

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

North Main Fish Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0202871

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 North Main Fish Market (hereinafter “Appellant”) was properly denied authorization to participate in the Supplemental Nutrition Assistance Program (SNAP) by the Retailer Operations Division, Retailer Operations Branch, hereinafter “ROD Office”.

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 C.F.R. § 271.2, § 278.1(b)(1) and § 278.1(k)(1) and (2) when it made the decision to deny the application by Appellant for authorization 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.”

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.

CASE CHRONOLOGY

The record reflects that on August 1, 2017, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** signed as President an application for authorization for the above-named firm to participate in the SNAP. A visit to obtain information regarding the firm's eligibility was conducted on June 9, 2017. Appellant was subsequently advised in a letter dated September 15, 2017 of the Department's decision to deny the application. The regulatory bases given for that denial were 7 C.F.R. § 271.2, § 278.1(b)(1)(iv) and § 278.1(k). On September 21, 2017, Appellant requested an administrative review of this action. The request was granted.

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) and § 278.1(k) establish the authority upon which a retail food store or wholesale food concern may be denied authorization to participate in the SNAP.

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.
stores...

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)(ii) further stipulates, *inter alia*:

Application of Criterion A. In order to qualify under this criterion, firms shall: 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 three different varieties of food items in each of the four staple food categories.

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

Application of Criterion B: In order to qualify under this criterion, 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.

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

...Variety of foods is not to be interpreted as different brands, different nutrient values, different varieties of packaging, or different package sizes.

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)(1) and (2) state, *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

APPELLANT'S CONTENTIONS

In its written request for review dated September 21, 2017, and in subsequent correspondence, Appellant provided information in which it was argued that:

1. The business is not a restaurant at all, as clearly shown in the photographs; Appellant provides photographs in support thereof. The local business license is for a Fish and Seafood retailer, not a restaurant. Appellant provides a copy of a business license in support thereof. The sale of raw fish is 60% based on cash register receipts (cash register code 3) provided to the ROD Office. The taxes on the raw fish were an error from cash register key codes, which will be corrected and the sales tax returns will be amended.
2. Appellant took over the business from the previous owner on April 2017 and has not changed the nature of the business.

ANALYSIS AND FINDINGS

The record reflects that a contracted store visit of the Appellant firm was conducted on June 9, 2017. The following is a brief summary of observations and documentation obtained during the visit:

- Estimated square footage of store: 2000.
- No optical scanners.
- No shopping carts or baskets.
- 1 check-out counter.
- 2 registers.
- Store takes telephone orders.
- No delivery service offered.
- No significant amount of non-foods.
- Commercial kitchen/food preparation area present.
- Hot food sold.
- Six dining booths/tables.
- Signage posted on wall states approximately \$1.00 cooking fee per pound of product purchased and lists examples.
- Signage posted on cold fish display case reads: "Store Policy – All Fresh Fish Purchased (tartar and cocktail sauce) and Cooked Have to Be Purchased – Tartar and Cocktail Sauce 25 cents each (can pay with EBT card).
- A marquee near the order/check-out counter advertised an extensive variety of prepared food entrees, including lunch specials, seafood dinners, side orders, family packs, sandwiches, seafood combination dinners, wings combos, North Main Specials (shrimp), steamed seafood and drinks. A menu on the counter lists similar information.

- A photo of the kitchen reflects a full commercial food preparation area including three deep fryers, a large stove, food preparation tables and a large ventilation hood.
- Signage located behind one of the counters read “Cook Fee Policy After Purchasing Any Raw Fishes From Us, You May Ask Us For Cook, In That Case We Will Charge \$1.00/LB W/Cash for Cooking.”

Documentation generated as a result of the store visit includes photographs of the firm’s interior and exterior, a store layout diagram and an inventory survey indicating that the firm operates primarily as a carryout/restaurant. As noted above, a firm that operates primarily as carryout/restaurant is not eligible to participate as retail food store in the SNAP and not subject to evaluation under either Criterion A or B; however, a restaurant may participate in 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 documentation indicated that the firm had ample varieties of staple food in two of the four required food categories, thus additionally failing to qualify under Criterion A. The visit further confirmed that the firm’s staple food sales could not have reasonably exceeded 50 percent of its gross retail sales, rendering it ineligible for authorization under Criterion B, as staple food sales must exceed 50 percent of gross retail sales. Prepared hot or cold food cannot count toward a firm’s sales of staple food items. 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.

