

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

Plaza Fish Market,

Appellant,

v.

Case Number: C0211767

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), has decided that there is sufficient evidence to support a finding that the Retailer Operations Division (Retailer Operations) properly denied the application of Plaza Food Market (Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it denied the retailer application of Appellant to participate as an authorized SNAP retailer.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that a food retailer 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

Appellant applied to participate in SNAP as an authorized retailer on June 28, 2018. In a letter dated August 6, 2018, Retailer Operations informed Appellant that the firm was a SNAP ineligible restaurant, because more than 50 percent of its total gross retail sales are from heated foods and/or prepared foods. This denial was based on evidence obtained during a store visit on July 30, 2018, as well as information provided on the firm's retailer application. The letter also informed Appellant that it could not submit a new application to participate in SNAP for a period of six months from the effective date of the denial as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter dated August 10, 2018, Appellant requested and administrative review of Retailer Operations' denial of its SNAP application. The request for administrative review was granted in a letter dated August 17, 2018.

STANDARD OF REVIEW

In appeals of adverse action, such as an application denial, 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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

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 promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k) reads, in relevant part:

FNS shall deny the application of any firm if it determines that: (1) 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

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.]

7 CFR § 278.1(k)(2) reads, in relevant part:

... 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.

Regulatory Change

Foods heated after sale were at one time considered to be SNAP eligible. However, due to a recent change in Federal regulations, foods heated after sale are now considered to be SNAP ineligible in the same manner as foods sold hot at the point of sale. On December 15, 2016, FNS published a final rule entitled “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)” at 81 Federal Register 90675. This final rule added the language to existing regulations clarifying that foods heated or cooked after sale would be considered in determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

APPELLANT’S CONTENTIONS

In a written request for administrative review, Appellant made the following summarized contentions, in relevant part:

- As a new business owner of this fish market, there were areas of the application process that were misunderstood and I wrote the incorrect amount of sales in the sales category. Owner provided updated sales information, check books, and receipts to support case.
- Store is a fish market, primarily selling fresh, raw fish to customers. Though we do sell some foods, sodas, and other non-alcoholic beverages, we are not a restaurant. Owner provided images of the market’s interior as supporting evidence that it is not a restaurant.
- Business has been affected dramatically. Fish market has been in business for over two decades and accepted EBT. Business is receiving numerous complaints from EBT customers since EBT stopped.

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

ANALYSIS AND FINDINGS

The central issue in this case is whether Plaza Fish Market is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). In reaching its decision to deny the firm’s application, Retailer Operations relied upon the firm’s application, the store visit report, and documents provided by the Appellant. A review of the entire case record indicates by a preponderance of the evidence that Retailer Operations properly determined that Plaza Fish Market does not qualify for SNAP as it is primarily a restaurant.

As noted above, there has since been a regulatory change impacting “you buy, we fry” firms. Foods heated after sale were at one time considered to be SNAP eligible. However, due to a recent change in Federal regulations, foods heated after sale are now considered to be SNAP ineligible in the same manner as foods sold hot at the point of sale. On December 15, 2016, FNS published a final rule entitled “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)” at 81 Federal Register 90675. This final rule added the language to existing regulations clarifying that foods heated or cooked after sale would be considered in determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

The Appellant's application received on June 28, 2018, initially provided estimated 2018 gross retail sales figures. Appellant self-reported 80 percent of the firm's gross retail sales were from hot and/or cold prepared foods and staple food sales accounted for only 14 percent of estimated gross retail sales. Therefore, on the face of the application, the firm was a SNAP ineligible restaurant as defined under 7 CFR § 271.2 and 7 CFR § 278.1(b)(1)(iv). Appellant contends that he is a new business owner, misunderstood the SNAP retailer application, and provided incorrect sales estimates. Appellant submitted new sales data on a corrected page 3 of the application. Appellant estimates 55 percent of sales are from staple foods, 2 percent from accessory foods, and 43 percent from hot foods. Appellant provided two check books and receipts as evidence of raw and prepared fish sales dated August 23 – August 25, 2018. Appellant contends that the average raw fish purchases in July and August 2018 was 56 percent and 44 percent was prepared upon the customer's request. The receipts Appellant submitted as evidence were hand written and appear to have been created after the fact. None of the hand written receipts have any dates, which is key in tracking and reporting monthly sales, nor any proof that the sales were actual fresh fish sales. No supporting sales ledgers, Z tapes, or cash register tapes were provided to support the hand written receipts. None of the receipts showed any tax which would mean 100 percent of sales were from fresh fish. This is unrealistic based on the setup of the store. While Appellant contends he made a mistake and reported 80 percent of his sales as hot foods and self-declared himself as a restaurant, Appellant provided no evidence to support the revised application sales of 55 percent in staple foods, 43 percent in hot foods, and 2 percent in accessory foods. Retailer Operations properly determined that the firm is a restaurant as defined by SNAP regulations at 7 CFR § 271.2 and 7 CFR § 278.1(b)(1)(iv).

The case record documents that in reaching a denial decision, Retailer Operations also considered information obtained during a July 30, 2018 store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. Through the store visit report and photographs, Retailer Operations determined that the firm likely has the majority of its gross retail sales in hot and cold prepared foods, primarily fish. The store photos document that Appellant has a large kitchen and food preparation area with three workers designated to taking food orders, food preparation, and cooking. There are coolers with raw, fresh fish. There are two tables for customers to dine in, and several chairs for customers to sit on while waiting for their hot food orders. Inside signage displays lunch, dinner, and combo specials, side items, and family pack menu items that are all hot, heated, or cold prepared food not intended for home preparation and consumption. Outside signage is You Buy, We Fry. An internet search markets Appellant as a restaurant. Appellant submitted additional store photos as evidence that firm is not a restaurant. However, these photographs are not significantly different than those in the case record and tend to support the decision made by Retailer Operations that the firm is a SNAP ineligible restaurant.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, in part “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. [Emphasis added.] A preponderance of

the evidence supports the determination made by the Retailer Operations Division that the Appellant firm is an ineligible restaurant as defined under SNAP regulations.

Appellant contends that business has been affected dramatically. The fish market has been in business for over two decades and Appellant is receiving numerous complaints from EBT customers. Appellant wants to continue to serve fresh, raw fish to those people who shop with EBT. Unfortunately, these contentions do not provide a valid basis for reversal of Retailer Operations' denial determination. A store may only accept SNAP benefits if it currently meets the minimum eligibility criteria for authorization.

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 Retailer Operations. 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 Retailer Operations. 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, 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 analysis above, the decision by Retailer Operations to deny the SNAP application of Plaza Fish Market is sustained. The regulations clearly state the criteria that a store must meet in order to be authorized for the SNAP. There are no exceptions to these requirements. In accordance with 7 CFR § 278.1(k)(2), Appellant shall not be eligible to submit a new application for SNAP authorization until six (6) months after August 6, 2018, which is the effective date of the denial decision.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 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 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, FNS is 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.

Kim Dameron
Administrative Review Officer

March 20, 2019