

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

7&7 Gourmet Deli Inc,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0222354

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a six month disqualification against 7&7 Gourmet Deli Inc (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5 and 6), and § 278.6(f)(1) in its administration of the SNAP when it imposed a six month period of disqualification against Appellant.

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

A USDA investigator conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period May 6, 2019, through August 20, 2019. The investigation determined that personnel at the Appellant firm accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. All three transactions were deemed clearly violative and warrant a six month disqualification period. The items sold are best described in regulatory terms as common nonfood items such as plastic cups, toilet tissue,

kitchen trash bags, and plastic cutlery. The investigative report indicates that these violative transactions were handled by two separate clerks with the first clerk responsible for the violations in Exhibits A and C. The report also notes that this clerk, in Exhibit B, refused to allow the purchase of ineligible items using SNAP even though this same clerk allowed the purchase of ineligible items in both Exhibits A and C. A second clerk was responsible for the violative transaction in Exhibit F. It is noted for the record that a third clerk refused to allow the purchase of ineligible items using SNAP or the exchange of SNAP benefits for cash in both Exhibits D and E.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated October 22, 2019, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).” Appellant, through counsel, responded to the charges in a letter dated October 28, 2019, that also included a Freedom of Information Act (FOIA) request. The agency responded to this request by correspondence dated November 22, 2019. On February 14, 2020, Appellant, through counsel, appealed the FOIA response and the Office of Retailer Operations and Compliance suspended all work on this case pending the outcome of the appeal. The FOIA appeal decision was subsequently issued on May 4, 2021. The Office of Retailer Operations and Compliance sent a 10 day reminder of the opportunity to submit an additional response to the charges to counsel in a letter dated May 6, 2021, that was received on May 10, 2021. Appellant, through counsel, did submit a second reply to the charges in a letter dated May 12, 2021, that voiced the same arguments that were in the initial response to the charges on October 28, 2019. That Appellant’s second reply to the charges was nearly identical to the first reply is suggestive of the FOIA request and subsequent appeal being nothing more than delaying tactics to keep the Appellant firm authorized.

After giving consideration to the evidence, the Office of Retailer Operations and Compliance notified Appellant in a letter dated May 19, 2021, that it determined that violations had occurred at the firm, and that a six month period of disqualification from participating as an authorized firm in SNAP was warranted. This determination letter also states that Appellant’s eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

By letter postmarked May 20, 2021, Appellant, through counsel, appealed the Office of Retailer Operations and Compliance’s decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. No subsequent correspondence was received.

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. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, 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 § 271.2 states that: 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 § 278.2(a) states that: Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. Further, the citation specifies that coupons may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states that: 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.

7 CFR § 278.6(e)(5) states that: a firm is to be disqualified 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 or poor supervision by the firm's ownership or management.

7 CFR § 278.6(f)(1) states that, “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. FNS may disqualify a store which meets the criteria for a CMP if the store had previously been assigned a sanction. A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

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:

- Ownership vehemently denies personally engaging in any type of illegal activity and was unaware, until receipt of the charge letter, that anyone else in the store was alleged to have engaged in such activities;

