

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

Roll&x Gourmet Deli Corp,

Appellant,

v.

Case Number: C0244884

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support the Retailer Operations Division's assessment of a \$5,844.00 hardship civil money penalty (CMP) against Roll&x Gourmet Deli Corp (hereinafter "Roll&x Gourmet Deli Corp" or "Appellant") in lieu of a six month disqualification from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(5), 7 CFR § 278.6(f)(1), and 7 CFR § 278.6(g) in its administration of the SNAP, when it imposed a hardship CMP of \$5,844.00 in lieu of a six month disqualification against Roll&x Gourmet Deli Corp.

AUTHORITY

7 U.S.C. § 2023 and its 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 Department of Agriculture conducted an investigation of the compliance of Roll&x Gourmet Deli Corp with Federal SNAP law and regulations during the period September 23, 2021 through October 8, 2021. In a letter dated February 1, 2022, the Retailer Operations Division charged the Appellant with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on six out of six compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5). The letter also stated that

under certain conditions, FNS may impose a hardship civil money penalty (CMP) in lieu of a disqualification as provided in 7 CFR § 278.6(f)(1).

The charge letter noted that per SNAP regulations Section 278.6(b), the Appellant has the right to present any information, explanation or evidence regarding the charges and must reply within 10 calendar days of the date of receipt of the charge letter. Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on February 3, 2022.

In a response to the Retailer Operations Division of February 11, 2022, the Appellant, through counsel, requested an extension in time for providing a response to the letter of charges. By letter of February 14, 2022, the Retailer Operations Division granted counsel's time extension request to March 15, 2022. No additional information or contentions were provided by counsel or the Appellant with regard to letter of charges.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated April 13, 2022 informing the Appellant that the violations cited in the charge letter occurred at the firm and that a six month period of disqualification was warranted. The determination letter also stated that the Appellant was eligible for a hardship CMP as Roll&x Gourmet Deli Corp is selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households. Thus, a hardship CMP in the amount of \$5,844.00 was imposed in lieu of the six month SNAP disqualification.

In a letter postmarked April 24, 2022, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to impose a hardship CMP in lieu of a six month disqualification of Roll&x Gourmet Deli Corp from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated April 28, 2022 and implementation of the hardship CMP was 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, might accept as sufficient to support a conclusion that the matter 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) establish the authority upon which a one year disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2 (a) states, in part: "Coupons 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 § 271.2 states that the definition of “coupon” includes: ... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 271.2 states, in part: (1) 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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system...”

7 CFR § 278.6(e)(5) states, in part: “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 food stamp 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(g) states, in part: “Amount of civil money penalties for hardship and transfer of ownership. FNS shall determine the amount of the civil money penalty as follows:

- (1) Determine the firm's average monthly redemptions ... for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations.
- (2) Multiply the average monthly redemption figure by 10 percent.
- (3) Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph (e) of this section”

Notwithstanding the above, there is an agency limit of \$11,000 per violation as the maximum CMP amount.

SUMMARY OF THE CHARGES

During an investigation conducted from September 23, 2021 through October 8, 2021, USDA conducted six compliance visits at Roll&x Gourmet Deli Corp. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated February 1, 2022. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during six of the six compliance visits and involved the sale of a variety of items best described in regulatory terms as “common nonfood items” and a “major ineligible item”. The misuse of SNAP benefits

noted in Exhibits A, B, C, D, E, and F warrant a disqualification as a SNAP retail food store for a period of six months. The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

The Retailer Operations Division determined that the assessment of a hardship CMP of \$5,844.00 in lieu of a six month disqualification was the appropriate penalty for these violations as Roll&x Gourmet Deli Corp is selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households.

APPELLANT'S CONTENTIONS

In the reply to the charge letter and in the request for administrative review, the Appellant, through counsel, made the following summarized contentions, in relevant part:

- The owner did not have the chance to respond to the letter of charges due to illness.
- The investigation reports reflect that the Appellant shows a clear pattern of refusing ineligible items. The reports show efforts by employees to be in compliance with the SNAP rules by rejecting many ineligible transactions/sales.
- More importantly, the employees refused the trafficking attempts by the investigator.
- Almost daily the Appellant turns away customers requesting to exchange SNAP benefits for cash and refuses the sale of ineligible items with SNAP benefits.
- The owner trains all employees monthly on the SNAP rules using videos and materials available on-line and usually asks them to read through the SNAP refresher training materials available on-line.
- This is the first time that the Appellant has been cited for SNAP violations.
- The Appellant requests the imposition of a warning letter or the imposition of a civil money penalty in lieu of a SNAP disqualification.

