

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

**New Seafood & Produce Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0230768**

**FINAL AGENCY DECISION**

The United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support that the Retailer Operations Division (Retailer Operations) properly imposed the withdrawal of the authorization of New Seafood & Produce Market (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 § 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 the 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 the FNS.

**CASE CHRONOLOGY**

FNS regulations require that firms be reauthorized on a set schedule. As part of this process, the owner was requested to complete a reauthorization application. A FNS-contractor conducted an onsite visit December 27, 2019, to ascertain Appellant's continued eligibility to participate in the SNAP. By letters dated February 25, 2020 and May 17, 2020, Retailer Operations requested additional information regarding Appellant's hot and cold prepared food sales data.

By letter dated June 8, 2020, the authorization of Appellant to participate in the SNAP was withdrawn because the firm is primarily a restaurant with more than 50 percent of its total gross retail sales from heated foods and/or prepared foods.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.

The owner requested administrative review of the withdrawal action by letter postmarked June 2, 2020. The appeal was granted by letter dated June 10, 2020. The record shows a second acknowledgement letter was issued dated June 22, 2020. The owner provided additional information by email dated July 11, 2020. He also mailed additional information.

### **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, credible evidence that 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: “An establishment 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.” The SNAP regulations as currently implemented define continuous basis as offering for sale 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 on any given day of operation.

7 CFR § 271.2 states: “Staple food means those 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. 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 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: “(A) An establishment 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, including perishable foods in at least three of the categories (Criterion A); 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)(ii) provides that for a retail store to qualify for authorization under Criterion A, a firm shall: “(A) Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, 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 and at least one variety of perishable foods in at least three staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement.” 7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis as offering for sale 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 on any given day of operation.

7 CFR § 278.1(b)(1)(ii)(B) states that in order to qualify under Criterion A firms shall: “Offer for sale perishable staple food items in at least three staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks.”

7 CFR § 278.1(b)(1)(ii)(C) states that in order to qualify under Criterion A firms shall: “Offer a variety of staple foods which means different types of foods within each staple food category. Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.”

7 CFR § 278.1(b)(1)(iii) provides that 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(b)(1)(iv) states: “Ineligible firms: Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of the SNAP shall not be eligible for program participation. New applicant firms that are found to be ineligible will be denied authorization and authorized firms will be withdrawn from program participation. 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 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.”

7 CFR § 278.1(l)(1) Withdrawing authorization reads in part: “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) deals with denying authorization and states FNS shall deny the application of any firm if it determines that 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.

### **APPELLANT’S CONTENTIONS**

All contentions, listed or not, have been considered as presented in rendering this decision.

- Due to the COVID-19 our response to the previous request for more information was delivered late resulting in our authorization to participate as a retailer in the SNAP being withdrawn. We ask you reconsider the newly supplied evidence (postmark around May 25/26) in supporting our continuing authorization to participate as a retailer in the SNAP.
- We are not sure how USDA arrived at this number in fact, of all the documents and receipts that we provided clearly indicated that the heated foods and prepared foods counts for less than 10% of our total gross sales.
- The statement issued in the letter by USDA is simply baseless and USDA haven't provide any proof to support such claim. This store is a seafood and produce store, it is not run or operate like a restaurant. We have two sit down tables which requested by customers because we also serve coffee and ice cream, our customers would like to sit down and wait for the bus that's right outside of our store while they enjoy their beverage or ice cream inside the store.
- The breakdown of retail sales: Staple foods : 63%, Accessory Foods: 15%, Hot prepared and heated Foods: 10%, Cold food prepared on site: 10%, Charges for food heating services: \$0, Nonfood items: 2%.
- Department 01 = Staple Foods, Department 16= Accessory Foods + Hot Prepared and Heated Foods + Cold Foods Prepared on Site: In the category of Accessory Foods we only sell 1 item, drinks (tea, soda, energy drinks) which is <1% of D2 category.
- In the category of cold Foods Prepared on Site, we only sell 2 items salad and water ice which is about < 1% of D2 category. We don't sell any Nonfood items; the hot prepared and heated Foods counts about 98% of the D2 category which is about 10% of the total gross sale.
- In the letter dated on June 8, 2020 it says our "firm is primarily a restaurant, because more than 50 percent of your total gross retail sales are from "heated foods" and/or "prepared foods." This is simply not true. FNS has no evidence to back up this claim. As I have shown in the excel sheet and the breakdowns the heated foods/prepared foods counts about 10% of the total gross sale. The receipts are the evidences which I have included in the envelope. I have also attached pictures to show that we actually have just one table, a restaurant should have more tables.
- The background in the picture shows the produce and staple food that we sell. The reason that some shelves are empty is because we lost lots of inventory during recent burglar. We will restock as soon as we receive relief checks from our insurance company.
- The Food Stamp counts more than 70% of the gross revenue, without the food stamps we can no longer serve our community.

## **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 decision of Retailer Operations. Thus, it is limited to consideration of the relevant facts at the time Retailer Operations rendered its 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.

