

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

Salty Wave Seafood Market,

Appellant,

v.

Case Number: C0215783

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 Salty Wave Seafood Market (“Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program.

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(l)(1)(iii), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied the application of Appellant to participate in SNAP in a letter dated February 8, 2019.

AUTHORITY

According to 7 U.S.C. § 2023 and its 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

The administrative record reveals that Appellant applied for authorization to participate in SNAP as an authorized retailer on March 21, 2014. The Appellant was authorized to participate in SNAP on April 25, 2014.

On December 18, 2018, the Retailer Operations Division sent a letter to Appellant indicating that the documentation in its possession indicated that the firm operated as a restaurant and requested additional information that would support Appellant's contention that it was not a restaurant.

Appellant replied to the Retailer Operations Division in a subsequent letter.

In a letter dated February 8, 2019, 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 Appellant's application and the contractor's store visit report dated October 5, 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.

In a letter dated February 22, 2019, Appellant appealed the Retailer Operations Division decision and requested an administrative review of this action. The appeal was granted.

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 § 278.1(l)(1) establishes the authority upon which the application of any firm to participate in SNAP may be denied if it meets the definition of an ineligible firm.

7 CFR § 278.1(k)(1) references 7 CFR § 278.1(b)(1)(iv) which reads, in part:

Firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross retail sales in hot and/or cold prepared foods not intended for home preparation and consumption, 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.

The definition of retail food store at 7 CFR § 271.2 states, in part:

Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption, and require no additional preparation, are not eligible for SNAP participation as retail food stores.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- Appellant's POS system requires that half of its sales be live and not returned for cooking. Appellant entered sales totals on its SNAP reauthorization application incorrectly. Appellant provided a 403-page sales report and an Excel spreadsheet breaking down sales by category.
- Appellant is primarily a seafood market that also sells produce.
- Appellant is not a restaurant. Appellant does not have servers or hostesses, and does not sell alcohol.
- Withdrawal of authorization would pose a hardship to local clientele who rely on the firm.
- Appellant does not allow soups or prepared foods to be purchased with SNAP benefits.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant contends that the firm is not a restaurant, but a retail store. Appellant stated it does not have servers or hostesses, and does not sell alcohol. 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. There is no doubt that staple food items may be delivered to the store fresh, raw and unprepared, and are available to customers that way. However, the store presents itself and is set up primarily as a restaurant; thus, it is reasonable to expect that fresh food products do not outsell prepared and cooked food products at this establishment.

Appellant stated it not allow soups or prepared foods to be purchased with SNAP benefits. Sales of hot foods are ineligible for purchase with SNAP benefits. Prepared foods, whether sandwiches or cold, steamed clams, are eligible for purchase with SNAP benefits. However, firms who primarily sell prepared foods are considered to be restaurants.

In regards to Appellant's contention that the store sells a great deal of fresh and unprepared food, the documentation presented does not support that the majority of the firm's business is in the sale of fresh foods for home preparation and consumption. There is no evidence in the inspection report and photographs of the October 5, 2018 store visit, nor in the information provided by

Appellant, that indicates that Appellant is anything other than primarily a restaurant. Appellant provided a 403-page sales report, but this report did not breakout sales of prepared and cooked foods. Appellant provided an Excel spreadsheet that did breakout sales. The basis for the sales amounts included in the spreadsheet are unclear, as these amounts were not included in the POS reports. Appellant stated that its POS system requires that half of its sales be live. The Excel spreadsheet provided by the firm indicates that live bushel crabs constituted a third of Appellant's sales, and outsold steamed bushel crabs by a ratio of more than 8 to 1. Yet, there was no live seafood evident at the time of the store visit. The large menu display board and menu show that Appellant largely sells prepared foods and meal combos. The layout of the store has tables and chairs for dining on the premises, typical of a restaurant. Appellant's application states that the majority of its sales are from cooked and prepared foods.

Hardship to SNAP Participants

Appellant has requested another chance because the store is located in an area where many people use SNAP. SNAP regulation 7 CFR § 278.6(f)(1) provides for civil money penalties in lieu of disqualification in cases where disqualification would cause hardship to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. However, because Appellant is a restaurant it is not an eligible retailer and 7 CFR § 278.6(f)(1) does not apply.

Summary

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 the Retailer Operations Division. 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 fresh, 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 discussion above, the determination by the Retailer Operations Division to withdrawal of authorization of Salty Wave Seafood Market to participate as an authorized SNAP retailer is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and its

associated regulations, this withdrawal action shall become effective 30 days after delivery of this letter.

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 Appellant desires a judicial review, 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.

RICH PROULX
Administrative Review Officer

April 8, 2019