

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

128 M Deli & Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0221270

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA) that there is sufficient evidence to support a finding that a six-month disqualification of 128 M Deli & Grocery (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 investigated the compliance of Appellant with federal SNAP law and regulations during the period of December 19, 2019, through January 11, 2020. 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 February 20, 2020, the Retailer Operations Division charged ownership with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a)

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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.

By letter dated March 3, 2020, Appellant denied the allegations and requested documents under the Freedom of Information Act (FOIA). The FOIA office responded to the request for documents on August 18, 2021. On August 25, 2021, the Retailer Operations Division sent a letter to Appellant's previous counsel to provide its response to the charges. Appellant did not provide anything additional in response.

After considering the retailer's original reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated September 13, 2021, 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 September 22, 2021, Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal was granted and implementation of the disqualification has been held in abeyance pending completion of this review.

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 . . .

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.

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:

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

During an investigation conducted between December 19, 2019, and January 11, 2020, two investigators conducted seven compliance visits at Appellant. A report of the investigation dated January 27, 2020, was provided to Appellant as an attachment to the charge letter. The investigation report included Exhibits A through G 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 dishwashing liquid, steel wool soap pads, Fabuloso multi-purpose cleaner, AJAX cleaner, sandwich bags, and kitchen bags. 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 C, D, and E, furnished with the charge letter.

APPELLANT'S CONTENTIONS

Appellant, through counsel, made the following summarized contentions in its administrative review request dated September 22, 2021, in relevant part:

- The decision to deny the CMP was without considering relevant facts.
- Appellant provides necessary items to the community comprising of numerous apartment buildings and other multi-story housing projects.
- The supermarkets in the area close early in the evening and none of them offer the same unique and nutritious items offered by the store including pressed fresh juice and Boar's Head brand deli items.
- The owner has maintained an exemplary record.
- A CMP should be imposed in lieu of a disqualification because it would be a violation of due process to prosecute this owner for alleged transactions that occurred without any warning letter to correct and cure any perceived issues.
- A CMP is appropriate because the firm has an effective training program.

The preceding may represent only a 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 investigation report documents that the charges of violations are based on the findings of a formal investigation. The transactions cited in the letter of charges are thoroughly documented. A complete review of this documentation has yielded no error or discrepancy. The investigation report is specific and thorough with regard to 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.

No Previous Violations

Counsel reports that Appellant has an exemplary record. A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

Warning Letter

Counsel contends that it would be a violation of due process to prosecute the owner for alleged violations that occurred without any warning letter to correct and cure any issues. It should be noted that a warning letter is not prerequisite to a disqualification. However, the SNAP regulations do provide for a warning letter in some cases. Specifically, 7 CFR 278.6(e)(7) states the following: "Send the firm a warning letter if violations are too limited to warrant a disqualification." As previously stated, the investigative report documented that common ineligible items were exchanged for SNAP benefits on three separate occasions. These violations are not considered "violations that are too limited to warrant a disqualification." Therefore, Appellant's contention does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

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.

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 99 other authorized firms located within a one-mile radius of Appellant. Thus, in its letter dated September 13, 2021, 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. 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

The determination by the Retailer Operations Division to impose a six-month disqualification against 128 M Deli & Grocery 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

February 9, 2022