

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

1029 Simpson Deli & Grocery Corp.,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0223368

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against 1029 Simpson Deli & Grocery Corp. (hereinafter “Appellant”) by FNS’s Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a six-month disqualification against 1029 Simpson Deli & Grocery Corp.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that “[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

FNS records show that the Appellant firm, 1029 Simpson Deli & Grocery Corp., was initially authorized for SNAP participation as a convenience store on April 26, 2002. Between May 8, 2019 and June 7, 2019, two FNS contractors conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigation report documented that personnel at 1029 Simpson Deli & Grocery Corp. accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold plastic cutlery and foam plates in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible food.

In a letter dated September 24, 2020, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the acceptance of SNAP benefits in exchange for ineligible merchandise warranted a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

On October 5, 2020, the Appellant responded to the allegations, apologizing for the alleged violations while simultaneously claiming that all of its employees denied conducting any violative transactions. The Appellant further indicated that it would take the necessary steps to prevent any type of violations from occurring at the store. The Appellant stated that it routinely trained all employees regarding the rules of SNAP and provided documentation of two training sessions that were apparently conducted in 2019 and 2020. As evidence of the firm's training activities, the Appellant noted that twice in the investigation report, the clerk on duty refused to exchange SNAP benefits for cash (i.e. trafficking). Finally, the Appellant requested that if avoiding a penalty was not possible FNS might consider imposing a CMP instead of disqualification.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated December 10, 2020. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the charge letter and that a six-month disqualification penalty would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that consideration for a hardship CMP was given, but the Appellant was not eligible for a CMP because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked December 21, 2020, the Appellant appealed the agency's determination by requesting an administrative review. The request was granted and the case was assigned to an administrative review officer. Implementation of the disqualification has been held in abeyance pending completion of this review. On July 12, 2021, the case was reassigned to administrative review officer Jon Yorgason.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(5) establish the authority upon which a six-month disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

7 CFR § 271.2 states, in part:

Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot food and hot food products prepared for immediate consumption...

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store...if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations....

Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section. [Emphasis added.]

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

7 CFR § 278.6(e) states, in part:

FNS shall take action as follows against any firm determined to have violated the Act or regulations...The FNS regional office shall:

(5) Disqualify the firm for 6 months if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management.

7 CFR § 278.6(f)(1) states, in part:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm subject to a disqualification is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to [SNAP] households

because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices.

INVESTIGATION DETAILS

During an undercover investigation conducted between May 8, 2019 and June 7, 2019, two FNS contractors completed six compliance visits at 1029 Simpson Deli & Grocery Corp. The agency's record indicates that a report of the investigation was provided to the Appellant as an attachment to the September 24, 2020 charge letter. The investigation report includes Exhibits A through F, and provides full details on the results of each compliance visit. SNAP violations were documented during four of the six visits; specifically, the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the firm allowed the investigators to purchase the following nonfood items:

- One 24-count box of plastic spoons (*Sunset* brand), Exhibit A
- One 24-count box of plastic forks (*Sunset* brand), Exhibit A
- Two 24-count boxes of plastic forks (*Sunset* brand), Exhibit B
- One 40-count package of foam plates (*Better Valu* brand), Exhibit C
- One 24-count box of plastic spoons (*Sunset* brand), Exhibit D
- One 24-count box of plastic forks (*Sunset* brand), Exhibit D

The report indicates that in Exhibits D and F, the clerk on duty did not allow an exchange of SNAP benefits for cash (i.e. trafficking). In Exhibits E and F, the investigator did not attempt to purchase any ineligible items. According to the report, two different clerks conducted the four violative transactions. The charge letter states that the violations that occurred in Exhibits A, B, C, and D warrant a disqualification from SNAP for six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The store's employees are very well-suited for the task of processing EBT transactions. All workers are routinely trained about SNAP rules and regulations. These trainings occur twice a year.
- The clerk's refusal to exchange SNAP benefits for cash in Exhibits D and F is an indication that the firm's employees are aware of SNAP rules.
- The store owner has questioned each employee and they all deny committing the alleged violations.
- Appellant apologizes for the alleged violations and requests reconsideration of the disqualification penalty. A six-month sanction will put the business into financial hardship.
- The owner will continue to take steps to prevent violation from ever occurring.
- Appellant requests a civil money penalty in place of disqualification.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

The Appellant has not provided any evidence to counter FNS's investigation report. While the owner claims to have questioned each of his employees about the allegations, and states that the employees denied committing any violations, he has not offered any proof of these claims. Conversely, the evidence in the case record shows that transactions for the amounts and dates listed in the report did, in fact, take place, suggesting that the transactions transpired as the investigators' claimed. Without compelling documentation or evidence from the Appellant to show that the transactions did not occur as described, this review finds through a preponderance of the evidence, that SNAP violations likely did occur as charged and a penalty is warranted.

