

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

New Boyd's Fish Market LLC,

Appellant,

v.

Case Number: C0207755

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny the authorization of New Boyd's Fish Market LLC (hereafter Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2 and § 278.1(b)(1), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied Appellant authorization to participate as a retailer in SNAP on March 19, 2018.

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 March 19, 2018, Retailer Operations Division denied Appellant's authorization to participate as a retailer in SNAP. This denial was based on evidence obtained during a firm visit conducted on March 2, 2018, as well as information provided on the firm's retailer application.

Retailer Operations Division determined that the firm did not meet the definition and requirements of a retail store as set forth in 7 CFR § 271.2 and § 278.1(b)(1) of the SNAP regulations. The denial letter stated it is the determination of FNS that your firm is primarily a

restaurant, because more than 50 percent of your total gross retail sales are from “heated foods” and/or “prepared foods.” “Heated foods” are foods cooked or heated by the retailer before or after purchase. “Prepared foods” are hot or cold foods not intended for home preparation and/or home consumption, including prepared foods that are consumed on the premises or sold for carryout. Restaurants are not eligible to participate in SNAP except in certain States that operate special restaurant programs allowing the elderly, disabled, and homeless participants to use SNAP benefits in restaurants. Your store is not located in a state with a restaurant program.

As the firm failed to meet SNAP eligibility criterion 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 7 CFR § 278.1(k)(2).

In a letter postmarked March 29, 2018, Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action. The appeal was granted.

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, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

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(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k) reads, in relevant part: “FNS shall deny the application of any firm if it determines that: (1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section”

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, 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.” [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

Foods heated after the sale were at one time considered to be SNAP eligible. However, due to a recent change in Federal regulations, foods heated after sale are now considered to be SNAP ineligible in the same manner as foods sold hot at the point of sale. 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 made the following summarized contentions in its response to the denial letter and in the request for administrative review, in relevant part:

1. Our sales of prepared food are not over 50% of my gross sales.

No other documentation was provided during this review. The preceding may represent only a brief 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.

ANALYSIS AND FINDINGS

In regards to Appellant’s contention, the issue in this case is whether New Boyd’s Fish Market LLC is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1) of the SNAP regulations. In reaching its decision to deny the firm’s application, Retailer Operations Division relied upon the firm’s application, the store visit report and documents provided by the firm.

The case record indicates that in reaching a denial decision, Retailer Operations Division considered information obtained during the March 2, 2018, store visit conducted by an FNS contractor to observe the nature and scope of the firm’s operation, stock and facilities. Additionally, the firm’s SNAP application indicates that only 29 percent of the firm’s gross retail sales were in SNAP eligible staple foods and that 65 percent of its gross retail sales were in hot and cold prepared foods.

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 discussion herein, the determination by the Retailer Operations Division to deny the authorization of New Boyd’s Fish Market LLC to participate as a retailer in SNAP is sustained. Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six months, effective March 19, 2018.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

June 28, 2018