

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

**Mojo Express,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0218835**

**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 Mojo Express 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 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it withdrew the authorization of Mojo Express.

**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In a letter dated June 4, 2019, the Retailer Operations Division informed the Appellant that it was being withdrawn from the SNAP as it no longer met the definition of a retail food store under 7 CFR § 271.2 and 7 CFR § 278.1(b)(1) of the SNAP regulations.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 and 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 months from the effective date of the withdrawal as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter dated and postmarked June 14, 2019, the Appellant, through counsel, requested an administrative review of the Retailer Operation Division's decision to withdraw the firm's SNAP authorization. The request for administrative review was granted and implementation of the withdrawal was held in abeyance pending completion of this review.

The Appellant also requested case documents under the Freedom of Information Act (FOIA) in the June 14, 2019 letter. The agency's official FOIA response was provided to the Appellant in a letter dated July 10, 2019. The Appellant was then given additional time to submit any further information, contentions or evidence in support of the administrative review request. The Appellant submitted its additional contentions, documents and evidence in a letter dated August 1, 2019.

### 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, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- There is insufficient factual basis to support the basis for the withdrawal.

- Mojo Express does maintain sufficient stock of qualifying staple foods to be eligible under Criteria A.
- Mojo Express does qualify for SNAP under Criteria B as more than 50 percent of total gross sales are in staple foods. The inventory on hand supports this volume of sales.
- The firm's accountant computed the breakdown of the sales figures for 2018 and 2019 through June 30, 2019 (Appellant's Exhibit 3). In addition, the 2017 breakdown of the sales figures were reported in Form FNS-252-R (Appellant's Exhibit 4).
- The conclusion that the retailer is primarily a restaurant is inaccurate. More than 50 percent of the firm's gross retail sales are in staple and accessory foods, not hot prepared or cold prepared foods.
- There is no food whatsoever that is consumed on the premises. The three booths shown in the inspector's photos are exclusively for customers waiting for their carryout food.
- The sign located on the inside of the business designates the business as "Mojo's Express Fish Food & Grocery".

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 Mojo Express is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). In reaching its decision to withdraw the store'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 Mojo Express does not qualify for the SNAP as it is primarily a carryout restaurant.

### **Reauthorization Application**

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 October 31, 2018. The Appellant's reauthorization application indicated that 69.4 percent of its 2017 actual gross retail sales were in staple foods and that less than 15.9 percent were in hot and cold prepared food items.

The remaining 14.7 percent were in accessory food items. 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 November 8, 2018, 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 69 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 photographs indicated that the firm likely sold a much larger percentage of heated, hot and cold prepared foods than what was reported on the FNS-252-R and was most likely a carryout restaurant.

The store visit report and photographs document that the interior footprint of Mojo Express 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 Plexiglas partition and wall bisecting and running the length of the store that separates the checkout registers, kitchen, food storage and food preparation area from customers. This area occupies approximately one-half of the interior footprint of the store.

There is a large menu display board behind and above the checkout registers advertising heated, hot and cold prepared food. The food preparation area includes a full commercial kitchen with industrial stoves, fryers, and ovens. There are freezers and storage areas with frozen chicken, seafood and meat all of which was inaccessible to customers. Based on the above, it is more likely true that not that this food was used in the kitchen to make prepared food items and was not available for customers to purchase as staple foods.

There was a small glass display area of fresh seafood and chicken 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. 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).

Another quarter of the store footprint consisted of three (3) booths where food could either be consumed or customers could wait on their prepared food orders. The Appellant contends that food is not consumed on the premises and any prepared food is strictly for carryout. 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 exclusively to staple and accessory food items. There were shelves containing a limited amount of inexpensive fresh produce, loaf bread, canned and packaged goods, and seasonings. There was a cooler with some milk, butter/margarine, juice, eggs, and carbonated and non-carbonated drinks. However, these products would likely not account for a large percentage of the firm's gross retail sales.

## **Supporting Sales Documents**

After reviewing the store visit report, the Retailer Operations Division sent a letter dated February 26, 2019 to the Appellant noting that the store visit appeared to indicate that Mojo Express was operating primarily as a carryout restaurant which would make the firm ineligible for SNAP reauthorization. The letter requested additional supporting documents from the firm including end-of-day sales summary reports for a representative three-month period; an overview document breaking the actual retail sales down into certain categories; and verification of total gross retail sales for the prior year using records such as state sales and use taxes and income taxes.

The Appellant responded to this request for additional documents and provided EBT register receipts and itemized cash register receipts for the months of December 2018, January 2019 and February 2019. The Retailer Operations Division reviewed this evidence and determined that it was inadequate to demonstrate that the firm was eligible for the SNAP as it did not clearly differentiate between staple food sales and heated, hot and cold prepared food sales. Some of the itemized items were listed as EBT items but appeared to describe heated, hot or cold prepared food not intended for home preparation and consumption.

As a result of the inadequate documentation sent by the Appellant, the Retailer Operations Division sent another letter dated March 26, 2019 asking for verification of a single week of actual sales and a one-week sales overview report for the purpose of differentiating staple food sales from heated, hot and cold prepared food sales. The Appellant sent a 28-page copy of a financial and itemized group Z-1 reports for March 29, 2019 through April 4, 2019. Although cooking fees for “EBT items” were not included in this report, a review of these documents appear to support that more than 50 percent of the firm’s gross retail sales derive from heated, hot and cold prepared food and that the firm accountant was mistakenly counting some prepared food items as staple food.

## **Marketing**

The Retailer Operations Division reviewed the firm’s marketing through its outdoor signage, menus, and a review of social media sites. Outdoor signage displays the store name as Fish Express Seafood and advertises pizza, chicken, ribs, subs and salads as well as various dinner specials. This exterior advertising was almost exclusively devoted to SNAP ineligible heated, hot and cold prepared food.

One side of the store’s paper menu advertised numerous prepared food items including round pizza singles with various toppings; cheese bread; bread sticks; ribs with sides; submarine sandwiches; burgers and fries; salads; party salad trays; fried wing dings; fried whole wings; chicken dinners; chicken tender dinners; chicken gizzard dinners; fish dinners; fish combos; family meals; desserts and beverages; and Sunday-Monday-Tuesday prepared food specials. On the other side of this paper menu was an “EBT Menu ... You Buy ... We Fry” list advertising fish, shrimp, whole wings, wing dings, chicken tenders, gizzards and liver with a separate fee for frying after purchase. 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.

Yelp, Google and Yahoo reviews by customers indicate that the firm is primarily considered by its customers as a seafood and/or carryout restaurant. Customer reviews exclusively refer to the firm’s hot food items and dinners and include statements such as all food is “made to order.” There is also a tip jar at the checkout window which also further supports that the firm is primarily a carryout restaurant.

### **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, hot and cold prepared food not intended for home preparation and consumption. 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 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, Mojo Express, 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 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

September 16, 2019