- A review of the charge letter reveals the inadequacies and insufficiencies of the investigation conducted and lack of evidence requiring dismissal of these charges. FNS failed, during the investigation, to make any effort to determine the true identity and full name of the one clerk allegedly employed by the owner and, specifically, the identity of the clerk who allegedly committed the wrongdoing as noted in Exhibits A, C, and F. There is no description of the clerk, no name, no title, no means of identification, or his relationship to the owner is set forth. The owner denies that the numerous descriptions of individuals alleged to be clerks in this store as set forth in the Transaction Reports are employed in this store. These are wholly fabricated as they are not identified by name or any identification;
- The amounts involved in the alleged sales are of such an insignificant amount that it raises a question about the appropriateness and credibility of the investigation. That where the value of such items is of such an insignificant amount, to wit, approximately less than Ten(\$ 10.00) Dollars, particularly compared to the failed attempt to induce the employee to engage in trafficking activities on May 15, 2019 as stated in Exhibit "D" and on May 20, 2019 as stated in Exhibit "E", and the failed attempts to induce the employee to engage in a sale of an ineligible item on May 9, 2019 in Exhibit "B", on May 15, 2019 in Exhibit "D" and on May 20, 2019 in Exhibit "E" evidences that the penalty imposed on this owner is unduly harsh and excessive;
- There are no times of entry and departure by anyone to and from the premises and there is no information on time spent in the store. Times would allow the owner to identify the clerks on duty at the time. The clerk's identities are of importance in any investigation, particularly when it will directly impact the business;
- There is also no proof that any sale of an ineligible item ever occurred. There are no cash receipts or cash register receipts. Counsel was informed that the price of each product is displayed and sold in this store is carefully marked. As a result, each customer receives a cash register receipt or tape when a purchase is made. The owner denies that sales were made without receipts or that there was no price indicated on items that were allegedly purchased;
- There is also a major issue as to what was exchanged or purchased, so that the entire substance of the acceptance of SNAP benefits in exchange for non-food items allegation is not supported in the record. In Investigative Transaction Report Exhibit "B" on May 9, 2019, it is admitted by the FNS that the same clerk who supposedly sold common non-food ineligible items on May 6, 2019, refused to permit the investigator to purchase a box of spoons on May 9, 2019. Additionally, not only are there no reports to indicate that this firm ever exchanged cash for an EBT transaction, it is admitted by the FNS that on May 15, 2019, in Exhibit "D" and on May 20, 2019, in Exhibit "E" the unnamed investigator asked the clerk for cash whereupon the clerk said "no" further contradicting the determination of the FNS;
- These inadequacies, inaccuracies and insufficiencies affect the reliability, veracity and sufficiency of the investigative reports and the meager and questionable sale of ineligible items charge. This charge cannot be sustained as a matter of fairness and justice to permanently disqualify this owner from participation in the SNAP;
- The firm is open 24/7 and SNAP accounts for 75 percent of sales. Should the FNS determine that this firm and owner violated Section 278.2(a) of the SNAP regulations, then and in that event, pursuant to Section 278.6(f)(1) the FNS should impose a CMP as a

sanction in lieu of disqualification, as 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 issue with one employee. That where the firm and owner are subject to a disqualification it is within the discretion of the FNS to impose such a civil penalty in lieu of a permanent [sic] as the application of the sanction in this case would be cruel and unusual punishment;

- A six month disqualification of the firm will have an adverse effect on the owner's future business endeavors and that it would cause him irreparable injury and damage to his reputations in the business community. He would not knowingly or intentionally jeopardize his livelihood and his reputation by engaging in the illegal activity charged. He has invested large sums of his personal savings to renovate the store in an effort to provide financial support to his family;
- Furthermore, the owner has maintained an exemplary record since 2018 and this allegation is the first occasion in which this store or a member of this firm and its management was made aware of any conduct alleged to have been violations of SNAP regulations. Counsel further submits that such an unblemished record is evidence of his continued compliance with the law and his training and supervision of his employees, up and including the present time;
- The business is staffed by four full-time employees and the owner has continuously trained and tested his employees concerning SNAP requirements since being authorized. The training program consists of two weeks of intensive, hands on classes overseen by the owner. He works with each employee during this period, teaching them the SNAP rules and regulations and provides them with handouts and other printed materials to study and learn prior to their full employment at the store. Each employee is tested upon the conclusion of the two-week period to ensure their compliance with SNAP regulations. Any employee that is suspected of failing the test or failing to comply with the policies of this store is immediately terminated as has happened in the recent past. It is unclear whether it was the same employees on duty during the alleged transaction violation, but there has been no reoccurrence of the alleged incidents;
- Counsel described the neighborhood around the store, store layout, and what food items the store stocks. By virtue of its hours, ownership cannot be in attendance at all times. Therefore, he relies upon the competence, honesty and good judgment of his employees, particularly the clerks and cashiers, during his absence; and,
- It is further submitted that where this owner's reputation in the community and his ability to ever again obtain permission to participate in SNAP in the future is being denied, he should not be disqualified for any period. Thus it is hereby requested that in lieu of such disqualification, a CMP be imposed.

Appellant submitted no evidence or other rationales in support of these contentions.

ANALYSIS AND FINDINGS

Regarding Appellant's vehement denial, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the action at the time such action was made. In an appeal of an adverse action, the Appellant bears the

burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the 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. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. Additionally, a claim of having a record of participation in 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 those charges.