Employee Training

The Appellant argues that the store's employees are well-suited for the task of processing EBT transactions and contends that all workers receive semiannual trainings concerning SNAP rules and regulations. In its response to the charge letter, the Appellant submitted two training documents showing that employees had participated in SNAP training in 2019 and 2020. The Appellant also argues that the clerk's refusal to engage in trafficking in Exhibits D and F is evidence that the employees are aware of SNAP rules.

With regard to these contentions, it should first be noted that the two training documents submitted by the Appellant are dated September 24, 2019 and March 26, 2020. Both dates are after the alleged program violations listed in the investigation report, so they do not offer any evidence that SNAP training had taken place prior to the investigation.

As to the trafficking refusals, it is notable that in Exhibit D, the investigator stated that the clerk did not actually refuse the request for cash, but rather told the investigator that the store was too busy at the time and to come back when it was not so busy. In Exhibit F, the refusal to engage in trafficking is much clearer.

Based on the actions of the clerk in Exhibit F, it is likely that some training related to SNAP had previously taken place. But the existence of a training program, by itself, is not a valid reason to dismiss the charges. In accordance with SNAP regulations, a six-month disqualification is appropriate for violations caused by "carelessness or poor supervision by the firm's ownership or management" (see 7 CFR § 278.6(e)(5)). With program violations being committed by two different clerks on four consecutive visits to the store, it is apparent to this review that employee carelessness or poor supervision was prevalent at this store. Accordingly, this review finds that a six-month disqualification penalty is proper and is entirely in line with SNAP regulations. This penalty is also consistent with sanctions imposed upon other retailers that have committed similar violations.

Remedial Actions to Be Taken

The Appellant contends that it will continue to take steps to prevent violation from ever occurring at the store.

With regard to this claim, it must be made clear that this review is limited to the facts that existed at the time the violations were committed. This review has no authority to consider any subsequent remedial actions that may have been taken or that will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented after the discovery of program violations.

Hardship to Appellant

The Appellant contends that if the disqualification determination is upheld, it will put the firm into a position of financial hardship.

With regard to this contention, SNAP regulations do not permit this review to dismiss or modify a disqualification penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself. To allow an exemption from penalties based on a purported financial hardship to the firm or its ownership would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA. Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program requirements, but also to those retailers who have been disqualified from the program for similar violations.

Hardship to SNAP Households / Civil Money Penalty

The Appellant has requested that if a sanction is necessary, FNS impose a civil money penalty instead of disqualification.

It is true that a CMP is an alternative penalty to disqualification. However, regulations at 7 CFR § 278.6(f)(1) only allow for a CMP to be imposed in limited circumstances. Specifically, the regulation states that a CMP is permitted when a firm's disqualification would cause "hardship" to SNAP households.

While it is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store is disqualified for a period of time and households are forced to use their benefits elsewhere, such inconvenience does not rise to the level of "hardship" unless there are no other comparable SNAP-authorized stores in the area at which customers can shop. The regulation states that hardship to SNAP households occurs when there is "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices" (emphasis added); in such circumstances, a CMP in lieu of disqualification may be considered.

It is the determination of this review that a disqualification of 1029 Simpson Deli & Grocery Corp. would not cause hardship to SNAP households because there are many other shopping options in the area. According to agency records, there are dozens of similarly-stocked or larger SNAP-authorized retail stores located in the vicinity of 1029 Simpson Deli & Grocery Corp., including two large grocery stores and a superstore within one-tenth of a mile. There is also no evidence that the inventory at other stores in the area is not comparably priced. Because hardship conditions do not exist in this case, a CMP in lieu of disqualification cannot be granted.

CONCLUSION

Based on a review of all available information in this case, this administrative review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at 1029 Simpson Deli & Grocery Corp. during a USDA-contracted investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record appears to be specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood merchandise, and in all other critically pertinent details. Furthermore, the contentions and evidence provided by the Appellant do not persuade this review to dismiss or modify the penalty in any way. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, 1029 Simpson Deli & Grocery Corp., is sustained.

In accordance with the Act and regulations, the disqualification penalty shall become effective 30 days after receipt of this decision. A new application for SNAP authorization may be submitted 10 days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

JON YORGASON
Administrative Review Officer

January 6, 2022