

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

Off The Hook Seafood Market 2,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0216922

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 Off The Hook Seafood Market 2 (hereafter Appellant), for a period of six-months, to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 271.2, § 278.1(b)(1), § 278.1(l)(1)(iii) , and §278.1(k)(2) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it withdrew the application of Appellant to participate in SNAP in a letter dated March 13, 2019.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 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 FNS requires that stores be reauthorized on a set schedule. The record reflects that Appellant submitted an electronic reauthorization application dated November 14, 2018. In a letter dated March 13, 2019, Retailer Operations Division withdrew Appellant’s authorization to participate as a retailer in SNAP. This withdrawal was based on information obtained during a store visit on September 24, 2018, as well as information provided on the firm’s reauthorization application.

Retailer Operations Division determined that the firm did not meet eligibility Criterion A or Criterion B under 7 CFR § 278.1(b)(1) of the SNAP regulations. The withdrawal letter stated that it is the determination of the Food and Nutrition Service that your firm is primarily a restaurant. Hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption, either for carryout or on-premises consumption, and requiring no additional preparation, comprise more than 50% of the total sales at your firm. Restaurants are not eligible to participate in SNAP except in certain States that operate special restaurant programs allowing the elderly, disabled, and homeless participants to use SNAP benefits in restaurants. Your store is not located in a state with a restaurant program.

As the firm failed to meet either eligibility criterion 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 at 7 CFR § 278.1(k)(2).

In a letter dated March 19, 2019, Appellant appealed Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

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

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.1(k)(2) 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 § 271.2 defines a retail store as “(1) 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 qualifying staple food items on a continuous basis, evidenced by having no fewer than [three]¹ 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 [two]¹ 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,

¹ As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at <https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion>.

purchase and sales records, counting of stock keeping units, or other inventory or accounting recordkeeping methods that are customary of reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter ...”

7 CFR § 278.1(l)(1)(iii) states in relevant part: “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 requirement of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section;”

7 CFR § 278.1(b)(1)(iv) states in relevant part: “...In addition, 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...”

7 CFR § 278.1(k)(2) states in relevant part: “The firm has failed to meet the eligibility requirement 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

In response to the Retailer Operations Division withdrawal letter and in the request for administrative review, Appellant has stated as its position in the matter the following:

1. I do not believe the determination is representative of the establishment’s category for authorization due to the fact that we sell our product raw.
2. We in no uncertain terms sell as a grocer nor as a restaurant. The fish market has raw uncooked food available for purchase however we do offer, upon request, prepared previously purchased goods. We do not offer chairs nor table settings for dining in.
3. I have since obtained a copy of an application that was filled out using my information. I was not aware that this application existed. This application does not pertain to my market due to the fact that I sell raw seafood and on occasion chicken.

The preceding may represent only a brief summary of Appellant’s contentions in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated or referenced herein.

ANALYSIS AND FINDINGS

With regards to Appellant’s contentions, for the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has available for sale fresh seafood and other raw meat or seafood products; the central issue is whether actual sales of prepared foods comprise more than 50 percent of the firm’s total gross retail sales. The record reflects that Appellant self-declared prepared food sales at 91 percent of its total retail sales. The contracted store visit documentation and photographs completed on September 24, 2018 confirms that the

establishment appears to be a restaurant. Additionally, an internet search of Appellant's establishment shows that the firm is listed on Yelp, Grub Hub and Google as a seafood restaurant with customer reviews. Appellant also has a menu posted for daily lunch specials and drinks. The menu included wings, fries, seafood, salads, nuggets, rice and steamed vegetables.

The authorization of a firm 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.

Thus, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division, and that it is limited to what circumstances existed at the time of the withdrawal action by the Retailer Operations Division. On the day of the contractor visit, the evidence supported that the firm is primarily a restaurant, and firms that are primarily restaurants are not eligible to participate in SNAP.

The establishment 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 firm may be available for sale fresh, it is more likely true than not true that the majority of foods in the establishment are actually sold prepared and/or hot and ready-to-eat. Pursuant to 7 CFR § 278.1(b)(1) of the SNAP regulations, such a firm is considered a restaurant and is not eligible for SNAP participation as a retail food store. Therefore, Appellant's firm does not qualify as a retail food store for purposes of SNAP participation.

The Food and Nutrition Act of 2008, as amended, states in part, "A retail food store or wholesale food concern that is denied approval to accept and redeem benefits because the store or concern does not meet criteria for approval. . . may not, for at least 6 months, submit a new application to participate in the program." There is no agency discretion to impose a sanction less than six months when a firm does not meet the aforementioned eligibility requirements for authorization.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to withdraw the application of Off The Hook Seafood Market 2 to participate as an authorized SNAP retailer is sustained. Appellant shall not be eligible to submit a new application for SNAP authorization for a period of six months, effective March 13, 2019.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right 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 you reside or are 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 receipt of this Decision.

Under the Freedom of Information Act (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

August 14, 2019