It is noted that Appellant's administrative review request and both previous replies to the charges make repeated references to the Appellant firm and its owner being permanently disqualified; however, the USDA FNS charge letter dated October 22, 2019, makes no mention of a permanent disqualification stating only that the Appellant firm was being charged with accepting SNAP benefits for ineligible non-food items that would warrant a disqualification period of six months. Appellant's replies also state that the firm is open 24/7 and became SNAP authorized in 2018, but FNS records show the firm was initially authorized in 2017 and is not open 24/7. Lastly, the replies mention that one employee was responsible for the violations when the investigative report clearly identifies two separate clerks as being responsible for Exhibits A, C, and F. The quantity and serious nature of these obvious misstatements raises the fundamental question of whether counsel for the Appellant was, in fact, referring to the Appellant firm or to a different store.

The FNS investigative report shows that two employees working at the Appellant firm, not one as claimed by Appellant, accepted SNAP benefits for ineligible items on three separate occasions during the investigative period indicating a series of SNAP violations most likely resulting from little or no training and poor or no supervision. The report shows that the nature and scope of the violations under review do violate SNAP regulations, and the transaction amounts cited in the report also match FNS transaction records for the dates in question. Additionally, a review of the report shows no errors or discrepancies. There is no regulatory threshold for the dollar value of the ineligible items purchased or for the timeframe in which they were purchased. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items. SNAP regulations explicitly state that FNS shall disqualify a store for a six month period 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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management. The applicable regulations do not specify intent as being a required element for a six month disqualification.

SNAP benefits, in general, are only authorized to be used for the purchase of foods for the household to eat as well as seeds and plants which produce food for the household to eat. The common nonfood items purchased are clearly not edible foods and are not plants or seeds, so one has to question the level of training these employees received by store ownership and/or management. The basic concept of “if you can’t eat it, you can’t buy it using SNAP” is not a difficult one for employees to grasp, yet these employees allowed the purchase of ineligible items using SNAP benefits on multiple occasions. Had an effective compliance policy and program been in effect at the firm, it is unlikely that these employees would have made such obvious mistakes. The more likely explanation is that store ownership and/or management failed to properly train and subsequently supervise these employees. Additionally, had store ownership and/or management been supervising these employees through occasionally monitoring them using videotape, if available, or in person, it would have readily noticed that they were allowing the sale of ineligible nonfood items in exchange for SNAP benefits. It also would have been immediately evident to store ownership and/or management that these employees were deficient in their knowledge of SNAP rules and regulations had it periodically spot checked their knowledge and abilities by asking questions about SNAP eligible/ineligible items. Either of these basic supervisory techniques would have provided a no cost method for store ownership and/or management to ensure that store employees were not putting the firm’s SNAP license at risk. These are clear signs of poor or no supervision by store ownership and/or management.

It is highly improbable, based on the willingness of these employees to exchange SNAP benefits for ineligible nonfood items, that the only instances of SNAP violations were those transactions identified as part of the FNS undercover investigation. Common sense dictates that these actions more likely than not represented an ongoing pattern of SNAP violations at the Appellant firm. As previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight and training on the part of ownership to ensure employees, especially new employees, are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store ownership to not have a program of ongoing supervision of employee performance and conduct by periodically monitoring store transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the firm or conducting other activities that would jeopardize the licenses and income that the firm is dependent upon. Under SNAP regulations, the penalty for allowing the purchase of ineligible nonfood items using SNAP benefits as the result of poor supervision by ownership or management is a six month disqualification. The regulations do allow SNAP retailers to pay a hardship CMP, if eligible, as explained in the next section.

A review of the investigative report shows no errors or discrepancies and a comparison of the dates/times/amounts on the POS receipts issued by the Appellant firm to the USDA investigator correspond to the dates/times/amounts provided to FNS by the firm’s EBT processor when it submitted the transactions to FNS for reimbursement. Other evidence provided (photos of the items purchased and detailed donation records signed by a local charitable organization) also support the details provided in the investigative report. While a firm that has previously received warnings of possible violations or that has been sanctioned before could receive a more severe penalty, SNAP regulations do not provide any grounds for dismissing or reducing penalties for those firms that have not received warnings or previously been sanctioned. The record shows no

evidence that the Appellant firm received any prior warnings or has been sanctioned and there is no evidence that the firm's ownership or management intentionally violated SNAP regulations.

