

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review Branch  
Alexandria, VA 22302**

**New Orleans Seafood,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0199426**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the authorization to participate in the Supplemental Nutrition Assistance Program (SNAP) of New Orleans Seafood (hereinafter “Appellant”) was properly withdrawn by the ROD Office (Retailer Operations Division).

**ISSUE**

The issue accepted for review is whether the SNAP Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(l) and § 278.1(k)(2) when it made the decision to withdraw the authorization of the Appellant firm to participate in the SNAP.

**AUTHORITY**

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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 record reflects that on or about March 13, 2012 the Appellant firm was authorized to participate in the SNAP. Appellant was subsequently advised in a letter dated April 5, 2017 of the Department's decision to withdraw the authorization. The regulatory bases given for that withdrawal were 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k)(2). On April 14, 2017, Appellant requested an administrative review of this action. The request 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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

## CONTROLLING LAW

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, at 7 U.S.C. § 2018 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(l) and § 278.1(k)(2) establish the authority upon which the authorization of a retail food store or wholesale food concern to participate in the SNAP may be withdrawn. **5 U.S.C. § 552 (b)(7)(E).**

7 C.F.R. § 271.2 states, *inter alia*:

*Retail Food Store* means: 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, on a continuous basis, a variety of foods in sufficient quantities in each of the four categories of staple foods including perishable foods in at least two such categories (Criterion A)...or has more than 50 percent of its total gross retail sales in staple foods (Criterion B)...Entities that have more than 50 percent of their total gross sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores...

And

Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments and spices shall not be considered staple foods for the purpose of determining the eligibility of any firm.

7 C.F.R. § 278.1(a) states:

FNS shall approve or deny the application within 45 days of receipt of a completed application. A completed application means that all information (other than an on-site visit) that FNS deems necessary in order to make a determination on the firm's application has been received.

7 C.F.R. § 278.1(b)(1) states, *inter alia*, that in order to meet Criterion A a firm must:

Offer for sale, on a continuous basis, a variety of qualifying foods in each of the four categories of staple foods, including perishables in at least two of the categories.

7 C.F.R. § 278.1(b)(1)(iv) states, *inter alia*:

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...

And

...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 under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

7 C.F.R. § 278.1(k)(2) states, *inter alia*:

FNS shall deny the application of any firm if it determines that:

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; or The firm has failed to meet the eligibility requirements...under Criterion A or Criterion B....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 C.F.R. § 278.1(l) states, *inter alia*:

FNS shall withdraw the authorization of any firm that fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section.

### **APPELLANT'S CONTENTIONS**

In its written request for review dated April 14, 2017, Appellant provided information in which it was argued that:

The firm operates as a wholesale and retail fish market. The firm cooks hot food, at customers' request, for an additional dollar. The firm is not a restaurant and does not use recipes other than home boiling or steaming recipes. The firm is paying additional tax on the dollar cooking fees. Appellant provides the name of 10 seafood markets with larger prepared food operations that are also accepting SNAP benefits. Appellant provides a copy of a 2015 and a 2016 IRS Tax Return Transcript for the store, a photo of the firm's dry-erase board marquee advertising food products for sale, a photo of the store front, a copy of a April 10, 2017 Food Establishment Inspection Report, a copy of a ServSafe Certificate for one of the firm Owners dated February 5, 2017 and a copy of a Labor Law Poster Certificate of Compliance.

## ANALYSIS AND FINDINGS

The record reflects that a contracted store visit of the Appellant firm was conducted on September 7, 2016. Documentation generated as a result of that visit includes photographs of the interior and exterior of the store, a store layout diagram and an inventory survey. These records reflect that the firm operated primarily as a carryout/restaurant: relative lack of space and inventory devoted to staple food items, marquees and signs advertising prepared food entrees, dine-in seating and carryout containers, among other indicators typical of food preparation operations. The following observations were documented during the store visit:

- No optical scanners.
- No shopping carts or baskets.
- Two registers and one card reader.
- Hot food sold.
- No deli section.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Approximately 750 square feet of store space.
- Small amount of staple food items, along with a large amount of accessory food items (spices, condiments, seasonings, etc.), on shelves behind ordering/check-out area. Photos: 1, 8, 10, 22, 25 and 29.
- Store signage/marquees/menus advertised numerous prepared food items and entrees. Entrees/items ranged from \$1.50 to \$16.99. The firm maintained a full-sized commercial kitchen/food preparation area which occupied approximately one-half of the firm's floor space. A dry erase board listed prices of seafood per pound but also noted a cooking fee for boiling various entrees as well as for grilling and deep-frying (lower right-hand corner of the marquee); there was a sign behind the register stating that the firm will cook live and frozen crawfish. There were numerous photos of entrees with menu numbers posted on the walls. External signage read "New Orleans Seafood, Fresh & Cooked Seafoods and Po Boys." Photos: 1, 2, 3, 4, 10, 12, 14, 18, 20, 22, 23, 24 and 30.
- Signage near the register stated: "Please help out environment by not trashing in front of the **restaurant**." (Emphasis added.)
- Table seating and chairs were arranged near the walls in what appeared to be a waiting and/or dining area. Photos: 7, 10, 13, 14 and 18.

As noted above, a firm that operates as a carryout/restaurant is not eligible to participate as a retail food store in the SNAP; however, a restaurant may participate under one of the special restaurant programs that serve the elderly, disabled and homeless populations, under the auspices of the state in which the firm is located, as set forth in 7 CFR § 278.1(d)(3) and must meet a number of additional requirements. Further, the store visit documentation indicated that the firm failed to maintain ample varieties of staple food stock in at least three of the four required staple food categories, thus additionally failing to qualify under Criterion A, as detailed above. The visit further provided evidence that the firm's staple food sales were not reasonably greater than 50 percent of its gross retail sales, rendering it ineligible for authorization under Criterion B, as detailed above, as staple food sales must exceed 50 percent of gross retail sales. Hot or cold prepared food cannot toward a firm's inventory of staple food. As noted, however, regardless of

Criterion A or B considerations, a restaurant or carryout operation, with the exception noted above, is not eligible to participate in the SNAP. Moreover, the record reflects that the ROD Office received information from the Georgia Department of Agriculture indicating that the firm was not licensed as a retail fish market but was viewed as operating primarily as a restaurant.

In regard to Appellant's contentions above, Appellant has provided no documentation demonstrating that the firm's staple food sales exceeded 50% of gross sales (note that prepared food is not considered staple food for the purposes of the SNAP). Separate cooking fees and/or the use of boiling/steaming recipes versus other recipes does not indicate that the firm was not a restaurant/carry-out operation; rather the use of cooking fees and prepared food recipes tends to reflect that the firm did in fact operate as a restaurant/carryout.

With regard to Appellant's list of other SNAP-authorized firms purportedly operating primarily as restaurants (outside of the special restaurant programs noted in the foregoing); if such firms were/are operating as SNAP-authorized firms such would indicate that they were/are improperly SNAP-authorized. However, the presence of an improperly authorized firm cannot constitute a valid rationale for improperly authorizing additional firms. Moreover, it is not uncommon that, once retail stores are SNAP-authorized, business changes occur which render these firms no longer SNAP-eligible. Given this reality, the agency works to remove these firms from the SNAP; however, again, the existence of ineligible firms that continue to participate does not constitute evidence of Appellant's SNAP-eligibility or a compelling rationale to authorize other ineligible firms to participate.

Appellant's photo of its dry-erase marquee does not demonstrate that the firm operated primarily as a retail food store, as opposed to a restaurant/carryout; as noted in the foregoing, a large amount of the firm's signage advertised and detailed its prepared food entrees and other offerings. Likewise the firm's IRS documents, Food Establishment Inspection Report, ServSafe Certificate, Labor Law Certificate and store front photo provide no evidence of the firm's staple food sales versus its prepared food sales. As noted, information from the Georgia Department of Agriculture tends to further indicate that the firm operated primarily as a restaurant.

## **CONCLUSION**

In view of the above, it is my determination that the SNAP Office's withdrawal of Appellant's authorization to participate in the SNAP is in accord with the law and regulatory provisions at 7 U.S.C. § 2018, 7 C.F.R. § 271.2, § 278.1(b)(1), § 278.1(l) and § 278.1(k)(2). The withdrawal, therefore, is sustained and will become effective 30 days following Appellant's receipt of this document.

## **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 provisions of the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

DANIEL S. LAY  
Administrative Review Officer

November 28, 2017