Documents requested by Retailer Operations were received from the owner on February 24, 2020. Upon review of the register receipts, Retailer Operations was unable to identify the types of items sold. The Z-tapes only identified department codes. On February 25, 2020, Retailer Operations sent the retailer a letter requesting identification of department accounting codes indicated on the Z-tapes. The retailer did not respond to this request.

Retailer Operations sent a letter on March 31, 2020, requesting the retailer provide business licenses. These business licenses were received by Retailer Operations on April 7, 2020. Since the retailer did not respond to the February 25, 2020, letter identifying the department codes, the information submitted was insufficient for Retailer Operations to make an eligibility determination. By letter dated May 17, 2020, Retailer Operations again requested three weeks of sales data, and information about the accounting codes previously sent by the owner. Retailer Operations received the information June 3, 2020, and determined that the hot and cold prepared foods accounted for about 98% of the firm's sales, coded in the Dept 16 category.

Retailer Operations' review of the Z-tapes indicated that Dept 01 was taxed 8%, per the state of Pennsylvania, for food other than groceries. Groceries (staple foods) are not taxed in Pennsylvania. Retailer Operations concluded that either the information on the register tapes was incorrect, or the tax information is in error. All of the transactions on the Z-tapes submitted by the owner show that tax is applied to the Dept 01 items sold. Retailer Operations therefore concluded that these taxed items, indicated by T1 with the tax amount listed by the Dept 01 code, were not likely staple foods. The regulations at Section 272.1 (b) clearly state that a State shall not participate in the SNAP if State or local sales taxes or other taxes or fees, including but not limited to excise taxes, are collected within the State on purchases made with SNAP benefits. The regulations are also clear that hot foods are not eligible for purchase with SNAP benefits and do not qualify as staple foods for the purpose of determining eligibility. Additionally, Retailer Operations noted that the time stamp for the transactions were not within the given business hours provided by the owner on his application. Additionally, the Z tapes totals for October 1, 2019 did not match the total of all SNAP transactions for that same date at the firm.

Retailer Operations determined that based on the definition of the accounting codes submitted by the owner, this location is most likely a restaurant with the majority of sales from hot/cold prepared onsite foods requiring no home preparation. The taxed items represent 76% of sales for 10/1/19, and 90% of sales for 4/28/20. All of the transactions on the Z-tapes have an 8% tax for Dept 01 items, and represent the majority of Appellant's sales. Thus, the evidence advanced was not persuasive that this is a retail food store that meets the eligibility requirements for SNAP authorization.

Retailer Operations determined that location signage, such as "cooked crabs," "take out," and "seafood platters," the onsite photos, including a large cooking area with deep fryers, a range, a kitchen hood, the photographed indoor table seating and chairs, the view of the order counter, a tip jar, Styrofoam/plastic takeout containers, and photos of menus for family/fried and steamed platters, offerings of catering and party platters, and an ice cream bar for prepared ice cream, all support that this is a restaurant. Please note that the regulatory definition of a restaurant does not include any reference to tables or chairs. A search for this firm on the internet shows a photo of

cooked food, and a comment that the fries could have been cooked longer. This too supports that this is not a retail food store as defined by the regulations.

The items listed on the cost of the items on the Z-tapes for Dept 01 directly correspond to the prices for the cooked foods shown on the firm's menu. Appellant's own reauthorization application received October 22, 2019, shows that hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption and require no additional preparation represent more than 50% of the firm's total retail sales. The owner himself provided application information that stated total retail sales of hot prepared foods at 10%, and cold prepared foods onsite at 60%, totaling to 70% of sales being the result of prepared foods, not staple foods for home preparation. The reauthorization application clearly shows that the owner stated staple food sales represented only 20% of total retail sales at Appellant. Therefore, the preponderance of the evidence supports that this business is a restaurant.

On review, the owner provided a letter, some photos, an excel spreadsheet, and receipts to support his position that this is not a restaurant but a retailer food store. Retailer Operations reviewed this additional information and found that it was comparable to what had previously been submitted to them and analyzed by them. Dept 01 is again seen as taxed on these advanced tapes/receipts. This information does not support that Dept 01 are sales of staple foods.

The owner has the burden to provide a preponderance of evidence within the timeframe granted, to support his contention that it is a retail food store rather than a restaurant. This review is to ascertain if Appellant meets the regulations for reauthorization. SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. Entities that have more than 50 percent of their total gross retail sales in food cooked or heated onsite 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 Section 278.1(b)(1)(iv).

## **CONCLUSION**

Based upon a review of all of the evidence in this matter, the decision by Retailer Operations to withdraw the authorization of Appellant because the firm does not meet the requirements of a retail food store as set forth in Section 278.1(b)(1) of the SNAP regulations is sustained. The eligibility requirements to participate as a SNAP retail food store must be met and cannot be waived.

If you have operational questions, please contact Richard Gleason at (609) 259-5148. This decision shall take effect 30 days after the date of delivery to the firm.

## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to the regulations at 7 CFR § 279.7 with respect to applicable rights to a judicial review of this determination. Please note that if 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. If any Complaint is filed, it must be filed within thirty (30) days of delivery 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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

July 29, 2020