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

Mr. Seas Fish & Seafood,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0212855

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the Retailer Operations Division properly withdrew the authorization of Mr. Seas Fish & Seafood (hereinafter "Appellant") from participation as a retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the firm may not reapply for SNAP authorization for a period of six months from the date of withdrawal.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it withdrew the authorization of Mr. Seas Fish & Seafood.

AUTHORITY

7 U.S.C. § 2023 and its 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

The Appellant firm, Mr. Seas Fish & Seafood, was originally authorized to participate as a retailer in SNAP on January 2, 2002. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization process to determine whether or not the firm still meets eligibility requirements.

Effective October 16, 2017, SNAP regulations at 7 CFR § 278.1(b)(1)(iv) were amended to clarify the types of stores that are considered restaurants for purposes of determining Program eligibility. Prior to this regulatory change, the regulation defined restaurants as those firms with

more than 50 percent of their gross sales from hot and/or cold prepared foods not intended for home preparation and consumption, including food items sold for carryout. This earlier regulation was silent about foods that were heated by the retailer **after** purchase (e.g. you-buy-we-fry). Because the regulation did not specifically address foods that were raw or cold at the point of sale but heated up afterward, FNS considered such foods to be staple food items for purposes of SNAP eligibility. Such foods did not count toward the 50 percent restaurant threshold. The new rule changed the wording of the regulation to state that any foods cooked or heated on-site by the retailer before **or after** purchase must be counted toward the 50 percent threshold.

Mr. Seas Fish & Seafood, a seafood store and take-out restaurant, was identified by the Retailer Operations Division as a firm that could be affected by this change in the regulation. On June 22, 2108, an on-site store visit was conducted by an FNS contractor in an effort to evaluate store conditions and inventory. Additionally, the firm was required to submit Form FNS-252-R, *Supplemental Nutrition Assistance Program Reauthorization Application for Stores*, which it did on February 7, 2018.

After reviewing the store visit report and photographs and evaluating the information from the Appellant's reauthorization application, the Retailer Operations Division determined that additional information from the firm was necessary to in order to make an accurate eligibility determination. In a letter dated June 28, 2018, the Retailer Operations Division sent the firm a letter in which it requested the following information:

- A monthly sales overview for the past three months showing total sales by category, including staple foods, accessory foods, nonfoods, and hot prepared foods.
- One week of actual sales receipts showing all foods sold in the store on an item-by-item basis. This should also include any cooking fees that are charged after a customer purchases fresh food and requests that it be cooked by the firm.
- Receipts should be clearly marked and divided into various categories.

On July 16, 2018, the Appellant submitted a 174-page cash register report listing total sales for the months of April, May, and June 2018. The report divided the sales into various categories, such as "Combos," "Cooked Fish," "Daily Special," "Dinner," "Jumbo Shrimp," "Sandwiches," "Side Orders," "Whole Wings," "Freezer," "Fresh Fish & Seafood," "Grocery," "Drinks," "Seasoning," "Cook Charge," "Custom Items," etc.

After reviewing this information, the Retailer Operations Division concluded that the firm's hot and/or cold prepared food sales constituted approximately 51 percent of the firm's total sales. In its calculation, the Retailer Operations Division counted everything in the "Fresh Fish & Seafood" and "Grocery" categories as staple foods. Everything else was considered prepared foods:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Based on its calculation, the Retailer Operations Division determined that the firm was operating primarily as a restaurant and thus did not meet the definition and requirements of a retail food store for purposes of SNAP authorization.

In a letter dated September 6, 2018, 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. The letter stated that the withdrawal determination was based on 7 CFR § 271.2, § 278.1(b)(1), and § 278.1(k)(2).

In a letter postmarked September 14, 2018, the Appellant, through counsel, requested an administrative review of the withdrawal determination. The request was granted and implementation of the withdrawal has been held in abeyance pending completion of this review. In a second letter postmarked September 19, 2018, the Appellant submitted an amended response to supplement its request for review. It should be noted that along with its request for review, the Appellant requested case file information from FNS in a request submitted under the Freedom of Information Act (FOIA). The agency completed its FOIA response on October 18, 2018. The Appellant did not provide any additional contentions or evidence after its receipt of the FOIA response.

STANDARD OF REVIEW

In an appeal of adverse action, such as the withdrawal of a firm's SNAP authorization, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. 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:
> (i) The firm's continued participation in the program will not further the purposes of the program;
> (ii) The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section;
> (iii) 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)(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 § 271.2 defines a *retail food store* as:
(1) 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 *[three]** 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 *[two]** 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 inventory or 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 cook 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**.... [Emphasis added.]

