

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

**Yummy Happy Gourmet Deli Inc.,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0245232**

**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 Yummy Happy Gourmet Deli Inc. (“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 Yummy Happy Gourmet Deli Inc.

**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**

Yummy Happy Gourmet Deli Inc. was initially authorized to participate in SNAP on July 25, 2014. Between October 9, 2021, and October 26, 2021, the USDA conducted an undercover investigation of Yummy Happy Gourmet Deli Inc. 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 November 30, 2021, 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, through counsel, responded to the charge letter on December 4, 2021. In the response, Appellant denied the violations occurred and claimed the investigative report was inadequate and unreliable. Appellant also requested a CMP in lieu of disqualification. In its response, Appellant noted that it had requested information regarding the charges under the Freedom of Information Act (FOIA) through FNS's FOIA office.

After considering the Appellant's response and further evaluating the evidence, the Retailer Operations Division issued a determination letter, dated December 27, 2021. This letter informed 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 Appellant was considered for a hardship CMP but was ineligible because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

On December 29, 2021, 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(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking...if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.

7 CFR § 284.1 Pandemic Electronic Benefits Transfer (P-EBT) states in part:

(a) Overview. Section 1101 of the Families First Coronavirus Response Act (FFCRA; Pub. L. 116-127), as amended, authorized supplemental allotments to certain households. These benefits shall be referred to as Pandemic Electronic Benefits Transfer (P-EBT) benefits. This section establishes the retailer integrity regulations for P-EBT for retailers in any State as defined in Section 3(r) of the Food and Nutrition Act.

(b) Definitions. For this section:

(1) Trafficking means the activities described in the definition of trafficking at § 271.2 of this chapter when such activities involve P-EBT benefits.

(2) Firm's practice means the activities described in the definition of firm's practice at § 271.2 of this chapter when such activities involve P-EBT benefits.

(3) Involving P-EBT benefits or involve P-EBT benefits means activities involving PEBT benefits as well as supplemental nutrition assistance program (SNAP) benefits, or only P-EBT benefits.

(c) Participation of retail food stores and wholesale food concerns, and redemption of PEBT benefits. Requirements and restrictions on the participation of retail food stores and wholesale food concerns and the redemption of coupons described at §§ 278.2, 278.3 and 278.4 of this chapter, including the acceptance of coupons for eligible food at authorized firms, also apply to activities involving P-EBT benefits....

(e) Penalties. For firms that commit certain violations described at §§ 278.6 and 278.2 of this chapter where such violations involve P-EBT benefits, FNS shall take the corresponding action prescribed at § 278.6 or § 278.2 for that violation. For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. Specifically, FNS shall: (7) Disqualify the firm for ineligibles violations for such circumstances and corresponding time periods as described at § 278.6(e)(2)(i), (e)(3)(i), (e)(4)(i), and (e)(5) of this chapter, where such violations involve P-EBT benefits....

(g) Administrative and Judicial review. Firms aggrieved by administrative action under paragraphs (d), (e), and (f) of this section may request administrative review of the administrative action with FNS in accordance with part 279, subpart A, of this chapter. Firms aggrieved by the determination of such an administrative review may seek judicial review of the determination under 5 U.S.C. 702 through 706.

## **SUMMARY OF INVESTIGATION**

During an undercover investigation conducted between October 9, 2021, and October 26, 2021, FNS completed four compliance visits at Yummy Happy Gourmet Deli Inc. A report of the investigation was provided to Appellant as an attachment to the charge letter, dated November 30, 2021. The report included Exhibits A through D and provided full details on the results of each compliance visit. SNAP violations documented during three of the four 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: a scrubber sponge, a package of plastic cutlery, a package of party cups, a box of steel wool pads, a bottle of dish liquid, and a container of air freshener.

