

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

**12 St. Gourmet Deli Inc.,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0220970**

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**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 12 St. Gourmet 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 investigated the compliance of Appellant with federal SNAP law and regulations during the period of November 22, 2019, through December 22, 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 4, 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

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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 13, 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 September 27, 2021. On September 24, 2021, the Retailer Operations Division sent a letter to Appellant's previous counsel to provide its response to the charges. Appellant, through current counsel, provided its final response to the charges on October 25, 2021. Appellant denied the violations and explained that the transactions do not warrant a six-month disqualification.

After considering the retailer's original reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated November 4, 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 November 15, 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 November 22, 2019, and December 22, 2019, an investigator conducted four compliance visits at Appellant. A report of the investigation dated January 29, 2020, was provided to Appellant as an attachment to the charge letter. The investigation report included Exhibits A through E 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 plastic cutlery, sandwich bags, fabric softener, bathroom tissue, and snack 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 B, C, D, furnished with the charge letter.

### **APPELLANT'S CONTENTIONS**

Appellant, through counsel, made the following summarized contentions in its administrative review request dated November 15, 2021, in relevant part:

- The decision to deny the CMP was without considering relevant facts.
- As a result of the store's demographics and its location, a very substantial portion of the store's sales, roughly 60% come from SNAP sales.
- The owner and staff are well trained on the proper handling for SNAP transactions.
- The owner was unaware of the violation until the charge letter.
- The owner did not benefits form the transactions.
- There were no warnings sent to the store and there is no evidence to support any intent by the owner to violate the SNAP regulations.
- Under§ 278.6(e)(7) a warning letter is the appropriate penalty where the alleged violations were minor or "limited."
- There must also be evidence that the violations occurred as a direct result of "carelessness or poor supervision" by the store's owner or management.

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.

### **Not Carelessness or Poor Supervision**

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 non-food items due to carelessness or poor supervision by the firm's ownership or management.

Counsel argues that the transactions were not the result of carelessness or poor supervision. The investigation report documents that the chargeable violations in this case consisted of eight inexpensive non-food items over three transactions conducted by two different employees. The violations were determined by the Retailer Operations Division to represent the first sanction for the firm and evidence carelessness or poor supervision. The imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

### **Intent**

Appellant contends that the violations were not intentional. The violation of exchanging ineligible items for SNAP benefits as described in the SNAP regulations at 7 CFR § 278.2(a) and 7 CFR § 278.6(e)(5) does not require an element of intent on the part of the violator. Therefore, whether or not the employee intended to violate SNAP regulations by exchanging non-food items for SNAP is irrelevant.

### **No Previous Violations**

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 Appellant never received a warning letter. 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: “[s]end the firm a warning letter if violations are too limited to warrant a disqualification.” As previously stated, the investigative report documented that common ineligible item 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.

## **Appellant Hardship**

Counsel reports that about 60 percent of the owner’s sales come from SNAP transactions. Counsel further contends that a disqualification will adversely affect the business. 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.

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 five other authorized firms located within a one-mile radius of Appellant, including

a supermarket locate 0.16 miles from Appellant. Thus, in its letter dated November 4, 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 12 St. Gourmet 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

April 4, 2022