

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

Brookdale Deli and Grill Inc.,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0222107

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record supports that Brookdale Deli and Grill Inc. (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a six-month disqualification of Appellant from the SNAP, as imposed by the Office of Retailer Operations and Compliance (Retailer Operations).

ISSUE

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

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

The USDA investigated of the compliance of Appellant with federal SNAP law and regulations during the period of November 13, 2019, through November 16, 2019. The investigative report dated July 24, 2020, documented that store personnel at Appellant accepted SNAP benefits in exchange for ineligible common nonfood items on multiple separate dates. As a result of evidence compiled during the investigation, by letter dated December 15, 2020, Retailer Operations charged Appellant with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits were noted in Exhibits A, B, and C, that warrants a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain

conditions FNS may impose a civil money penalty (CMP) in lieu of a disqualification. Counsel responded to the Charge letter by letter dated December 26, 2020. This response included a FOIA request.

Retailer Operations informed Appellant by Determination letter dated June 8, 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 also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

Counsel requested review of the determination by letter dated June 9, 2021. The review was granted by letter dated July 7, 2021.

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. That means the Appellant has the burden of providing relevant, credible evidence that a reasonable mind, considering the record, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 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.

7 CFR § 278.2(a) states: “SNAP benefits may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food.”

7 CFR § 278.6(a) states: “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 based on 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.”

7 CFR § 278.6(e)(5) of the SNAP regulations 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) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause hardship to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs.

It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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 THE CHARGES

The investigative report details on the results of each compliance visit to Appellant as part of a USDA onsite investigation. The investigative report documents that SNAP violations were recorded during three of three store visits, that warrant a six-month disqualification. The SNAP violations of 7 CFR § 278.2(a) involved the sale by store personnel, of ineligible nonfood items for SNAP benefits. The nonfood items exchanged for benefits included: forks, spoons, steel wool soap pads, and sandwich bags.

APPELLANT’S CONTENTIONS

Consideration was made of all contentions whether recapitulated here or not.

- The USDA, based on alleged transactions on three occasions has charged, and I submit wrongfully concluded, that his firm and enterprise did engage in accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items.
- My clients vehemently deny that they personally engaged in any type of illegal activity and were unaware, until the receipt of the letter of charges, that anyone else in their store or employed by them in this business is alleged to have engaged in such activities.
- The FNS have failed to make any effort during the investigation of this owner’s store to determine the identity and full name of the one clerk allegedly employed by the owner, and specifically the identity of the clerk during each transaction who allegedly committed the wrongdoing as noted in the Exhibits A, B, and C. During this investigation there is no description of the clerk, no name, no title, no means of identification or his relationship to the owner is set forth, after three undercover visits to the store.
- The owners deny 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.
- That where the value of such items is of such an insignificant amount, as no prices were ever indicated on any common ineligible non-food item allegedly purchased, particularly compared to the failed attempt to induce the employee to exchange EBT benefits for cash on November 16, 2019, as stated in Exhibit C evidence that the penalty imposed on this owner is unduly harsh and excessive.
- In each of the alleged transactions, there is no time of entry and departure by anyone to and from the subject premises. There is no information about time spent in the store which is important because: was the time sufficient to complete the selection of the multiple items from the various locations in this grocery store, wait on line at the counter, have the purchases totaled at said counter and pay for same, and based on the hour of any given day, the owners herein can identify the clerk who was on duty at the time. The clerk’s identity is of importance in any investigation, particularly when it will directly impact a business.

- Any surveillance cameras in this store are self-erasing and the images taken from November 13, 2019, thru November 16, 2019, are no longer available for viewing.
- The name of anyone connected with the investigation for the FNS on each transaction described has never been disclosed, I submit that the owner is entitled to know whether there was an investigation and who was involved.
- There are no cash receipts or cash register receipt. I am informed that the price of each product is displayed and sold in this store is carefully marked. Each customer receives a cash register receipt or tape when a purchase is made. The owners deny that sales were made without receipts or that there was no price indicated on items that were allegedly purchased.
- There is also a serious flaw in this case as to what was exchanged or purchased, under the SNAP, so that the entire substance of the acceptance of SNAP benefits in exchange for non-food item allegation is not supported in the record.
- 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.
- Should the FNS determine that this firm and owner violated Section 278.2(a) of the SNAP regulations, then and in that event, 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 any issue with one employee.
- The owner would not knowingly or intentionally jeopardize this source if business and his livelihood and his reputation in the community by engaging in the illegal activity charged herein. He has invested large sums of his personal savings to renovate this store in the effort to provide financial support to his family.
- During the time the owner has been in the Program, since 2015, he has maintained an exemplary record and that the allegations contained in the letter of charges is the first occasion in which a member of this firm and its management has been made aware of conduct of any violations by the firm. I further submit 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 training program consists of two (2) weeks of intensive, hands-on classes, overseen by the owner of this store. He works with each employee during this period, teaching them the rules and regulations of the SNAP. He provides them with handouts and other printed materials, which they must read, study and learn prior to their full employment in this store. Upon the conclusion of the two-week period, this owner gives each employee a test 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 re-occurrence of the incidents that are alleged in the letter of charges.
- It is hereby requested that in lieu of such disqualification, a civil money penalty be imposed. Disqualification would cause hardship to participating households as it is the only retail SNAP participating store on the block.