7 CFR § 271.2 defines *staple food* as:
...food items intended for home preparation and consumption in each of the following four categories: Meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products... 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 this chapter. Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple food item and will be included in the staple food category of the main ingredient as determined by FNS. 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. Items shall not be classified as accessory food exclusively based on packaging size but rather based on the aforementioned definition and as determined by FNS. A food product containing an accessory food item as its main ingredient

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[*] As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion.

shall be considered an accessory food item. Accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm.

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

- Appellant denies the allegation that it has more than 50 percent of its gross sales in the sale of prepared or hot take-out food.
- Appellant requests that it be afforded due process before being assessed the ultimate penalty of disqualification, which will result in a taking of rights resulting in financial devastation of the business and a loss of service needed by the community.
- The register tapes show that some sales do not have a specific button on the register as most products do. These sales were entered in a "custom" button which may have resulted in FNS incorrectly classifying the items as prepared or heated foods. Appellant claims that under no circumstances does it permit hot or prepared foods to be rung up on the "custom" button.
- There have been no warning letters to the firm that it was violating the regulations.
- After a careful review of the register tapes provided to the Retailer Operations Division, Appellant believes it has proven by no less than a clear and convincing standard that its sales of hot and prepared foods are far less than 50 percent of its total sales.
- In April 2018, hot and prepared food sales constituted 31.9 percent of its total monthly sales. In May 2018, it was 34.5 percent; and in June 2018, it was 34 percent.
- FNS must dismiss the charges to withdraw the firm's SNAP authorization because the allegations are unsupported by the necessary substantive and reliable evidence to meet the Department's preponderance of the evidence standard. Additionally, the Appellant's representations are what exists in the Department's record, and that evidence reveals that

the Appellant does not, and has not violated SNAP rules. As such, its SNAP authorization should remain in effect.

In support of its contentions the Appellant submitted the following documentation:

- A handwritten chart listing sales of fresh fish, frozen fish, fish cleaning, and custom items for the months of April 2018 through August 2018. The chart indicates that fresh food sales during that period were between 56 and 65 percent of the firm's total monthly sales.
- Four printouts showing the various categories of sales as listed on the firm's cash register screen.
- A three-page affidavit from Appellant owner 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This affidavit provides somewhat greater detail regarding the contentions listed above. The key point of the affidavit is the owner's contention that the sale of fresh food exceeds 50 percent of the firm's total sales and as such, the store is not a restaurant.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final decision, full attention was given to all contentions submitted, including any not specifically summarized or explicitly referenced herein.

It should be noted that the Appellant's initial request for review, dated September 14, 2018, included a large number of references to terms such as "allegations," "violations," "charging letters," "accusers," "disqualification," etc. Unfortunately, Appellant's counsel seems to be greatly confused as to the type of case he is defending. This is not a case where violations have occurred. No charge letter was ever sent. There are no allegations and no accusers, and the end result is certainly not disqualification, much less permanent disqualification, which Appellant's counsel mentioned at least once. Instead, this case is simply and solely about whether or not the Appellant firm continues to meet basic eligibility requirements in order to remain authorized to accept SNAP benefits.

The Appellant's supplementary response, dated September 19, 2018, strikes a somewhat different tone, and appears to be more focused on the actual issue under consideration.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time the Retailer Operations Division rendered its decision.

Based on a review of all evidence in this case, this review finds that more likely than not, Mr. Seas Fish & Seafood is primarily a restaurant based on current SNAP regulations that have been in force since October 2017. The chief issue in this case is whether or not the firm's hot and/or cold prepared foods constitute more than 50 percent of its total sales. Critical to this issue is the change to the regulation at 7 CFR § 278.1(b)(1)(iv) which states that the 50 percent threshold now includes any items cooked or heated on-site by the retailer before or after purchase. This

means that any food sold in a you-buy-we-fry manner no longer counts as a staple food for purposes of determining SNAP eligibility.

This review conducted its own analysis of the sales documentation that was submitted by the Appellant, specifically the cash register report for the month of June 2018, which is when the contractor's store visit occurred. Category names that appear to clearly be hot and/or cold prepared foods include the following:

- Combos
- Cooked Fish
- Daily Special
- Dinner
- Jumbo Shrimp
- Large Shrimp
- Sandwiches
- Side Orders
- Whole Wings
- Wing Dings

These 10 categories add up to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in total sales, or 34.3 percent of the firm's gross sales.
Category names that appear to be for staple foods include the following:

- Freezer
- Fresh Fish & Seafood
- Groceries

These three categories add up to 5 U.S.C. § 552 (b)(6) & (b)(7)(C), or 53.3 percent of the firm's gross sales.

