

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

Bronx Gourmet Food Corp.,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0225309

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination by the Retailer Operations Division to impose a six-month disqualification of Bronx Gourmet Food Corp. (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a six-month disqualification against Bronx Gourmet Food Corp.

AUTHORITY

7 U.S.C. § 2023 and 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

Bronx Gourmet Food Corp. was initially authorized to participate in SNAP on August 3, 2005. Between January 24, 2020, and January 28, 2020, the USDA conducted an undercover investigation of Bronx Gourmet Food Corp. to ascertain the firm’s compliance with Federal SNAP law. Agency records show that during the investigation Appellant violated SNAP regulations by accepting SNAP benefits in exchange for ineligible non-food items on three separate occasions.

In a letter dated April 3, 2020, the Retailer Operations Division charged Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise, in violation of 7 CFR

§ 278.2(a). The charge letter informed Appellant that the violations warranted a six-month disqualification period from SNAP, as provided in 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.

In response to the charge letter, on April 13, 2020, Appellant, through counsel, requested documents under the Freedom of Information Act (FOIA). The FOIA Office responded to Appellant's FOIA request on October 13, 2020. Appellant responded to the trafficking charges, through counsel, in a letter emailed on October 17, 2021. Appellant denied personally engaging in any type of illegal activity and claimed to be unaware, until receipt of the charge letter, that anyone else in his store or employed by him was alleged to engage in such activities. Appellant also requested a CMP in lieu of disqualification.

After considering the Appellant's response and further evaluating the evidence, the Retailer Operations Division issued a determination letter, dated October 20, 2021. This letter informed the Appellant that the Retailer Operations Division found that the violations did occur as outlined in the charge letter and that a six-month disqualification would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that a hardship CMP was considered, but that 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 an October 21, 2021, letter, Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the six-month disqualification has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, the appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. This 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 law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and is promulgated through regulation under Title 7 CFR Part 278. Specifically, 7 CFR § 278.6(a) and (e) 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(e) states, in part:

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

(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.

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.

SUMMARY OF INVESTIGATION

During an undercover investigation conducted between January 24, 2020, and January 28, 2020, FNS completed three compliance visits at Bronx Gourmet Food Corp. A Report of the Investigation was provided to Appellant as an attachment to the charge letter, dated April 3, 2020. The report included Exhibits A through C and provided full details on the results of each compliance visit. SNAP violations documented during each of the three visits included the exchange of ineligible non-food merchandise for SNAP benefits. One clerk committed the violations. The report noted that the following ineligible non-food items were sold in exchange for SNAP benefits: plastic spoons, scrub sponges, turkey roasting bags, and sandwich bags.

The report said that on one occasion the investigator suggested to the clerk that the investigator would purchase items for the store in exchange for cash, but the clerk refused the suggestion. This refusal is documented in Exhibit C. The charge letter states that the violations that occurred in Exhibits A, B, and C warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

Appellant, through counsel, submitted the following summarized contentions as part of its request for administrative review, in relevant part:

- There is no prior compliance history against this firm prior to issuance of the charge letter.
- Appellant vehemently denies that he personally engaged in any type of illegal activity and was unaware, until receipt of the charge letter, that anyone else in his store or employed by him in his business is alleged to have engaged in such activities.
- FNS failed to make any effort during the investigation to determine the true identify of the one clerk who allegedly committed the wrongdoing. There is no description of the clerk, no name, no title, or means of identification.
- Appellant denies that the numerous descriptions of individuals alleged to be clerks as set forth in the report are employed in the store.
- The amounts of the involved sales are so insignificant that it raises questions about the appropriateness and credibility of the investigation.
- In each of the alleged transactions, there is no time of entry and departure by anyone to and from the premises. The owner cannot identify the clerk on duty without this information.
- Store surveillance cameras are self-erasing and images taken from January 24, 2020, through January 28, 2020, are no longer available.
- The name of anyone connected with the investigation for the Food and Nutrition Service has never been disclosed. The owner is entitled to know whether there was an investigation and who was involved.
- There is no proof any sale ever occurred. There are no cash receipts or cash register receipts. The owner denies that sales were made without receipts.
- There are no reports to indicate this firm exchanged cash for an EBT transactions, and it is admitted on Exhibit "C" that the investigator asked the clerk for cash whereupon

the clerk told the investigator that he “refused” further contradicting the determination.

- EBT transactions are approximately 75% of the store’s sales. A 6-month disqualification will have an adverse effect on Appellant’s future business endeavors and cause irreparable injury and damage to his reputation in the business community.
- If FNS determines violations happened, then FNS should impose a CMP in lieu of disqualification.
- Inadequacies, inaccuracies, and insufficiencies affect the reliability, veracity, and sufficiency of the investigative report.
- Appellant has continuously trained and tested his employees concerning SNAP regulations related to the prohibition against sales of ineligible items and exchanging cash for EBT benefits.
- The store is highly rated and provides necessary items to the community which is comprised of numerous apartment building and other multi-story housing project within a two-block radius. The families who live and work in the neighborhood need to have access to basic items.

