

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

**Ocean Fish Market,**

**Appellant,**

**v.**

**Case Number: C0215496**

**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 withdraw the authorization of Ocean Fish Market (“Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

**ISSUE**

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(l)(1)(iii), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Appellant to participate in SNAP in a letter dated January 30, 2019.

**AUTHORITY**

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 administrative record reveals that Appellant applied for authorization to participate in SNAP as an authorized retailer on July 13, 1999. The Appellant was authorized to participate in SNAP on July 14, 1999.

In a letter dated January 30, 2019, the Retailer Operations Division withdrew Appellant's authorization to participate as a retailer in SNAP because the firm is not a retail food store as defined by the SNAP regulations. Specifically, the withdrawal letter states that firms that have more than 50 percent of their total gross sales in heated foods and/or prepared foods not intended for home preparation and/or consumption are not eligible to participate as retail food stores. The letter states the firm is primarily a restaurant based on information provided Appellant's application and the contractor's store visit report dated November 23, 2018. As the firm failed to meet the eligibility criteria 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 Section 9 of the Food and Nutrition Act of 2008, as amended.

In a letter dated February 6, 2019, Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action. The appeal was granted.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant 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 untrue.

### **CONTROLLING LAW**

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(l)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it meets the definition of an ineligible firm.

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv) which reads, in part:

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. . . .

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

The definition of retail food store at 7 CFR § 271.2 states, in part:

Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores.

## APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- Appellant has been SNAP authorized since 1999. Appellant is licensed to sell uncooked seafood. Appellant provided a copy of its business license.
- FNS authorized purchases of prepared foods for hurricanes, which increased Appellant's sale of prepared foods past the 50% threshold. Appellant provided two emails.
- Appellant can only seat five people in its restaurant.
- Disqualification will hurt SNAP participants who rely on the firm. Appellant provided a one-page notice to customers.
- Appellant has no control over whether customers request their seafood to be cooked or not.
- Appellant denies that it is a restaurant.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

## ANALYSIS AND FINDINGS

Appellant contends that the firm is not a restaurant, but a retail store. Appellant stated it has been SNAP authorized since 1999. Appellant argued it is licensed to sell uncooked seafood and provided its business license (that expired in 2014) which states the firm's restaurant has seating for only five customers. Appellant also argues it has no control over whether customers request their seafood to be cooked or not. For the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has available for sale SNAP-eligible food or how much seating exists within the restaurant. The central issue is whether actual sales of prepared foods comprise more than 50 percent of the store's total gross retail sales. That the firm has been authorized since 1999 and that it does not have control over whether customers request prepared food is immaterial. There is no doubt that staple food items may be delivered to the store fresh, raw and unprepared, and are available to customers that way. However, the store presents itself and is set up primarily as a restaurant; thus, it is reasonable to expect that fresh food products do not outsell prepared and cooked food products at this establishment.

In regards to Appellant's contention that the store sells a great deal of fresh and unprepared food, the documentation presented does not support that the majority of the firm's business is in the sale of fresh foods for home preparation and consumption. There is no evidence in the inspection report and photographs of the November 23, 2018 store visit, nor in the information provided by Appellant, that indicates that Appellant is anything other than primarily a restaurant.

Appellant's reauthorization application stated that 64% of its sales were from the sale of prepared foods. Appellant argued this was due to FNS authorization of purchases of prepared

foods for hurricanes in 2016 and 2018. In support of this contention, Appellant provided an email which permitted the use of SNAP benefits for hot foods and foods intended to be consumed on the retailer premises from November 8, 2016 to November 30, 2016. This evidence is insufficient to support Appellant's contention.

Appellant's menus show that Appellant largely sells prepared foods and meal combos. The external signage states "Fish Fry" supporting the determination that Appellant operates as a restaurant. The pictures on the "specials" board feature only prepared foods. The layout of the store has tables and chairs for dining on the premises, typical of a restaurant.

### **Hardship to SNAP Participants**

Appellant asserts that withdrawal of authorization cause a hardship to customers who rely on the firm. Some degree of inconvenience to SNAP benefit users is inherent in the failure to authorize a retailer, since the distance to the nearest SNAP-authorized firm may be longer for some SNAP benefit holders. However, there is no provision in the SNAP regulations to allow the authorization of an otherwise ineligible firm because of inconvenience, or even hardship. to SNAP participants.

### **Summary**

The authorization of a store to participate in SNAP must be in accord with the Food and Nutrition Act and regulations, as amended. Those requirements of law cannot be waived. This review is limited to consideration of the circumstances at the time of the denial action by the Retailer Operations Division. On the day of the store visit, the evidence supported that the store is primarily a restaurant, and firms that are primarily restaurants are not eligible to participate in SNAP.

The store is set up primarily to sell hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption or for carry-out, and require no additional preparation. Although food items in Appellant's store may be available for sale fresh, it is more likely true than not true that the majority of foods in the store are actually sold prepared and/or hot and ready-to-eat. According to 7 CFR § 278.1(b)(1) of the SNAP regulations, such a store is considered a restaurant and is not eligible for SNAP participation as a retail food store. Therefore, Appellant's store does not qualify as a retail food store for purposes of SNAP participation.

## **CONCLUSION**

Based on the discussion above, the determination by the Retailer Operations Division to withdrawal of authorization of Ocean Fish Market to participate as an authorized SNAP retailer is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery of this letter.

## **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 Appellant desires a judicial review, 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 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.

RICH PROULX  
Administrative Review Officer

April 8, 2019