

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

Clinton Gourmet Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0221401

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 Clinton Gourmet 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 Clinton Gourmet 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

Clinton Gourmet Corp was initially authorized to participate in SNAP on October 24, 2014. Between June 18, 2019, and July 20 2019, the USDA conducted an undercover investigation of Clinton Gourmet 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 February 27, 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.

Appellant responded to the charge letter on March 4, 2020. In the letter, the Appellant owner claimed to be unaware of any violations occurring. Appellant said that SNAP EBT transactions were a large part of the store's business and provided the income necessary to keep the business operating. The letter said the business was staffed by four employees, including the owner and that the owner personally guards the EBT from any unusual transactions related to SNAP including trafficking and the sale of ineligible items. Appellant questioned the consistency of the visits and the description of the clerks in the Report of Investigation and said the owner was willing to submit an affidavit under oath that he never intended to violate or break the law. Appellant claimed no knowledge of the violations, saying he trained employees and himself on SNAP policy. Appellant also requested documents under the Freedom of Information Act (FOIA).

The FOIA Office responded to Appellant's FOIA request on September 1, 2021. In a September 2, 2021, letter, the Retailer Operations Division provided Appellant 10 days to submit additional information given the FOIA response. Appellant did not respond to this letter.

After considering the Appellant's response and further evaluating the evidence, the Retailer Operations Division issued a determination letter, dated October 13, 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 20, 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 June 18, 2019, and July 20, 2019, FNS completed seven compliance visits at Clinton Gourmet Corp. A Report of the Investigation was provided to Appellant as an attachment to the charge letter, dated February 27, 2020. The report included Exhibits A through G and provided full details on the results of each compliance visit. SNAP violations documented during three of the seven visits included the exchange of ineligible non-food merchandise for SNAP benefits. Two different clerks committed the violations. The report noted that the following ineligible non-food items were sold in exchange for SNAP benefits:

- One 48-count package of plastic spoons (Diamond Daily brand), Exhibit A
- One 48-count package of plastic spoons (Diamond Daily brand), Exhibit E
- One 18-count package of plastic cups (Jack Frost brand), Exhibit E
- One 48-count package of plastic spoons (Diamond Daily brand), Exhibit G
- One 18-count package of plastic cups (Jack Frost brand), Exhibit G

The report indicated that in Exhibits B,C, and F, clerks refused to allow the investigator to use SNAP benefits to purchase ineligible items. In Exhibit C, the clerk on duty also refused to exchange SNAP benefits for cash (i.e. trafficking). In Exhibit D, the investigator did not attempt to commit program violations. The charge letter states that the violations that occurred in Exhibits A, E, and G warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

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

- It seems that there was a clerk who was indifferent to the rules and policy of the store. I have terminated his employment and he is no longer available.
- I am in charge and work most of the time and although I receive several requests a day to compromise the store policy or rules, I refuse and sometimes kick them out of the store. I never allow violations such as this to happen.
- Mistakes do happen due to careless clerks who do not care about their job first and then the rules.

- I pray you will consider my request for the penalty instead and grant me the opportunity to continue because only in very rare instances with the clerk did such violations occur.
- I can submit an affidavit under oath that I did not know anything about such violations as the owner nor will I ever allow such violations to take place.

Appellant provided no evidence in support of its contentions.

The preceding may represent only a summary of Appellant's contentions presented in this matter. However, in reaching a decision, full consideration was given to all contentions presented, including any not specifically summarized or referenced herein.

ANALYSIS AND FINDINGS

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.

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.

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.

In response to the charge letter and on administrative review, Appellant did not offer any evidence to counter the agency's investigative report. While Appellant previously claimed to be unaware of any violations, Appellant now concedes that the violations occurred and says he has fired an employee for conducting the violative transactions. Because the violations themselves do not appear to be in dispute, 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 balance of this review will address the Appellant's remaining contentions. The Retailer Operation's Division's decision not to impose a hardship CMP is also sustained.

Lack of Knowledge of SNAP Violations

Appellant contends that as the owner, he was unaware of the violations and would never allow such violations to take place. He says that he is often asked to violate but refuses and sometimes kicks the customer out of the store. Appellant says the violations were due to a clerk who was indifferent to the rules and policy of the store and that the clerk has been terminated.

Regarding Appellant's contentions, it is noted that while Appellant claims to have fired one clerk involved in the violations, the Report of Investigation documents that two clerks conducted the violative transactions. Regardless, although ownership allegedly 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. To allow store owners to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Lastly, the store owner signed the FNS application to become a SNAP authorized retailer on August 20, 2014. That application included a certification and confirmation that the owner(s) would "accept responsibility on behalf of the firm 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.

Hardship Civil Money Penalty (CMP)

On administrative review, Appellant requests a CMP in lieu of disqualification because he says it was only in very rare instances with the clerk that such violations occurred.

Regarding Appellant's request for a CMP, 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 Clinton Gourmet Corp would not cause a hardship to SNAP households as there are comparable or larger SNAP authorized stores in the area.

SNAP customers are likely to suffer some degree of inconvenience whenever any SNAP authorized retailer is disqualified, as the normal shopping pattern of SNAP customers may be altered. However, potential inconvenience is not the same as hardship, as defined in SNAP regulations.

This review finds that a disqualification of Clinton Gourmet 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 Clinton Gourmet Corp, including at least sixteen superstores, two supermarkets, one large grocery store, three medium grocery stores, and two small grocery 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 Clinton Gourmet Corp. during a USDA investigation. Accordingly, the Retailer Operations Division's determination to impose a six-month disqualification period is sustained. The denial of the hardship CMP is also 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 12, 2022

