraw the store from the SNAP and allow it to help the community by providing a good fresh product that customers can go home and cook for their families. However, there are no provisions in the Food and Nutrition Act or SNAP regulations allowing hardship to SNAP customers as a consideration in determining eligibility for participation in the SNAP, with the exception of co-located wholesale/retail firms, which must meet a variety of additional requirements. Louisiana Seafood And Fish Market is not a co-located wholesale/retail firm; therefore, such provisions do not apply in the present case.

## **CONCLUSION**

After review of all the documentation in the record, the decision by the Retailer Operations Division to withdraw the authorization of Louisiana Seafood And Fish Market to participate in the SNAP as a retail food store is sustained. The preponderance of the evidence supports that the Appellant is an ineligible firm as per the definition cited herein. Ineligible firms 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. In accordance with the Food and Nutrition Act of 2008, as amended, and the SNAP regulations, the withdrawal of Louisiana Seafood And Fish Market shall become effective 30 days after receipt of this letter.

## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to 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.

LORIE L. CONNEEN  
ADMINISTRATIVE REVIEW OFFICER

September 9, 2019