ANALYSIS AND FINDINGS

The evidence considered by Retailer Operations included the information obtained during the onsite store investigation conducted by two USDA investigators. The regulations allow 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, and that such disqualification shall result from a finding of a violation based on evidence that may include facts established through onsite investigations. This review is to either validate or to invalidate the determination made by Retailer Operations, and it is limited to the facts at the basis of Retailer Operations' determination at the time it was made. The report shows that the two investigators declared under penalty of perjury that the report is true and correct. The record under review includes the EBT receipts with the store's name and address, for the total SNAP benefit amounts recorded in the Exhibits. The record also includes photographs of the items exchanged at Appellant for SNAP benefits, and documentation that confirms that the items as noted in the Exhibits, were donated to local community organizations by the investigators.

The violating store personnel are described by gender, and ranges of estimated age, weight, height, hair color, and other identifiers. There is no provision in the regulations that an investigator must provide the name(s) of the store personnel who conduct a violative transaction(s) for the FNS to take administrative action against an authorized store. The evidence supports that Appellant was the offending store, and the report supports that the nonfood ineligible items identified were exchanged for SNAP benefits by store personnel as described in the Exhibits and charged in the Charge letter.

Regardless of the cost of items, Appellant established a record of selling nonfood items on multiple store visits. The record supports that some prices of items are listed in the Exhibits. The SNAP regulations make no mention of minimum cost for a common ineligible nonfood item exchanged for SNAP benefits to be considered a violative exchange. The regulations are clear that benefits can only be exchanged for eligible foods. Therefore, the contention that the transactions totaled to a small dollar amount is not relevant.

The owner contends that a SNAP disqualification will have a negative financial impact on Appellant's business. 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 based on possible economic hardship to the firm resulting from imposition of such penalty. To allow the owner 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 Act, 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.

The owner submitted no evidence to support that the transactions did not occur at Appellant. Retailers are informed that it is their responsibility to ensure that store personnel are properly

trained regarding the SNAP rules. Regardless of whom the owner of a store may utilize to handle store business, the firm's ownership is accountable for the proper training of personnel, and the effective monitoring and handling of SNAP benefit transactions. Counsel did not provide evidence to support that Appellant had a SNAP training program. The owner is responsible for all violative transactions completed by the firm. A record of participation in the SNAP with no previously documented instance of violations does not constitute grounds for dismissal of the current charges of violations. 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.

The preponderance of evidence under review supports that Appellant's personnel sold nonfood ineligible items on multiple store visits, in exchange for SNAP benefits. Such repetitive violations are considered evidence of carelessness or poor supervision. The regulations at 7 CFR § 278.6(e)(5) state 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.

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six-month period of disqualification from SNAP on Appellant. The record documents that there are other authorized stores within a nearby radius of Appellant that stock as large a variety of comparable staple foods at comparable prices. Retailer Operations concluded that the evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified. Therefore, Appellant was not eligible for a hardship CMP.

CONCLUSION

The preponderance of the evidence in the record supports that Appellant violated the SNAP regulations as charged. The record documents that Retailer Operations properly evaluated Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations. On review, it is decided that Retailer Operations properly denied a CMP. Therefore, the six-month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained. This penalty shall become effective thirty (30) days after delivery of this decision.

A new application for participation in the SNAP may be submitted ten days prior to the expiration of the six-month period of disqualification. Please contact the Retailer Center at 877-823-4369 with general questions regarding the SNAP application process.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023), and to the regulations at 7 CFR § 279.7 with respect to the owner's right to judicial review of this decision. 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 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 (30) days of delivery 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

July 30, 2021