In regard to contention 1 above, photographs provided by Appellant were attached to its September 21, 2017 letter requesting administrative review and were otherwise undated; the photographs depict customers waiting in or near the dining area in booths and/or chairs, raw fish on ice in a display case, the dining area with a cooler and freezer adjacent to it and the retail sales counter with a customer at the checkout area. Photos taken subsequent to the store visit are not generally regarded as an accurate reflection of conditions and store inventory held at an earlier time; nonetheless, the photos, taken at face value, neither prove nor disprove Appellant’s eligibility to participate in the SNAP at the time of the ROD Office’s denial decision.

Likewise, that the firm was licensed as a Fish and Seafood Market does not support or refute the ROD Office’s earlier decision that the firm was not eligible to participate in the SNAP. State and local retail licenses, while sometimes useful in providing evidence for or against a firm’s status as a restaurant versus a retail food store, are rarely conclusive in and of themselves, as the standards/requirements of said licenses are neither commonly known to the agency nor known to be the same as those used to determine SNAP eligibility. In the present case, these licenses, as presented, do not demonstrate that the firm did or did not operate primarily a restaurant.

Appellant provided, as requested by the ROD Office, tax documentation for April through July 2017. Tax documentation provided reflects that all sales were state-taxable; The ROD Office points out that state tax is charged on prepared foods but not on raw foods, which led the ROD Office to conclude that virtually all sales were of prepared foods. Appellant states that said tax forms were done incorrectly, plans to amend them and offers largely illegible cash register receipts as evidence that more than 50% of the firm’s sales are comprised of staple food items.

Some of the receipts are in fact legible, though many are not, so a conclusion about the totality of them regarding staple food sales percentage is not possible.

The receipts present sales separated by coded numbers; the codes provided by Appellant are as follows:

- 01 = Source
- 02 = Cook
- 03 = Fish
- 04 = Beverage
- 05 = Beverage (Soda)
- 06 = Misc snack

The category entitled “Source” is not explained, though most daily totals from this category are quite small, usually around 1% of total sales; accordingly they are not critical. Likewise the two beverage categories are typically quite small and not critically important. The “Misc snack” category is larger and, of the relatively few legible receipts, has a broad range of from less than 1% of daily sales to over 10%. However, the two most relevant categories are 02 and 03, “Cook” and “Fish,” respectively.

Category 2 could appear to reflect the number of pounds of fish cooked on a given day, as the firm charges \$1.00 per pound to cook fish. However, the firm does not fully explain which sales contribute to category 02. For example, does this category capture only the cooking fees attached to instances in which customers purchase raw fish and have it cooked or does it also capture restaurant sales (sales from the menu and/or marquee listing prices for various entrees)? Similarly, it is not apparent from Appellant’s documentation what kinds of sales comprise category 03; given Appellant’s business model, including the prominently displayed prepared-food marquee and other signage, it appears very unlikely that this category includes only raw fish sold (but not cooked before the product leaves the store); that is, this category appears to capture all fish sold, whether cooked before leaving the store or not. As a result, the receipts cannot establish that the firm’s sales of staple foods exceeded 50% of gross sales.

Appellant notes that it plans to amend its tax records to show less prepared food sales; however, no documentation of this amended information is provided, nor is any estimate regarding the extent to which the amended returns would alter the firm’s sales of staple foods versus prepared food items.

Regarding contention 2 above, to the extent Appellant implies that the firm was previously SNAP-authorized under different ownership, the SNAP status of the business prior to Appellant’s ownership/operation of the firm and submittal of an application to participate in the SNAP is not relevant; whether the business under prior ownership was eligible or not eligible to participate in the SNAP has no bearing on the present case. A new owner of a retail food store must apply for a new SNAP authorization and eligibility requirements must be met. There are no provisions in the statute or regulations allowing or requiring the portability of a firm’s SNAP authorization from a prior to a current owner.

Thus, given the record as it stands, the firm quite clearly appeared to operate primarily as a

restaurant at the time of the ROD Office's decision to deny Appellant's application to participate in the SNAP.

CONCLUSION

In view of the above, it is my determination that the ROD Office's denial of Appellant's application for 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) and § 278.1(k). The denial, therefore, is sustained. However, it is noted that the six-month waiting period (to reapply to participate in the SNAP) following the denial stipulated by the Food and Nutrition Act of 2008 (Sec. 9(d)), § 278.1(k)(2) will elapse on March 19, 2018.

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), FNS is releasing this information in a redacted format as appropriate and will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

DANIEL S. LAY
Administrative Review Officer

November 7, 2017