The report noted that, on one other occasion, an investigator attempted to exchange SNAP benefits for ineligible non-food merchandise and to exchange SNAP benefits for cash but the attempts were refused by the clerk on duty. These refusals are documented in Exhibit D. 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's contentions regarding this matter are summarized as follows:

- An FNS contractor conducted a field inspection at this location on or about the time of these alleged violations and during that visit, no violations occurred, the store was fully stocked, and yet the unnamed FNS investigator claims the sale of common ineligible non-food items occurred.
- Prior to the charge letter, there had been no prior non-compliance history. Since the time the owner has been in the program, since 2014, he has maintained an exemplary record and this is the first occasion of any accused violations.
- Appellants vehemently deny that they personally engaged in any type of illegal activity and were unaware, until receipt of the charge letter, that anyone else in their store or employed by them is alleged to have engaged in such activities.
- FNS failed to make any effort to determine the true identity and full name of the one clerk allegedly employed by the owner, and specifically identify the clerk who allegedly committed the wrongdoing. There is no description of the clerk, no name, not title, no means of identification or his relationship to the owner.
- The owner denies that the numerous descriptions of individuals alleged to be clerks are employed in the store. These are wholly fabricated as they are not identified by name or any identification.
- The alleged violations for the sale of common ineligible non-food items are in such insignificant amounts that it raises a question about the appropriateness and credibility of the investigation.
- That where the value of items is of an undetermined amount, not one common household ineligible non-food item allegedly purchased had any prices on them, and particularly compared to the failed attempt to induce the employee to exchange SNAP

benefits for cash evidences 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 and no information about the time spent in the store to determine if there was sufficient time for the transactions to take place and so the owner can identify the clerk on duty, which is important as it will directly impact the business. Any surveillance cameras in the store are self-erasing and any images are no longer available for viewing.
- The name of anyone connected with the investigation has never been disclosed. The owner is entitled to know whether there was an investigation and who was involved.
- There are no cash receipts or cash register receipts. The price of each product is displayed and carefully marked. As such, each customer receives a cash register receipt when a purchase is made.
- As indicated in the Report of Positive Investigation, there are no prices indicated on all of the items purchased, so FNS cannot identify which items were purchased or whether they were merely given by the clerk gratuitously.
- As admitted by FNS, on October 26, 2021, the investigator failed or bungled an unconscionable attempt to induce the employee to exchange SNAP benefits for cash, which the clerk refused. A clerk has nothing to do with purchasing stock and inventory for the store and these attempts are pure entrapment.
- These incompetencies, inadequacies, inaccuracies, and insufficiencies affect the reliability, veracity, and sufficiency of the investigative reports and the meager and questionable sale of ineligible items charge.
- The store is a deli/grocery convenience store open seven days per week, 24 hours per day. Approximately 70 percent of sales come from SNAP transactions and provide the income necessary to keep the business profitable and operating. A six-month disqualification will adversely affect future business endeavors and cause irreparable injury and damage to the owner's reputation in the business community.
- Should FNS determine the violations occurred, pursuant to Section 278.6(f)(1), FNS should impose a CMP as a sanction 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.
- The firm has met the criteria in Section 278.6(i) for a CMP. The owner has continuously trained and tested his employees relating to SNAP regulations and requirements.
- The store is in a busy area and serves numerous apartment buildings and other multi-store housing projects, all with large families in a two-block radius. Almost half the population is below the poverty line and receives public assistance. The closest supermarket is several blocks away and closes early in the evening. The store makes deliveries and takes telephone orders. There is a great need for families who live and work in the neighborhood. Disqualification would cause hardship to participating households.
- It would be irrational and illogical to accept and conclude that the owner of a solvent and successful business would intentionally jeopardize his business and livelihood by risking a six-month disqualification for the sale of meager amounts of ineligible non-food items.

- A FOIA request has submitted, but no information has been provided. As a result, Appellant has not been afforded an opportunity to properly defend, answer, and address the charges and has been deprived of due process.

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**

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.

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.

### **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 have the names of the employees that committed the violations, and that no cash register receipts were provided to Appellant. Appellant claims that the identity of the clerk was not determined, nor the clerk's relationship to the owner, and that the description of the clerks was wholly fabricated. Appellant also says, in one contention, that there are no prices on items purchased so that FNS cannot identify if any ineligible items were purchased or received gratuitously, but in another contention that the price of each product is displayed and carefully marked.

In reviewing the investigative report, 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 any 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. Photographs of the ineligible items purchased show price stickers on the items, so that the prices of these items are easily determined. The report describes the clerk on duty during each of the 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 along with the store's SNAP authorization number, the date and time of the transaction, the amount of the transaction, and transaction method. Appellant has offered no compelling evidence that any relevant detail on the report is incorrect. Accordingly, the violations in Exhibits A, B, and C were sanctionable and warrant the six-month disqualification imposed by the Retailer Operations Division.

