

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

Moes Fish & Chicken Inc,

Appellant,

v.

Case Number: C0217903

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service, finds there is sufficient evidence to support the determination by the Retailer Operations Division to deny the application of Moes Fish & Chicken Inc (hereinafter 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) § 278.1(b)(1), in its administration of the SNAP, when it denied the application of Appellant to participate in SNAP by letter dated May 2, 2019

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

In a letter dated May 2, 2019, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not meet the definition and eligibility requirements of a retail food store established by Federal regulations at 7 CFR § 278.1(b)(1). This action was taken because the Retailer Operations Division had determined the Appellant firm was primarily a restaurant and as such failed to meet the definition of an eligible firm. This denial action was based on observations during an onsite store visit on March 20, 2019, as well as information provided on and in support of the firm’s SNAP retailer application.

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 § 278.1(k)(2). Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

By letter dated May 9, 2019, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received from Appellant.

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 Part 278.1(k)(1) and Part 278.1(l)(1) establish the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet the definition of an eligible firm.

7 CFR § 271.2 states, in part, that: 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

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv), Ineligible Firms, which states, in part, that: 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.

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, that: 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

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 description of the business is in error and a review is requested.

Appellant submitted no evidence or other rationales in support of this contention.

ANALYSIS AND FINDINGS

The authorization of a firm to participate in SNAP must be in accord with the Act, as amended, and regulations. These requirements of law cannot be waived. Thus, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts and circumstances that existed at the time of the denial determination.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) state, in part, that, "Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross retail 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." As previously noted in the Controlling Law section, 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 SNAP regulations.

Appellant's most recent SNAP retailer application shows that staple food sales account for 79 percent of total sales while accessory foods account for the remaining 21 percent of sales. The application specifically states that the firm does not sell any hot foods or cold prepared foods.

That Appellant misrepresented the facts its SNAP retailer application is confirmed by the FNS store visit conducted on March 20, 2019, showing that the firm, in fact, offers a wide variety of hot and/or cold prepared foods that are sold for carryout and require no additional preparation. The many store visit photos also show the firm has a substantial commercial kitchen/food preparation area as well as menus and signage advertising a wide range of hot and/or cold prepared foods that include sandwiches, hot platters, cold salads, and hot sides in addition to a large exterior sign stating "U BUY-WE FRY" and many pictures of hot foods. The FNS photos show only a very small area of the firm contains grocery food items. The majority of the grocery food items are accessory foods (condiments, seasonings, drinks, etc.) with an extremely limited quantity and variety of staple foods. The staple food stock also includes 14 commercial sized cans of vegetables that are covered in a thick layer of dust indicating a particularly low turnover of staple food stock.

Sales documents provided by Appellant indicate that nine percent of total sales were of hot or cold prepared foods, two percent were accessory foods, and 88 percent were asserted to be staple foods. However, the accuracy of the categorization of sales made by these documents is questionable and is not supported by the FNS store visit report, staple food inventory listing, and photos or by how the firm presents itself to the public. Therefore, it is more likely than not that a substantial number of the transactions attributed to staple food sales should actually be hot or cold prepared food sales based on the evidence. This is further supported by the fact that these sales documents also show a transaction volume that is higher around typical meal times and transaction prices and patterns that indicate patrons are buying prepared food even though the register code shows a "staple" category (i.e. fish for \$8.00-\$11.00 and a \$1.00-\$2.00 beverage rung-up back-to-back **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**).

The Appellant firm was involuntarily withdrawn as a SNAP retailer in 2017 based on the FNS determination that the firm was operating primarily as a restaurant. A review of the reports and photos from the three FNS store visits conducted since 2017 show the firm has made no significant changes to its business model and is still operating primarily as a restaurant. The only change noted is that the flyers advertising a \$1.00 per pound cooking fee are no longer on display. The apparent removal of the cooking fee is supported by sales documentation provided by Appellant showing no charges in the column titled "Charges for Heated Services". Removing the cooking fee does not change the firm's business model. Invoices provided by Appellant contain many items associated with a high volume of hot food sales such as various sizes of foam boxes, hinged containers, cases of condiment packets, commercial sized #10 cans, commercial sized containers of frying oil, commercial sized seasoning, etc. The majority of the firm's floor space is also dedicated to the sale or preparation of hot and or cold prepared food items that require no additional preparation. Additionally, a review by the Retailer Operations Division of the firm's online presence further supports it primarily being a restaurant. The firm delivers hot and/or cold prepared foods on door dash and its yelp.com reviews are all based around hot food sales and include the full menu of hot and cold prepared foods. A variety of other internet sites, including Facebook, also identify the firm as a restaurant with photos of hot foods and sides. There is no mention of purchasing fresh fish/chicken or grocery items on any of these sites.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny the application of the Appellant firm to participate as an authorized SNAP retailer is sustained.

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

July 31, 2019