The remaining categories are either accessory foods or nonfoods:

- Desserts
- Drinks
- Seasoning
- Cook Charge
- Fish Cleaning
- No Category ("Custom Items" that apparently do not fit in any of the other categories)

Combined, these remaining six categories account for 5 U.S.C. § 552 (b)(6) & (b)(7)(C), or 12.4 percent of the firm's sales for the month of June. It should be noted that there is no indication what constitutes a "custom item." There were 388 "custom items" purchased in June. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The "custom items" category accounted for 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

There is also no explanation for the category "fish cleaning," which constituted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of sales for the month. There are no signs in the store to indicate that the firm offers a fish cleaning service to local fishermen, or that a separate fish cleaning charge would be added to existing orders.

If the Appellant's category designations are to be believed, it would appear that because the three staple food categories account for 53 percent of the firm's total sales, the firm should be eligible for SNAP participation under Criterion B. The Appellant's evidence also suggests that because the 10 prepared foods categories account for just 34 percent of the firm's total sales, the store is not a restaurant.

Unfortunately, this review does not agree. The category designations on the Appellant's report were not created by FNS, but by the Appellant. It is very unlikely that the Appellant would count you-buy-we-fry transactions under any of the prepared food categories, such as Cooked Fish, Daily Specials, Dinner, or Sandwiches. This is because those categories very likely identify the sale of hot or prepared foods – meaning hot or prepared at the point of sale. It is universally known to SNAP-authorized retailers that hot foods cannot be purchased with SNAP benefits. As such, it would be very unlikely that a retailer, particularly one that has been authorized for many years under a you-buy-we-fry business model, would list any EBT purchases under one of the ineligible hot food categories. Instead, the retailer would be much more likely to place EBT purchases under the Fresh Fish & Seafood category. By entering the EBT transaction as a fresh fish or seafood purchase, the customer could legally make the purchase with SNAP benefits and then afterward request that the firm heat up the food.

Owners and employees of stores that are primarily you-buy-we-fry establishments are well aware of the terminology and order of operations at the point of sale that has allowed them to accept SNAP benefits for what is essentially a hot meal requiring no additional preparation.

What the Appellant's evidence does not show are the specific transactions that identify precisely what was purchased or the method of payment used to make the purchase. Such information could show whether the category names in the Appellant's monthly reports were accurate or inaccurate. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is very unlikely that any of those SNAP purchases are listed in the Appellant's 10 prepared food categories for the reasons listed earlier. This means that most of the SNAP transactions were likely from the Fresh Fish & Seafood category: raw fresh fish that gets heated up later.

It is the position of this review that the names of the categories as listed on the Appellant's sales reports cannot be taken at face value. They very likely do not give a proper accounting of the firm's you-buy-we-fry emphasis.

In determining whether or not this store is a restaurant, one must also consider the general appearance and physical characteristics of the store. The only prices listed anywhere in the store are found on the large menu board, which only lists prepared food items. The display cases of fresh fish do not include any signage identifying the type of fish being sold or the prices of each fish or seafood item by the pound. Furthermore, the outside walls are virtually filled with signage dedicated to its you-buy-we-fry operations. A sign on the front of the store advertising "You Buy/We Fry" is every bit as large as the name of the store itself. Other large signs indicate that the store is a carry-out restaurant and accepts the Bridge Card – the name of the EBT card in the state of Michigan. Finally, the Appellant's Facebook website advertises itself as a restaurant. Nowhere online or in the store itself is there any signage indicating that the store even sells fish or other fresh food items by the pound. By every visual indication, the store is a restaurant.

It is important to remember that in an administrative review, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. This means providing relevant and compelling evidence which demonstrates that the decision made by the Retailer Operations Division was improper. In this case, the Appellant's evidence does not sufficiently prove that the firm is not a restaurant. As such, it is the determination of this review that the withdrawal of the firm's SNAP authorization was proper and was done in accordance with existing Program regulations.

As to the Appellant's contention that a withdrawal of its SNAP authorization will result in financial devastation to the business and a loss of service needed by the community, such arguments have no bearing in this matter. A firm may only participate in SNAP if it meets basic program eligibility requirements.

CONCLUSION

The documentation and contentions presented by the Appellant are not sufficient to prove, by a preponderance of the evidence, that the withdrawal decision made by the Retailer Operations Division was inaccurate or that it should be reversed. In fact, the opposite is true. The evidence strongly suggests that Mr. Seas Fish & Seafood is primarily a restaurant and as such, it is not eligible for SNAP participation under Criterion A or B. Therefore, the agency's withdrawal decision is sustained.

Pursuant to 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to reapply for participation as a retailer in SNAP for a minimum period of six months from the date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal of Mr. Seas Fish & Seafood shall become effective 30 days after receipt of this decision.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON — March 14, 2019
Administrative Review Officer