### **Applicable Penalty**

Appellant contends that the violations were for insignificant amounts and states that a warning letter is the more appropriate sanction rather than a six-month disqualification. Appellant offers that this is the first time the store has been charged with a violation and that the clerks refused to exchange cash for SNAP benefits. Appellant also claims to continuously train and test employees regarding SNAP requirements. Finally, Appellant points to a store visit in which no violations occurred as evidence of compliance.

Regarding Appellant's contentions, SNAP regulations specifically provide that the applicable penalty for a first offense of the sale of common nonfood items, due to carelessness or poor supervision by a firm's ownership or management, is a six-month disqualification. SNAP regulations do not require any threshold be met for the six-month disqualification to apply. This is the minimum penalty in this circumstance, and accounts for the elements of 7 CFR § 278.6(d).

Although Appellant claims to have taken adequate care in training employees and that the violations committed by Appellant were minor in nature, the facts tell a different story. During the investigation period, two different clerks at Appellant's store sold ineligible items for SNAP benefits on three occasions. During these transactions, store clerks sold six ineligible items to the investigator in a period of just over two weeks. Given the duration and extent of the violations, and the fact that multiple clerks were involved, it is unlikely that Appellant took adequate care in supervising or training employees.



Finally, Appellant's counsel disingenuously claims that an FNS contractor conducted a field inspection at the store on or about the time of the alleged violations and that during the visit, no violations occurred. The field inspection Appellant appears to be referring to is a store visit that took place almost three years prior to this investigation, on September 20, 2018, when the store was due for reauthorization. The purpose of the store visit was to determine if the store had sufficient inventory to remain eligible for SNAP authorization, not to assess if violations were occurring.

### **No Personal Involvement or Intent to Violate**

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 October 31, 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. By signing the SNAP application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP.

### **Hardship to Appellant**

The Appellant contends that SNAP transactions account for approximately 70 percent of the firm's revenue. It further claims that a disqualification from SNAP will cause irreparable injury and damage to the owner by adversely affecting the owner's future business endeavors and damaging his reputation in the business community. According to the Appellant, the owner would not knowingly jeopardize his business and his livelihood by engaging in the violations outlined in the charge letter.

With regard to these contentions, SNAP regulations do not permit this review to consider a waiver or modification of a disqualification penalty on the basis of possible hardship – financial or otherwise – to either the ownership personally or to the firm itself. To allow an exemption from penalties based on a purported hardship to the firm or its ownership would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA. Moreover, giving special consideration to hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program requirements, but also to those retailers who have been disqualified from the program in the past for similar violations.

### **Trafficking Civil Money Penalty (CMP)**

Appellant asserts that the firm has met the criterion in 7 CFR § 278.6(i) for a trafficking CMP as the owner has continuously trained and tested his employees on SNAP regulations and requirements.

However, a trafficking CMP under 7 CFR § 278.6(i) is only available in lieu of a permanent disqualification due to trafficking violations. Appellant was not charged with any trafficking violations. Therefore, the Appellant's contention that the store's compliance policies and training program support a trafficking CMP are not relevant to the circumstances of this case.

### **Deprivation of FOIA and Due Process**

Appellant argues that a FOIA request has been submitted, but since a response has not yet been provided, Appellant has not been afforded an opportunity to properly defend, answer, and address the charges and has been deprived of due process.

Effective October 26, 2020, changes to 7 CFR § 278.6 and 7 CFR § 279.4 went into effect which allow FNS to take administrative action against a firm, even if the firm has submitted a FOIA request or an appeal for records. Further, program regulations do not provide for formal discovery procedures. FNS has provided Appellant all the information required, as well as every opportunity to respond, under program regulations. Accordingly, the agency's obligations regarding due process have been met.

### **Hardship Civil Money Penalty (CMP)**

The Appellant requests a CMP in lieu of disqualification, alleging disqualification would cause hardship to customers.

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 Yummy Happy Gourmet Deli Inc. would not cause a hardship to SNAP households as there were 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.

It is the determination of this review that a disqualification of Yummy Happy Gourmet Deli Inc., 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 half-mile radius of Yummy

Happy Gourmet Deli Inc., including at least five superstores, one supermarket, one large grocery stores, 11 medium grocery stores, and 18 small grocery stores, and 33 other conveniences 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 Yummy Happy Gourmet Deli Inc. 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

August 16, 2022