Appellant is correct that the firm has no previous history of SNAP program violations or warnings. However, this does not necessarily mean that the firm has not been conducting violative transactions. Neither FNS nor Appellant has sufficient data to conclusively prove that the firm was or was not conducting violative transactions prior to the start of the undercover investigation. However, the results of the investigation showed SNAP violations conducted by two store employee in three of the six visits to the firm over more than a three month period. While it is not definitive, it can be readily inferred that violative transactions were more likely than not occurring in previous months based on these investigatory visits.

Regarding Appellant's other contentions, no statutory or regulatory requirements exist for USDA investigative personnel to positively identify store employees that have committed violations of SNAP rules and regulations. The descriptions contained in the Report of Positive Investigation are provided only to assist store ownership in identifying those employees responsible for the violative transactions. Many variables can affect the description of an employee (e.g. whether the employee was sitting or standing or on a platform, the fit of their clothing, changing hair styles/lengths/colors, etc.) so these descriptions may not be one hundred percent accurate which does not mean that the violations did not occur. Disclosing the identity of investigative personnel would cause a clearly unwarranted invasion of personal privacy. The store entry/exit times could also be used to identify investigative personnel and cannot be provided. SNAP regulations do not establish any minimum dollar amount that exchanges of SNAP benefits for common ineligible nonfood items must exceed in order to be considered violative, therefore any allegations that transactions involving "insignificant amounts" not being credible are baseless. While the firm did stock a very limited selection of infant baby food, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products at a WIC vendor using WIC vouchers, not SNAP EBT at the Appellant firm.

Regarding a warning letter, there are no requirements in existing FNS regulations that require stores suspected of trafficking or misusing SNAP benefits be provided with a written or verbal notification that violations of SNAP regulations may be occurring and the potential penalties. Warning letters are issued in those situations where the SNAP violations are of a limited nature that would not warrant a disqualification and therefore would not have been appropriate in this situation.

Counsel also claims it was informed that the price of each product displayed and sold in this store is carefully marked. However, while a review of the dozens of photos of store stock taken during the most recent FNS store visit show that many food items were individually priced, there are still many food items, especially drinks in the coolers, that were not.

Appellant offered no evidence to validate any of its claims. Since Appellant's contentions are only assumptions, not facts, and no basis has been presented to substantiate them, they are found to be without merit.

Based on this discussion, the decision by the Office of Retailer Operations and Compliance to disqualify the firm for a six month period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

It is recognized that some degree of 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 waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, 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 may 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 imposed.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications. The matter under review is a term disqualification of six months and does not involve trafficking therefore a trafficking CMP cannot be considered under 7 CFR § 278.6(i).

A hardship CMP as an optional penalty in lieu of a six month disqualification was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and its disqualification would create a 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. Contrary to Appellant's contentions, FNS records show there are at least 23 comparably sized or larger SNAP retailers located within a 0.65 mile radius of Appellant's location that includes two super stores, two supermarkets, three medium grocery stores, three small grocery stores, and 13 convenience stores. The closest small grocery store is only two blocks from Appellant's location while the nearest medium grocery store is only four blocks away with five convenience stores being located even closer. There are many additional larger stores within 1.0 miles. All of the comparable stores stock adequate varieties of food in all four staple food categories and in perishables as required by FNS.

The nearby stores appear readily accessible to SNAP recipients and offer a variety of staple foods comparable to, or better than, those offered by Appellant. It is acknowledged that some level of inconvenience to SNAP users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience, however, does not rise to the level of hardship required by the regulations.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted under the direct supervision of a USDA investigator and signed under penalty of perjury. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail. Accordingly, the determination by the Office of Retailer Operations and Compliance to impose a disqualification of six months against the Appellant firm from participating as an authorized retailer in SNAP is sustained. Furthermore, the Office of Retailer Operations and Compliance properly determined that Appellant was not eligible for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this decision. A new application for SNAP participation may be submitted ten (10) days prior to the expiration of the six month disqualification period. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS web site. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

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

October 8, 2021