

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

New Orleans Seafood Market & Deli,,

Appellant,

v.

Case Number: C0205919

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the Retailer Operations Division (Retailer Operations) properly imposed the withdrawal of the authorization of New Orleans Seafood Market & Deli (Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 271.2 and 7 CFR § 278.1(b)(1), in its administration of the SNAP when it withdrew the authorization of Appellant to participate as a SNAP retailer.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that “A food retailer ...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

By letter dated January 19, 2018, the authorization of Appellant to participate in the SNAP was withdrawn because the firm failed to meet the definition and requirements of a retail food store as set forth in Sections 271.2 and 278.1(b)(1) of the SNAP regulations and therefore is ineligible to participate in SNAP as an authorized retailer. The letter also states that the firm is primarily a restaurant, because more than 50 percent of Appellant’s 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 allow elderly, disabled, and homeless participants to use SNAP benefits in restaurants. Appellant is not located in a state which operates a restaurant program.

The owner requested an administrative review of the withdrawal action by an undated letter. The appeal was granted by letter dated January 31, 2018. The owner provided additional information which was reviewed by Retailer Operations and this office.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means the 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 argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended, and 7 U.S.C. § 2018. The SNAP regulations at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008.

7 CFR § 271.2 states that retail food store means: “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.”

7 CFR § 278.1(b)(1)(i) imparts specific program requirements for retail food store participation which states: “(A) An establishment or house-to-house trade route shall normally be considered to have food business of a nature and extent that will 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 as defined in §271.2 of this chapter.... or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).”

7 CFR § 278.1(b)(1)(iii) provides that in order for firms to qualify for authorization under Criterion B: “Firms must have more than 50 percent of their total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees, and entertainment, sports, games income. However, a fee directly connected to the processing of staple foods, such as raw meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B.”

7 CFR § 278.1(l)(1) Withdrawing authorization states: “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), (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; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section.”

7 CFR § 278.1(k)(2) requires that firms withdrawn for failure to meet program eligibility criteria “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 withdrawal.

APPELLANT’S CONTENTIONS

The owner contends:

- We have provided our receipts, tax records, purchase orders/delivery receipts, license and everything asked of us.
- We do have service to heat up foods, but that is only 15-20% of our operations.
- We do not have any seating only chairs for customers to sit while waiting for us to package foods.
- We have all required inventory in stock to remain eligible.
- This is a source of income for us. If we are withdrawn we cannot say profitable or afloat and might go out of business.

The owner provided sales and use tax information, a business and occupations tax certificated, a sales tax certificate of registration, a food sales establishment license, a copy of the FNS-252-R, and hundreds of copies of “flash reports” with sales and media totals.

ANALYSIS AND FINDINGS

The reauthorization process is to ensure that authorized retailers continue to meet the eligibility criteria for SNAP authorization. The purpose of this review is to validate or to invalidate the eligibility decision rendered by Retailer Operations. Thus, this review is limited to consideration of the relevant facts and circumstances at the time Retailer Operations made its decision. It is

not within the scope of this review to consider actions the owner may take to qualify for participation in the SNAP subsequent to that decision. The authorization of a store to participate in the SNAP must be in accord with the Act and the regulations, as amended; those requirements of law cannot be waived.

The determination regarding whether Appellant is eligible to continue to participate as an authorized SNAP retailer includes consideration of whether or not the firm is eligible under paragraph 7 CFR § 278.1(b)(1) cited herein. Under Criterion B, a business must have more than 50 percent of its total gross retail sales in staple foods. By letter dated December 29, 2017, Retailer Operations notified the owner that an onsite visit by an FNS Contractor on December 14, 2017, indicated that Appellant was operating primarily as a restaurant in that more than 50 percent of the total gross retail sales are hot food (heated by your firm before or after purchase) and/or cold prepared foods. Firms with more than 50 percent of total gross retail sales in hot food (heated by the firm before or after purchase) and/or cold prepared foods are considered restaurants, and are ineligible for SNAP authorization.

The owner was asked to provide copies of documents as evidence it was a retail food store such as: verification of total gross retail sales for the last three months (sales tax records, income tax records, or other records verifying total gross retail sales income; verification of actual gross retail sales for the last three months; a summary of actual gross retail sales for the last three months (for example, including total dollar amount of gross retail sales, separated in the following categories: 1) heated or prepared foods, 2) non-foods, 3) accessory foods, 4) staple foods, and 5) charges for food heating services); and supply and inventory records (purchase orders, delivery receipts for suppliers/wholesalers, inventory logs, etc.).

The record supports that Appellant advanced some information to support that it met SNAP eligibility requirements. Retailer Operations assessed the information provided and determined that it failed to support that Appellant met the definition of a retail food store. Rather, the information supported that Appellant is indeed primarily a restaurant. To be a considered restaurant does not require onsite seating. The regulations are clear 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 under §278.1(b)(1) of this chapter.”

For review the owner provided some more information in an effort to support the contention that this business is a retail food store. This information was assessed and after a thorough review, it was again determined that Appellant is primarily a restaurant. The owner provided no evidence to support her contention that “heat up foods” are only 15-20% of Appellant’s operations. The sales and use tax information provided by Appellant confirms that the percentage of food cooked or heated on-site at Appellant 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 exceeded more than 50 percent. Therefore, Appellant is not eligible for SNAP participation as a retail food store under 7 CFR § 278.1(b)(1).

Ownership contends that withdrawal of the SNAP authorization will have a negative impact on Appellant. It is recognized that some economic impact may be a consequence whenever a firm is withdrawn from participation in SNAP. Nevertheless, the eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived. Appellant does not meet the definition of a retail food store.

CONCLUSION

Based on a review of all of the evidence in this matter, the decision by Retailer Operations to withdraw the authorization of Appellant to participate as a retail food store in the SNAP is sustained. Appellant does not meet the eligibility criteria for authorization per the regulations.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to Section 279.7 of the regulations (7 CFR § 279.7) with respect to applicable rights 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 the Appellant's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction.

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.

M. Viens
Administrative Review Officer

March 7, 2018