

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

T J Seafood,

Appellant,

v.

Case Number: C0214496

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 withdraw the authorization of T J 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) Part 278, when it withdrew the authorization of the Appellant firm to participate in SNAP by letter dated November 16, 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 16, 2018, the Retailer Operations Division withdrew Appellant’s authorization to participate as an authorized 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 dated October 19, 2018, and the contractor’s store visit report of September 19, 2018.

Appellant appealed the Retailer Operations Division's decision by letter dated November 27, 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 dated December 17, 2018, 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 withdrawn 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.

7 CFR § 278.1(l)(1) states, in part, that: 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 specification 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...for the time period specified in paragraph (k)(2) of this section.

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 firm has mainly raw fish for sale and sales include raw and cooked fish. There are no other groceries for sale; and,
- Ownership has obtained a separate business license for the raw food side of the business.

Appellant submitted a sketch of the firm's layout, photos of stock, inventory invoices, an inventory of stock, a retail food establishment inspection report by the South Carolina Department of Health, a retail license, a business license, information about the owner, and a handwritten sales breakdown showing 100 percent uncooked fish 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 withdrawal 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 September 19, 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 photographs show the firm is primarily a restaurant with a commercial kitchen/food prep area as well as menus advertising a wide range of hot and/or cold prepared, foods. The store visit report also notes that the quantity

and variety of staple food items offered for sale is extremely limited with the firm only stocking eligible foods in the meat, poultry, or fish staple food category.

For the purpose of determining whether a firm is a restaurant under SNAP regulations, the issue is not whether the firm has available for sale uncooked or raw SNAP-eligible food, the fundamental issue is whether the firm has more than 50 percent of total gross retail sales in the combined sales of heated and/or cold prepared foods, including foods cooked or heated after purchase. There is no doubt that uncooked or raw staple food items may be available to customers. However, the Appellant's SNAP retailer authorization application dated October 19, 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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in 2017 with hot and/or cold prepared food sales accounting for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) 51.0 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. The fact that the firm sells uncooked or raw food and then cooks the food for a small fee would increase the amount of hot and/or cold prepared food sales. A review of the store visit documentation including a staple food inventory, store layout, and operating hours of 11 AM-9:30 PM Tuesday-Saturday and closed on Sunday and Monday which further support the USDA determination that the firm is primarily a restaurant selling hot and/or cold prepared foods. That a firm may have been SNAP authorized under a prior owner has no impact on the eligibility of the firm currently under review.

Regarding the owner having now obtained a separate business license for the raw food side of the firm, SNAP regulations at 7 CFR Part 271.2 under the definition of a retail food store address multiple firms operating at the same location. Specifically, establishments that include separate businesses operating under one roof and sharing 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. In other words, if a firm is selling raw fish and is located under the same roof as a restaurant and both firms have the same owner(s), both sell similar foods, and both share inventory, then both firms would be treated as a single firm to determine SNAP retailer eligibility. As previously stated, the purpose of this review is limited to consideration of the relevant facts and circumstances that existed at the time of the withdrawal determination and cannot make an eligibility determination regarding a new firm.

CONCLUSION

Based on a review of the evidence in this matter, the determination by the Retailer Operations Division to withdraw the authorization of the Appellant firm to participate as an authorized SNAP retailer is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and associated 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

May 14, 2019