The preceding may represent only a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by the Retailer Operations Division; it is limited to the facts at the basis of the Retailer Operations Division's determination at the time it was made.

The Appellant contends that the investigation reports reflect that the store shows a clear pattern of refusing ineligible items. The reports show efforts by employees to be in compliance with the SNAP rules by rejecting many ineligible transactions/sales. More importantly, the employees refused the trafficking attempts by the investigator.

However, 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.

Regardless of who the store owner utilizes to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf.

The transactions cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no known 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.

While the Appellant is correct in that the employee in Exhibits E and F refused to exchange SNAP benefits for cash, the FNS investigative report shows that employees working at the Appellant firm accepted SNAP benefits for ineligible nonfood items on six separate occasions during the investigative period indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The investigation report documents by a preponderance of the evidence that the store employees engaged in the misuse of SNAP benefits noted in Exhibits A, B, C, D, E, and F warranting a disqualification as a SNAP retail food store for a period of six months.

The Appellant requests the imposition of a warning letter in lieu of a SNAP disqualification. However, neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of SNAP benefits for transactions involving the sale of ineligible items to be defined as violative. No mention of minimum cost or types of ineligibles is cited in Section 278.6(e)(5) of the SNAP regulations, which states that FNS shall disqualify a store 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 in exchange for SNAP benefits due to carelessness by store employees or poor supervision by the firm's ownership or management.

While the Appellant contends that it provides monthly training to employees on the SNAP rules and usually asks them to read through the SNAP refresher training materials available on-line, no evidence was provided to substantiate the Appellant's training claim. Had an effective compliance policy and program been in effect at the firm, it is unlikely that the 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 the employees. Additionally, had store ownership and/or management been supervising the 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 the employees were deficient in their knowledge of SNAP rules and regulations had it periodically spot checked the employees' 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 authorization 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 the 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. These actions more likely than not represent an ongoing pattern of SNAP violations at the Appellant firm. 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 Civil Money Penalty section of this Final Agency Decision.

The Appellant is correct that the firm has no previous history of SNAP program violations or warnings. However, 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 those charges.

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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur.

CIVIL MONEY PENALTY

The Retailer Operations Division correctly concluded that the Appellant was eligible for a hardship CMP in lieu of a six month SNAP disqualification as Roll&x Gourmet Deli Corp is selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households. Thus, a hardship CMP in the amount of \$5,844.00 was imposed in lieu of the six month SNAP disqualification.

The case record documents that the Retailer Operations Division correctly calculated the amount of the hardship CMP under 7 CFR § 278.6(g). That regulation states that the hardship CMP is to be calculated on a formula which includes the SNAP redemption volume of the store during the twelve months prior to the firm being notified of the violations. Modifications to the hardship CMP may occur only when there is an error in calculation or the amount exceeds the agency limit. The Retailer Operations Division correctly determined, using the methodology described in 7 CFR § 278.6(g), that the calculated amount of the hardship CMP was \$5,844.00.

CONCLUSION

Accordingly, the determination by the Retailer Operations Division to assess a hardship CMP in the amount of \$5,844.00 in lieu of a six month disqualification from participating as an authorized retailer in the SNAP is sustained. Based on the discussion above, the amount of the hardship CMP was properly computed by the Retailer Operations Division. Please note that if the penalty is not paid, the six month SNAP disqualification will be imposed. The Appellant may contact the FNS Financial Management Accounting Division at 1-703-605-0483 to discuss a monthly payment plan,

or follow the instructions in the Retailer Operations Division's letter dated April 13, 2022, regarding payment options.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. In the event a six month disqualification is imposed for failure to pay the CMP, or some lesser disqualification period reflecting the unpaid portion of the CMP, the Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the disqualification period. When eligible, the 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 1-877-823-4369.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you reside or are 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 receipt of this Decision.

Under the Freedom of Information Act, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

June 16, 2022