Appellant provided no additional evidence in support of its contentions on administrative review.

The preceding may represent only a summary of 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 referenced herein.

ANALYSIS AND FINDINGS

This review examines the relevant information regarding the Retailer Operation Division’s determination. Once the Retailer Operations Division establishes a violation occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that the disqualification should be reversed. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

If a store has never been sanctioned and its personnel, due to carelessness or poor supervision, sells common nonfood items for SNAP benefits, then the penalty under SNAP regulations is a six-month disqualification of the store’s SNAP authorization.

In this case, the Report of Investigation, signed by the investigator under penalty of perjury, documents that the charges of violations are based on the findings of a formal USDA investigation. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough regarding the dates of the violations, the critical facts related thereto, and is supported by documentation that confirms details of the transactions. The Retailer Operations Division has thoroughly documented the transactions in which personnel at the store exchanged ineligible items for SNAP benefits.

As described below, Appellant has not provided sufficient credible and convincing evidence to overturn the Retailer Operations Division’s determination. This review finds, by a preponderance

of the evidence, that program violations did occur as charged by the Retailer Operations Division and a six-month disqualification is warranted. The Retailer Operation's Division's decision not to impose a hardship CMP is also sustained.

Sufficiency of the Investigative Report

Appellant contends there are inadequacies in the investigative report including that the report did not having the entry and departure times of each visit, did not having the names of the employees that committed the violations, and that no cash register receipts were provided to Appellant.

In reviewing the report of the investigation, the report appears to be wholly credible and fully documented. The transactions identified on the investigative report unquestionably occurred at Appellant's store. The record includes photographs of the items purchased at the store by the investigator, photographs of the EBT receipts provided by the store to the investigator, and a donation certification listing the specific items purchased during the investigation and showing the charitable organization the items were donated to, including a signature of receipt by the charitable organization. The report describes the clerk on duty during each of the three violations and specifies the date of each violation.

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 or not the transactions actually took place. Every SNAP transaction that occurs at Appellant's firm appears on agency records and along with 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 Appellant's 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 evidence that any relevant detail on the report is incorrect.

Hardship to Appellant

Counsel reports that 75% of the store's sales come from SNAP transactions and contends that a six-month disqualification would adversely affect the business and cause irreparable injury and damage to the owner's reputation in the business community.

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 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 fully comply 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 a valid basis for dismissing the charges or for mitigating the required penalty.

Lack of Knowledge of SNAP Violations

Appellant denies that he personally engaged in any type of illegal activity and was unaware, until receipt of the charge letter, that anyone else in his store or employed by him in his business is alleged to have engaged in such activities.

Although ownership claims to have had no involvement in, or knowledge of, the violations, this cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Regardless of whom the ownership of a store may utilize to handle store business, the owner is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. On February 15, 2018, the store owner signed the store's SNAP reauthorization application. That application included a certification and confirmation that the owners and officers are responsible for "violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The list of violations on the certification included the exchange of ineligible non-food items for SNAP benefits.

Civil Money Penalty (CMP)

Appellant, through counsel, reports that the owner continuously trained and tested its employees concerning SNAP regulations. Counsel contends that the owner has established and implemented an effective compliance policy and program to prevent violations of the SNAP regulations 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, Appellant was not charged with trafficking, and therefore is ineligible for a trafficking CMP.

Appellant requests a CMP in lieu of disqualification, alleging disqualification would cause hardship to customers. Appellant notes families who live and work in the neighborhood need to have access to basic items. Regarding this contention, regulations at 7 CFR § 278.6(f)(1) do allow, in some circumstances, for a CMP to be imposed in lieu of disqualification when the firm's disqualification would cause hardship to SNAP households. According to this regulation, hardship is defined as "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 had determined that a six-month disqualification of Bronx Gourmet Food Corp. would not cause a hardship to SNAP households as there are comparable or larger SNAP authorized stores in the area.

It is the determination of this review that a disqualification of Bronx Gourmet Food Corp., a convenience store, would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are a number of similarly stocked or larger SNAP authorized retail stores located within a one-mile radius of Bronx

Gourmet Food Corp., including one supermarket, five small grocery stores, and six convenience stores. There is also no evidence that Appellant sells its inventory at unusually low prices in comparison to nearby stores. Given that hardship conditions have not been established, this review agrees with the Retailer Operations Division's determination that a hardship CMP may not be assessed in lieu of disqualification.

CONCLUSION

This review finds, by a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at Bronx Gourmet Food Corp. during a USDA investigation. Accordingly, the Retailer Operations Division's determination to impose a six-month disqualification period is sustained.

In accordance with the Food and Nutrition Act and SNAP regulations, the six-month period of disqualification shall become effective 30 days after receipt of this decision. Appellant may submit a new application for SNAP authorization 10 days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this determination are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in SNAP regulations, at 7 CFR § 279.7. If 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.

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.

MICHELLE WATERS
Administrative Review Officer

January 21, 2022