

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

Read Seafood,

Appellant,

v.

Case Number: C0216714

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support that the Retailer Operations Division (Retailer Operations) properly imposed the withdrawal of the authorization of Read Seafood (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 7 CFR § 278.1(n) in its administration of the SNAP, when it withdrew the authorization of Appellant to participate as a SNAP retail food store.

AUTHORITY

7 U.S.C. § 2023, and the 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 the FNS.

CASE CHRONOLOGY

FNS regulations require that firms be reauthorized on a set schedule. As part of this process, the owners were requested to complete a reauthorization application. A FNS-contractor conducted an onsite visit December 15, 2018, to ascertain Appellant's continued eligibility to participate in the SNAP. By letter dated March 12, 2019, the owners were requested to send additional information for the reauthorization process of Appellant to proceed.

By letter dated March 25, 2019, the owners were informed that they did not provide the information requested by the due date established by Retailer Operations. In accordance with the SNAP regulations at 7 CFR § 278.1(n), FNS may withdraw the authorization of any firm which fails to cooperate in the reauthorization process. Failure to cooperate may include non-response to a request for information, failure to submit information timely, or submission of unclear or incomplete information in response to a request.

One owner requested administrative review of the withdrawal action by undated letter postmarked March 29, 2019. The appeal was granted by letter dated April 5, 2019. Additional information was provided by mail postmarked April 11, 2019.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means the 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 not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in Section 14(a)(5) of the Food and Nutrition Act of 2008, as amended, and 7 U.S.C. § 2018. The SNAP regulations at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008.

7 CFR § 271.2 states that Retail Food Store means: “An establishment 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. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared

inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.”

7 CFR § 271.2 states: “Staple food means 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. 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) states: “(A) An establishment shall normally be considered to have food business of a nature and extent that 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 as defined in § 271.2 of this chapter, including perishable foods in at least three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).”

7 CFR § 278.1(b)(1)(ii) provides that for a retail store to qualify for authorization under Criterion A, a firm shall: “(A) Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, 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 and at least one variety of perishable foods in at least three staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement.” 7 CFR § 278.1(b)(1)(ii)(A) of the SNAP regulations as currently implemented define continuous basis as offering for sale 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 on any given day of operation.

7 CFR § 278.1(b)(1)(ii)(B) states that in order to qualify under Criterion A firms shall: “Offer for sale perishable staple food items in at least three staple food categories. Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2-3 weeks.”

7 CFR § 278.1(b)(1)(ii)(C) states that in order to qualify under Criterion A firms shall: “Offer a variety of staple foods which means different types of foods within each staple food category.

Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.”

7 CFR § 278.1(b)(1)(iii) provides that to qualify for authorization under Criterion B: “Firms must have more than 50 percent of their total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees, and entertainment, sports, games income. However, a fee directly connected to the processing of staple foods, such as raw meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B.”

7 CFR § 278.1(b)(1)(iv) states: “Ineligible firms: 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. New applicant firms that are found to be ineligible will be denied authorization and authorized firms will be withdrawn from program participation. Ineligible firms under this paragraph include, but are not limited to, stores selling only accessory foods, including spices, candy, soft drinks, tea, or coffee; ice cream vendors selling solely ice cream; and specialty doughnut shops or bakeries not selling bread. In addition, 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.”

7 CFR § 278.1(l)(1) Withdrawing authorization reads in part: “FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons. (i) The firm’s continued participation in the program will not further the purposes of the program; (ii) The firm fails to meet the specifications of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section; (iii) 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 requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section.”

7 CFR § 278.1(n) deals with periodic reauthorization and states: “At the request of FNS, a retail food store 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 the withdrawal of the firm’s approval to participate in the program.”

APPELLANT’S CONTENTIONS

All contentions have been considered in rendering this decision.

- The letter was dated for 03/12/2019, but I did not receive the letter until the date of 03/23/2019. I would not have been able to gather all the necessary information for you by the 22 of March if I did not have the letter in my presence.
- I will be able to provide you all with the paperwork requested for.
- As of now, I can provide you with the licenses and ownership information, and the rest will follow not to [sic] long after.

In addition to copies of USDA letters sent to them, the owner(s) provided copies of business licenses and permits.

ANALYSIS AND FINDINGS

The authorization of a store to participate in the SNAP must be in accord with the Act and the regulations as amended; those requirements of law cannot be waived. The reauthorization process is to ensure that authorized retailers continue to meet the eligibility criteria for SNAP authorization. The purpose of this review is to validate or to invalidate the decision of Retailer Operations. Thus, it is limited to consideration of the relevant facts at the time Retailer Operations rendered its decision.

On review, the owners provided no additional evidence to support the sale of staple foods as a percentage of total gross retail sales at Appellant as compared to cold or hot prepared foods and heated foods. Appellant has to burden to provide sufficient evidence within the timeframe granted, to support that it is a retail food store eligible to participate in the SNAP. This burden has not been met. The owners were requested to provide: “End-of-day sales summary reports that are electronically generated by your firm’s cash register system, such as Z-tapes, to verify 3 representative months of actual retail sales at your firm. An overview document (e.g., an Excel spreadsheet) that you create which totals the 3 months of end-of-day sales summary reports and breaks these actual retail sales down into the following categories: 1) heated or prepared foods, 2) non-foods, 3) accessory foods, 4) staple foods, and 5) charges for food heating services (if a food is both an accessory and a heated or prepared food, it should be counted as a heated or prepared food). Verification of total gross retail sales for the last 1 year period (State Sales and Use tax records, income tax records, or other records verifying total gross retail sales income).”

Based on the onsite store visit, Retailer Operations determined that the firm appears to be a restaurant, does not meet Criterion A or B, and is an ineligible firm. 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). Establishments that include separate businesses that operate under one roof and share the following commonalities: ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores.

As indicated in the March 25, 2019, withdrawal letter, FNS may withdraw the authorization of any firm which fails to cooperate in the reauthorization process. While the owners submitted

license information, they failed to submit information timely regarding the firm's sales figures. The additional sales information was required for the reauthorization process to continue so that Retailer Operations could determine Appellant's eligibility to transact SNAP benefits as a retail food store. Absent the presentation of the requested sales information by ownership, the withdrawal is hereby sustained. There is not a required duration period for this withdrawal. As such, a new application for SNAP participation may be submitted at any time.

CONCLUSION

Based upon a review of all of the evidence in this matter, the decision by Retailer Operations to withdraw the authorization of Appellant because the firm failed to cooperate with the reauthorization process, is sustained. The withdrawal of the firm will not adversely impact any application the owners' may wish to submit in the future. The owners may reapply at any time after the withdrawal by submitting an online application as directed in the March 25, 2019, letter. If you have operational questions about this matter, please contact Danielle Chandler at (804) 309-3880.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008, and to the regulations at 7 CFR § 279.7 with respect to applicable rights to judicial review of this determination. Please note that if 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 Appellant's owners 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, 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.

M. Viens
Administrative Review Officer

May 7, 2019