

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

Peter’s Seafood & Crab House,

Appellant,

v.

Case Number: C0207010

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to withdraw the authorization of Peter’s Seafood & Crab House (Appellant or Peter’s Seafood) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR 278.1(n) in its administration of the SNAP when it withdrew the authorization of the Appellant to participate as an authorized SNAP retailer.

AUTHORITY

7 USC § 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

Peter’s Seafood, was originally authorized to participate as a retailer in SNAP on October 2, 2012. In accordance with regulation, each SNAP-authorized firm is required to undergo a periodic reauthorization process to determine whether or not the firm still meets eligibility requirements.

Effective October 16, 2017, SNAP regulations at 7 CFR § 278.1(b)(1)(iv) were amended to clarify the types of stores that are considered restaurants for purposes of determining eligibility. Prior to this regulatory change, FNS considered restaurants to be firms with more than 50 percent of their gross sales from hot and/or cold prepared foods not intended for home preparation and

consumption, including food items sold for carryout. This earlier regulation considered foods that were heated by the retailer **after** purchase to be staple foods for purposes of SNAP eligibility and thus did not count toward the 50 percent threshold. The new rule changed the wording of the regulation to state that any foods cooked or heated on-site by the retailer before **or after** purchase must be counted toward the 50 percent threshold.

On February 2, 2018, an on-site store visit was conducted by an FNS contractor in an effort to evaluate store conditions and inventory. After reviewing the store visit report, the Retailer Operations Division concluded that further evidence was necessary to determine whether or not the firm would meet eligibility criteria under the new rule.

On February 8, 2018, the Retailer Operations Division sent the firm a letter requesting the following information:

- Verification of total gross retail sales for the last 3 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 3 months (actual sales receipts, etc.).
- A summary of actual gross retail sales for the last 3 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).
- Supply and inventory records (purchase orders, delivery receipts for suppliers/wholesalers, inventory logs, etc.).
- All business licenses for this location (for example, health, liquor, cigarette, sales tax, etc.).

Appellant did not provide the requested documentation. After reviewing the store visit report and photographs, the Retailer Operations Division determined that without further documentation from the Appellant it could not make an eligibility determination. In a letter dated February 20, 2018, the Retailer Operations Division informed the Appellant that its SNAP authorization was being withdrawn because it failed to cooperate in the reauthorization process. The letter stated that the withdrawal determination was based on regulations found at 7 CFR § 278.1(n).

In a letter postmarked February 27, 2018, Appellant requested an administrative review of the withdrawal determination. The request 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, 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.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 USC § 2018, and SNAP regulations at Title 7 Code of Federal Regulations (CFR) Parts 271 and 278. In particular, SNAP regulations at 7 CFR § 278.1(n) establishes the authority upon which FNS may withdraw an application from a retail food store or wholesale food concern.

7 CFR 278.1(n) states ...

Periodic reauthorization. At the request of FNS a retail food store or wholesale food concern will be required to undergo a periodic reauthorization determination by updating any or all of the information on the firm's application form. Failure to cooperate in the reauthorization process will result in withdrawal of the firm's approval to participate in the program.

7 CFR § 271.2, defines a retail food store, in part, as:

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*] 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*] 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 inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter....

7 CFR § 271.2 defines staple food, in part, as:

...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. Commercially processed foods and prepared mixtures with multiple ingredients that do not represent a single staple food category shall only be counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, shall only be counted as one staple

* 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>.

food item and will be included in the staple food category of the main ingredient as determined by FNS. 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)(A) reads, in part,

An establishment...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...including perishable foods in at least [two*] of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment...in staple foods (Criterion B).

7 CFR § 278.1(b)(1)(iv) states, in part:

Ineligible firms. Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of SNAP shall not be eligible for program participation ... 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 [Emphasis added.]

APPELLANT'S CONTENTIONS

Appellant made the following summarized contentions in its February 27, 2018, administrative review request, in relevant part:

- Appellant prepared all the documents but could not mail them out on time.
- The total sale of fresh fish and uncooked food is more than 50%.
- Appellant did not purposely delay sending in the documents.

Appellant provided the following documents in support of its contentions:

* 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>.

- FNS February 20, 2018, withdrawal letter;
- Appellant’s February 20, 2018, response;
- Sales and Use Tax Return for November 2017, December 2017, and January 2018;
- Three register Z2 reports for December 4, 2017, December 30, 21017, and February 4, 2018;
- Peter’s Seafood 3-Month Sales Excel worksheet;
- Thirty-three invoices and receipts;
- Georgia Sales Tax Registration;
- Garden City 2017 Business Occupation Tax Certificate Business license; and
- UPS label and tracking information.

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

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time the Retailer Operations Division rendered its decision. It must be made clear that the purpose of this review is not to determine the firm’s eligibility for SNAP participation. Rather it is solely to determine whether or not the firm cooperated with the reauthorization process.

With its administrative review request, Appellant provided a large amount of evidence in an attempt to show that the firm was eligible to remain authorized to accept SNAP benefits. The three month summary report did not indicate which shares of the firm’s sales are from heated or prepared foods, non-foods, accessory foods, staple foods, and charges for food heating services. In addition Appellant did not provide the actual sales receipts for three months to show the actual gross retail sales. Because Appellant did not provide the documentation as requested, it is the determination of this review that the decision to withdraw the firm’s authorization was appropriate and was made in accordance with SNAP regulations at 7 CFR § 278.1(n).

It should be noted that in this case, the term “failed to cooperate” simply denotes that the Appellant did not submit sufficient information to enable the Retailer Operations Division to make an eligibility determination. It does not imply that the firm was unwilling or reluctant to provide the required information.

It should also be noted that the agency’s policy regarding minimum documentation standards has been modified somewhat since the time the withdrawal decision for Peter’s Seafood was made. The modified policy no longer specifically states that a minimum of three months of sales data/receipts is required. Additionally, because there is not a required duration period for withdrawals made in accordance with 7 CFR § 278.1(n), a new application for SNAP participation may be submitted at any time.

CONCLUSION

The contentions and evidence presented by the Appellant are not sufficient to prove that the withdrawal decision made by the Retailer Operations Division was inaccurate or that it should be reversed. Appellant offered no evidence that it provided the sales receipt documentation which the Retailer Operations Division determined was necessary for an eligibility determination.

On the basis of the analysis above, the decision by the Retailer Operations Division to withdraw the authorization of Peter's Seafood to participate as a retailer in SNAP is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted at any time.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 USC § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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 the 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 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.

Mary Kate Karagiorgos
Administrative Review Officer

June 12, 2018