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

Rose Hill Seafood Inc,

Appellant,

v.

Case Number: C0209589

Retailer Operations Division,

Respondent.

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 Rose Hill Seafood Inc (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) Part 278, when it withdrew the authorization of Appellant to participate as a SNAP retailer by letter dated May 23, 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 May 23, 2018, the Retailer Operations Division withdrew Appellant's authorization to participate as a retailer in SNAP because the firm is not a retail food store as defined by the SNAP regulations. Specifically, the withdrawal letter states that firms that have more than 50 percent of their total gross sales in heated foods and/or prepared foods not intended for home preparation and/or consumption are not eligible to participate as retail food stores. The

letter states the firm is primarily a restaurant based on information provided in Appellant's reauthorization application and the contractor's store visit report of April 19, 2018. As the firm failed to meet the eligibility criteria 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 in Section 9 of the Food and Nutrition Act of 2008, as amended.

Appellant appealed the Retailer Operations Division's decision by letter dated May 24, 2018, and requested an administrative review of this action. The appeal was granted and implementation of the withdrawal held in abeyance pending completion of this review. Subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action 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(l)(1) establishes the authority upon which the authorization of any firm to participate in SNAP may be withdrawn if it fails to meet the definition of an eligible firm.

The 7 CFR § 271.2 definition of Retail Food Store states, in part: "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 § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv) which states, in part, that, "Firms 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 . . . This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout.

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 firm has participated in SNAP for more than 20 years and its business model has not changed. The business consists of a retail fresh seafood market, the initial business, and a restaurant that was started later. SNAP is only accepted in the seafood market and while the market and restaurant are physically adjacent to each other, they have separate checking accounts, independent record keeping/accounting systems, separate entrances, and separate phone numbers. All retail sales and EBT sales from the market are deposited into its own checking account separate and apart from the restaurant. Please note that market gross sales are listed separate from all other gross sales. The business license lists the fish and seafood market as a separate entity, apart from the full service restaurant;
- Each reauthorization, the same questions and misconceptions arise as evidenced by the USDA letter dated September 6, 2011, withdrawing the firm's SNAP authorization based on it being a restaurant. During the last review [2011], a civil action was filed by store ownership in the District Court of the Middle District of Georgia. After an extensive review by the court, it was determined that the market and restaurant were indeed separate and that the market should not lose its authority to redeem SNAP benefits. The firm has made every effort since to carefully follow the terms of that agreement and has continued to operate according to the agreement reached and outlined in the letter dated October 25, 2012;
- The only items purchased with EBT funds are staple foods. The firm is extremely careful to follow SNAP guidelines for approved purchases and SNAP customers are not allowed to purchase heated or prepared foods, non-foods, accessory foods, or charge for food heating services with EBT;
- Copies of invoices for recent purchases are included. The firm maintains a variety of grocery items in addition to the wide selection of fish, seafood, and shellfish items. Grocery items include: lettuce, cabbage, onions, lemons carrots, tomatoes, cucumbers, eggs, buttermilk, cheese, sour cream, butter, various salad dressings, bread, meal, and breading; and,
- The firm is still committed to conducting its business honestly and in accordance with the law and FNS guidelines. The owners have faithfully kept their part of the agreement and hope that they are able to continue to meet the nutritional needs of SNAP recipients.

Appellant submitted copies of the firm's Business License; a Statement of Revenue and Expenses; invoices for recent purchases; the USDA May 23, 2018, withdrawal letter; the USDA September 6, 2011, withdrawal letter, the DOJ October 10, 2012, letter; the Harp Poydasheff October 24 and October 25, 2012, letters to the US Attorney's Office outlining the agreement; and the USDA November 9, 2012, withdrawal rescission letter in support of these contentions.

ANALYSIS AND FINDINGS

The authorization of a business 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 decision 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 decision.

The Agricultural Act of 2014 (the 2014 Farm Bill) amended the Food and Nutrition Act of 2008 (the Act). One of the amendments changed the definition of "Retail Food Store" for co-located firms to specify that multiple businesses that operate under one roof will only be considered a single firm for purposes of determining SNAP retailer eligibility if the businesses have common ownership, sale of similar food, and shared inventory. This amendment was incorporated into SNAP regulations and became effective on October 16, 2017. The firm's reauthorization application and the supporting documentation provided by Appellant as well as the FNS store visit show that the co-located seafood market and restaurant meet this criteria and therefore both entities were evaluated as a single firm to determine SNAP eligibility. Contrary to Appellant's contentions, USDA has honored the 2012 agreement and did, in fact, follow the standard re-application procedure as stated in both the October 24 and the October 25, 2012, letters to the US Attorney's Office by adhering to the law and regulations governing the authorization of retailers in reaching its decision. It is further noted that the possibility of the law being changed was recognized and incorporated into the second to last paragraph of the October 25, 2012, letter.

For the purpose of determining whether a firm is a restaurant, the issue is not whether the firm has available for sale SNAP-eligible food. The central issue is whether actual sales of prepared foods comprise more than 50 percent of the store's total gross retail sales. SNAP regulations at 7 CFR § 278.1(b)(1)(iv) state that 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. The sale of hot and/or cold, ready-to-eat prepared foods cannot be included in determining if staple foods account for more than 50 percent of overall sales since these items do not count as staple foods. These typically include such items as cold sandwiches and salads. Additionally, foods that are sold uncooked and then heated by the retailer after purchase, sometimes referred to as the "you buy, we fry" business model, also cannot be included in determining if staple foods sales account for more than 50 percent of overall sales.

The documentation provided by Appellant shows that the firm's Columbus Georgia Business License identifies the firm as a Full Service Restaurant with the following allowed activities: fish & seafood market, brown bag permit, and full service restaurant. Additional documentation shows that the sale of hot food represents an average of 67 percent thereby exceeding the 50 percent threshold and classifying the firm as a restaurant. Restaurants are not eligible for SNAP participation as retail food stores.

CONCLUSION

Based on a review of the evidence in this matter, the determination by the Retailer Operations Division to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and SNAP regulations, the withdrawal action will become effective 30 days after receipt of this decision.

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

September 17, 2018