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

Macker Seafood, LLC,

Appellant,

v.

Office of Retailer Operations and Compliance,

Respondent.

Case Number: C0238995

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is insufficient evidence to support the determination by the Office of Retailer Operations and Compliance to deny the application of Macker Seafood, LLC ("Appellant") to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Appellant to participate in SNAP in a letter dated October 5, 2020.

AUTHORITY

According to 7 U.S.C. § 2023 and its 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

On September 4, 2020, the Office of Retailer Operations and Compliance sent a letter to Appellant indicating that the documentation in its possession indicated that the firm operated as a restaurant and requested additional information that would support Appellant's contention that it

is not a restaurant. Appellant replied to the Office of Retailer Operations and Compliance in a subsequent letter.

In a letter dated October 5, 2020, the Office of Retailer Operations and Compliance denied the application of Appellant to participate as an authorized retailer in SNAP because the firm is not a retail food store as defined by the SNAP regulations. Specifically, the denial letter states that 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 as retail food stores. The letter states the firm is primarily a restaurant based on information provided in Appellant's application and the contractor's store visit report dated January 11, 2020. As the firm failed to meet the eligibility criteria for approval, Appellant was informed that the firm could not submit a new application to participate in SNAP for a period of six months as provided in Section 9 of the Food and Nutrition Act of 2008, as amended.

In a letter dated October 12, 2020, Appellant appealed the Office of Retailer Operations and Compliance's decision and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, 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 untrue.

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

APPELLANT'S CONTENTIONS

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

- The specific week of receipts that were requested were not a good sample as Appellant's SNAP authorization was cancelled during the middle of this week.
- Appellant was using a new POS system and tax was accidently charged on raw product to EBT customers on a few occasions. Appellant provided ~437 pages of receipts, two pages of sales summaries, and a sales-summary spreadsheet.
- Appellant has corrected tax issues and retrained staff.
- More than 50% of the firm's gross retail sales are from raw, staple foods. This is particularly evident in prior weeks when SNAP was available all seven days.
- Lack of authorization poses a hardship to the firm.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant contends that the firm is a not a restaurant, but a retail store. For the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has available for sale SNAP-eligible food. 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 staple food items may be delivered to the store fresh, raw and unprepared, and are available to customers that way. However, the store presents itself and is set up primarily as a restaurant; thus, it is reasonable to expect that fresh food products do not outsell prepared and cooked food products at this establishment.

In regards to Appellant's contention that the store sells a great deal of fresh and unprepared food, 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. The evidence in the inspection report and photographs of the January 11, 2020 store visit, as well as the information provided by Appellant, supports that Appellant is primarily a restaurant.

The large menu display board and menu show that Appellant largely sells prepared foods and meal combos. The external signage indicates Appellant is a restaurant. The layout of the store has tables and chairs for dining on the premises, typical of a restaurant. Appellant's application states that the majority of its sales are from staple foods. The health department certificate supports that Appellant's establishment is a restaurant.

A detailed analysis of the receipts provided by Appellant supports that ~71% of Appellant's sales are from hot/cold prepared foods. Appellant contends that the specific week of receipts that were requested were not a good sample as Appellant's SNAP authorization was cancelled during the middle of this week. The analysis of Appellant SNAP transactions during the three days that Appellant was SNAP authorized supported that over 75% of these sales were for hot/cold prepared foods.

Appellant insists a few mistakes were made during this period because it was training staff on a new POS system, and it has since corrected those mistakes and retrained staff. A few mistakes would not have made a significant difference in the results of this analysis.

Appellant appears to be contending that because it charges a separate fee for cooking, it avoids designation as a restaurant. Whether food is cooked as part of the initial purchase or through an additional charge is irrelevant to the determination of whether Appellant's establishment is a restaurant. Foods cooked on the premises before or after purchase are considered prepared foods.

Hardship to Appellant

Appellant asserts that denial of authorization would put the business in financial jeopardy. Economic hardship is a likely consequence whenever a store is denied from participation in SNAP. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship to the firm would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to economic hardship of the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been denied from the program in the past for similar deficiencies. Therefore, Appellant's contention that it will incur economic hardship based on deficiencies in meeting the eligibility requirements does not provide any valid basis for dismissing the denial of Appellant's application.

Summary

The authorization of a store to participate in SNAP must be in accord with the Food and Nutrition Act and regulations, as amended. Those requirements of law cannot be waived. This review is limited to consideration of the circumstances at the time of the denial action by the

Office of Retailer Operations and Compliance. On the day of the store visit, the evidence supported that the store is primarily a restaurant, and firms that are primarily restaurants are not eligible to participate in SNAP.

The store is set up primarily to sell hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption or for carry-out, and require no additional preparation. Although food items in Appellant's store may be available for sale fresh, it is more likely true than not true that the majority of foods in the store are actually sold prepared and/or hot and ready-to-eat. According to 7 CFR § 278.1(b)(1) of the SNAP regulations, such a store is considered a restaurant and is not eligible for SNAP participation as a retail food store. Therefore, Appellant's store does not qualify as a retail food store for purposes of SNAP participation.

Appellant was authorized at the time of the determination by the Office of Retailer Operations and Compliance. Consequently, Appellant should have been withdrawn as a SNAP-authorized retailer, not denied authorization.

CONCLUSION

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to deny the application of Macker Seafood, LLC to participate as an authorized SNAP retailer is modified to withdraw the authorization of Macker Seafood, LLC to participate as an authorized SNAP retailer.

Appellant should be immediately reinstated as a SNAP-authorized retailer. In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, the withdrawal action shall become effective 30 days after delivery of this letter. As Appellant has already been removed from the program for two months, Appellant may reapply for authorization four months after the implementation of the withdrawal action.

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 Appellant desires a judicial review, 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.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

December 7, 2020