

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

Phillips' E&N Seafood,

Appellant,

v.

Case Number: C0214608

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service, finds there is sufficient evidence to support the determination by the Retailer Operations Division to deny the application of Phillips' E&N Seafood (hereinafter Appellant) 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 Title 7 of the Code of Federal Regulations (CFR) § 278.1(b)(1), in its administration of the SNAP, when it denied the application of Appellant to participate in SNAP by letter dated November 15, 2018

AUTHORITY

According to 7 U.S.C. § 2023 and the 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

In a letter dated November 15, 2018, the Retailer Operations Division informed Appellant that its application to participate as an authorized retailer in SNAP was denied because it did not meet the definition and eligibility requirements of a retail food store established by Federal regulations at 7 CFR § 271.2 and 278.1(b)(1). This action was taken because the Retailer Operations

Division had determined the Appellant firm was primarily a restaurant and as such failed to meet the definition of an eligible firm. This denial action was based on observations during an onsite store visit on November 1, 2018, as well as information provided on and in support of the firm's retailer application.

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 § 278.1(k)(2). Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

By letter postmarked November 30, 2018, Appellant appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received from Appellant.

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 Part 278.1(k)(1) and Part 278.1(l)(1) establish the authority upon which the application of any firm to participate in SNAP may be denied if it fails to meet the definition of an eligible firm.

7 CFR § 271.2 states, in part, that: 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

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv), Ineligible Firms, which states, in part, that: 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.

Section 9 of the Food and Nutrition Act of 2008, as amended, states in part, that: 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.

APPELLANT'S CONTENTIONS

The following may represent a summary of 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:

- The FDA states that cold food must be 40 degrees and below and the firm's cold seafood platters meet this requirement;
- The platters are prepared out of a licensed commercial kitchen with over 500 SF of space;
- Because the kitchen is in a church, the owner was discriminated against and the denial is invalid; and,
- With no reasonable explanation other than an invalid argument stating that the firm does not meet the requirements of a retail food store. There are several locations that accept SNAP for cold foods which are prepared in a commercial kitchen so the firm's environment is no different.

Appellant submitted no evidence or other rationales in support of these contentions.

ANALYSIS AND FINDINGS

The authorization of a firm to participate in SNAP must be in accord with the Act, as amended, and regulations. These 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 determination of the Retailer Operations Division, and as such it is limited to consideration of the relevant facts and circumstances that existed at the time of the denial determination.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) state, in part, that, "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. 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 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." As previously noted in the Controlling Law section, 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 SNAP regulations.

The FNS store visit conducted on November 1, 2018, confirms the firm is set-up primarily to sell hot and/or cold prepared foods that are consumed on the premises or sold for carryout and require no additional preparation. The store visit report and photos show the firm is primarily a carryout restaurant with a commercial kitchen/food prep area as well as a menu advertising hot prepared food. The store visit report also notes that the firm offered no staple food items for sale with the firm being deficient in all four staple food categories.

Appellant contends that the firm should be authorized because the cold platters are properly refrigerated and that there are other SNAP retailers selling cold foods prepared in a commercial kitchen that are no different. Appellant also contends store ownership was discriminated against because the firm is located in a church kitchen.

For the purpose of determining whether a firm is a restaurant under SNAP regulations, the issue is not where the food is prepared, the fundamental issue is whether the firm has more than 50 percent of its total gross retail sales in the combined sales of heated and/or cold prepared foods, including foods cooked or heated after purchase. Appellant's SNAP retailer application dated October 17, 2018, states that the majority of its sales are from hot and/or cold prepared foods. Specifically, the application shows total estimated gross retail sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with hot and/or cold prepared food sales accounting for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or 68.96 percent of the firm's total gross retail sales. Since the firm has more than 50 percent of total gross retail sales in the sale of hot and/or cold prepared foods it is classified as a restaurant under SNAP regulations making it ineligible for SNAP retailer authorization. A review of the store visit documentation including a staple food inventory, store layout, and operating hours of noon-3:00 PM on Thursday-Friday and closed the other days further supports the USDA determination that the firm is primarily a carryout restaurant selling hot and/or cold prepared foods.

The purpose of the SNAP, as stated in the Food and Nutrition Act of 2008, is to permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation. As evidenced by the FNS store visit report and photos, the Appellant firm sells no staple or accessory food items, solely offering hot or cold platters of prepared food, and therefore does not meet the regulatory definition of a retail food store. A retail food store is defined at 7 CFR § 271.2 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 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.”

Based on the above definition and discussion, the Appellant firm is clearly not a retail food store as it sells no staple or accessory foods and only offers two types of hot or cold prepared platters. While other SNAP authorized retailers may sell cold prepared foods, they must have less than 50 percent of their total gross sales in hot and/or cold prepared foods and also must qualify under Criterion A or under Criterion B as defined above in order to become authorized as a SNAP retailer.

Appellant’s SNAP retailer application dated October 17, 2018, was reviewed in accordance with applicable SNAP laws and regulations and was correctly denied because it did not meet the definition and requirements of a retail food store as set forth in 7 CFR § 278.1(b)(1). However, ownership has the right to pursue any such allegations of discrimination directly with the USDA office which handles such matters. If ownership wishes to file a Civil Rights program complaint of discrimination with USDA, the USDA Program Discrimination Complaint Form, found online at http://www.ascr.usda.gov/complaint_filing_cust.html, should be completed. The form may also be requested by calling (866) 632-9992. Ownership may also write a letter containing all of the information requested in the form. The completed complaint form or letter should be mailed to U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue, S.W., Washington, D.C. 20250-9410. Any such allegations of discrimination will be handled by that office independently of this administrative review.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny the application of the Appellant firm to participate as an authorized SNAP retailer is sustained.

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 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.

ROBERT T. DEEGAN
Administrative Review Officer

May 15, 2019