

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

1088 Flatbush Deli Inc.,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0223235

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the six-month disqualification of 1088 Flatbush Deli Inc. (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(1) and 7 CFR § 278.6(a) and (e)(5) in its administration of the SNAP, when it imposed a six-month period of disqualification against Appellant.

AUTHORITY

7 USC § 2023 and the 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

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of November 30, 2019, through December 10, 2019. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. As a result of evidence compiled during this investigation, by letter dated March 25, 2020, the Retailer Operations Division charged ownership with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a) and noted the violations warranted a six-month disqualification period. The letter also stated that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a

disqualification. Appellant did not reply to the charge letter. After considering the evidence, the Retailer Operations Division notified Appellant in a letter dated April 15, 2020, that the violations cited in the charge letter occurred at the firm and that a six-month period of disqualification was warranted. The letter stated that eligibility for a hardship CMP was not applicable as there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

By letter dated April 24, 2020, Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination and requested documents under the Freedom of Information Act (FOIA) on April 24, 2020¹. The appeal was granted and implementation of the six-month disqualification has been held in abeyance pending completion of this review. The FOIA office provided counsel with the response to the FOIA request on December 1, 2021. By an e-mail sent on December 9, 2021, counsel was provided until December 20, 2021, to provide any additional information in support of its review request. Counsel did not provide any additional information.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 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 § 278.6(a) states, *inter alia*:

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**, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system . . . (emphasis added)

Section 278.6(e)(5) of the SNAP regulations states, in part, that a firm is to be disqualified for six months:

[I]f 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 § 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.

In addition, 7 CFR § 278.6(f)(1) provides for civil money penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households benefit because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It reads, *inter alia*:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when . . . the firm’s disqualification would cause hardship to SNAP households benefit because there is no other authorized retail food store in the area selling as large a variety of staple food items.

SUMMARY OF CHARGES

1088 Flatbush Deli Inc. is a convenience store originally authorized by FNS on August 17, 2016. During an investigation conducted between November 30, 2019, and December 10, 2019, an investigator conducted four compliance visits at Appellant. A report of the investigation dated January 10, 2020, was provided to Appellant as an attachment to the charge letter. The investigation report included Exhibits A through D, which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during three of the compliance visits and involved the sale of common ineligible items including dishwashing liquid, steel wool pads, kitchen bags, trash bags, air freshener, and multi-purpose cleaner. Upon review, the evidence indicates that Appellant established a record of selling non-food items, as defined by Section 271.2 of the regulations, on multiple occasions as noted in Exhibits A, B, and C furnished with the charge letter.

APPELLANT’S CONTENTIONS

Appellant, through counsel, made the following summarized contentions in its April 24, 2020, administrative review request, in relevant part:

- Appellant denies that that any employees engaged in such activities.
- Approximately 45 percent of the owner’s sales come from SNAP transactions and a disqualification will cause a hardship for Appellant.
- FNS should impose a CMP because it would be a violation of due process to prosecute for alleged violations that occurred without any warning letter to correct any issue.
- The owner has established and implemented an effective compliance policy and program to prevent violations of the SNAP which was in effect at the time of the violations.
- The owner has an exemplary record, and this is the first allegation against the business.
- The majority of customers use Appellant as their primary grocery store.
- The investigator failed to make any effort to determine the identity and name of the clerks.

- The violations involve such insignificant amounts that it raises a question about the appropriateness and credibility of the investigation.
- The time of the entry and departure are redacted and the time is important.
- Any surveillance cameras are self-erasing, and the images taken during the investigative period are no longer available for viewing.
- There is no proof that the transactions occurred because there were no cash register receipts provided and the owner states that cash register receipts are provided.
- The clerk refused to provide cash in exchange for SNAP benefits.
- The inadequacies, inaccuracies and insufficiencies affect the reliability, veracity, and sufficiency of the investigative report.
- A disqualification for any period will adversely affect this business.
- Appellant would not knowingly or intentionally jeopardize the business and livelihood by engaging in illegal activity.

The preceding may represent only a brief summary of the Appellant's contentions presented 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.

ANALYSIS AND FINDINGS

The charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted by an investigator and are thoroughly documented. A complete review of this documentation has yielded no error or discrepancy. The investigation report is specific and thorough regarding the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The documentation presented by the Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm. 7 CFR § 278.6(e)(5) states, as noted above, that FNS shall disqualify a firm for six 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 and poor supervision by the firm's ownership or management.

Investigative Report

Appellant contends there are inadequacies in the report including not having the entry and departure times of each visit; not having the names of the employees that committed the violations; and not having cash register receipts which are alleged to always being provided. Without evidence to the contrary, the report of the investigation appears to be wholly credible and fully documented. The transactions identified on the investigative report unquestionably occurred at the Appellant's store. Thus, the contentions that the investigative report did not include certain details do not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Counsel also explains that its surveillance cameras in the store are self-erasing and any images that were taken at the time of the investigation have since been erased. However, this information is not necessary to determine whether the transactions as reported actually took

place. Every SNAP transaction that occurs at Appellant's firm appears on agency records and confirms the store's SNAP authorization number, the date and time of the transaction, the amount of the transaction, and transaction method. A full list of transactions during the investigative period, including the violative transactions, was provided to Appellant in the agency's official FOIA response. Appellant has offered no compelling information or supporting documentation which would constitute evidence that any relevant detail on the report is incorrect in any substantial respect.

Appellant Hardship

Counsel reports that 45 percent of the owner's sales come from SNAP transactions. Counsel further contends that a disqualification will adversely affect the business and would cause irreparable injury and damage to the owner. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the 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 regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

Civil Money Penalty

Counsel contends that the owner has established and implemented an effective compliance policy and program to prevent violations of the SNAP which was in effect at the time of the violations. Retailers that are charged with trafficking can request a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i). In such cases, retailers must submit evidence to demonstrate that the firm had established and implemented an effective compliance policy to prevent SNAP violations prior to the violations. However, since Appellant was not charged with trafficking, it is therefore not eligible for a trafficking CMP.

Appellant also contends that a six-month disqualification will be a hardship on SNAP households. 7 CFR § 278.6(f)(1) reads, in part, "FNS may impose a civil money penalty as a sanction in lieu of disqualification when . . . 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." The Retailer Operations Division determined that there are 32 other authorized stores located within a 0.4 mile radius of Appellant, including one supermarket and one super store. Thus, in its letter dated April 15, 2020, the Retailer Operations Division determined that a hardship CMP would not be appropriate, as there are other authorized retail stores in the area selling as large a variety of staple foods at

comparable prices. Some degree of inconvenience to SNAP customers is inherent whenever any SNAP authorized retailer is disqualified. For example, the normal shopping pattern of SNAP customers may be temporarily altered during the period of disqualification. Nevertheless, the determination of the Retailer Operations Division that the six-month disqualification of Appellant from the SNAP would not create a hardship to customers, as differentiated from potential inconvenience, is sustained and a civil money penalty in lieu of disqualification is not appropriate in this case.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to impose a disqualification of six months against 1088 Flatbush Deli Inc. from participating as an authorized retailer in SNAP is sustained. In accordance with the Food and Nutrition Act, and the regulations, this penalty shall become effective 30 days after receipt of this letter. A new application for participation in SNAP may be submitted ten 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 7 USC § 2023 and 7CFR § 279.7. 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's owner resides or is 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 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

January 18, 2022