

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

American Choice Gourmet Deli Corp,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0248582

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a six month disqualification against American Choice Gourmet Deli Corp (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5 and 6), and § 278.6(f)(1) in its administration of the SNAP when it imposed a six month period of disqualification against Appellant.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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

A USDA investigator conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period December 15, 2021, through January 18, 2022. The investigation determined that personnel at the Appellant firm accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. All four transactions were deemed clearly violative and warrant a six month disqualification period. The items sold are best described in regulatory terms as common nonfood items such as lip balm, paper towels, plastic

cutlery, rolling papers, and a cigarette lighter. The investigative report indicates that these violative transactions were handled by two separate clerks with each clerk responsible for two violative transactions. The report noted that a third clerk refused to allow the purchase of two ineligible items using SNAP in Exhibit A. The report also noted that while the second violative clerk refused to allow the exchange of SNAP benefits for cash in Exhibit F, he did allow the purchase of two ineligible items (the rolling papers and lighter) in the same Exhibit.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated March 4, 2022, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).” Appellant responded to the charges in an email dated March 13, 2022, that admitted to the violations. Specifically, Appellant stated that a clerk named Wally had allowed the purchase of ineligible items because he didn’t care about the business and was hoping to make a relationship with the ladies.

After giving consideration to the evidence, the Office of Retailer Operations and Compliance notified Appellant in a letter dated June 8, 2022, that it determined that violations had occurred at the firm, and that a six month period of disqualification from participating as an authorized firm in SNAP was warranted. This determination letter also states that Appellant’s eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

By a request sent via email on June 10, 2022, Appellant, through counsel, appealed the Office of Retailer Operations and Compliance’s decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. No subsequent correspondence was received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, Sections 278.6(a) and (e)(5) establish the authority upon which a six month disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 271.2 states that: 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 § 278.2(a) states that: Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. Further, the citation specifies that coupons may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states 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, 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.

7 CFR § 278.6(e)(5) 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) states that, “FNS may impose a civil money penalty as a sanction in lieu of disqualification when 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. FNS may disqualify a store which meets the criteria for a CMP if the store had previously been assigned a sanction. A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 278.6 Disqualification of retail food stores... and imposition of civil money penalties in lieu of disqualifications states in part: “(p) Freedom of Information Act (FOIA) requests and appeals. A FOIA request or appeal for records shall not delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm under paragraphs (c) and (d) of this section, or delay the effective date of a disqualification or penalty listed in paragraph (e) of this section.

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- It should also be noted at the outset that an FNS contractor conducted a field inspection at this location on or about the times of these alleged violations. That during that visit to the location by the unnamed FNS contractor, no violations occurred, the store was fully stocked, yet the unnamed FNS investigator claims that the sale of common ineligible non-food items occurred;
- Ownership vehemently denies personally engaging in any type of illegal activity and was unaware, until receipt of the charge letter, that anyone else in the store or employed by

the store was alleged to have engaged in such activities;

- A review of the charge letter reveals the inadequacies and insufficiencies of the investigation conducted and lack of evidence requiring dismissal of these charges. FNS failed, during the investigation, to make any effort to determine the true 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 Exhibits C, D, E, and F. 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 six visits to the store. The description given does not match any employee of the store;
- The amounts involved in the alleged sales are of such an insignificant amount, to wit, less than \$17.00, and where the clerk refused a request for cash back off the EBT card, that the penalty imposed on this owner is unduly harsh and excessive;
- There are no times of entry and departure by anyone to and from the premises and there is no information on time spent in the store. Times would allow the owner to identify the clerks on duty at the time and if the time in the store was sufficient to have completed the purchases. The clerk's identity is of importance in any investigation, particularly when it will directly impact a business;
- There are no cash receipts or cash register receipts. Counsel was informed that the price of each product is displayed and sold in this store is carefully marked. As a result, each customer receives a cash register receipt or tape when a purchase is made. The owner denies 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 as to what was exchanged or purchased, so that the entire substance of the acceptance of SNAP benefits in exchange for non-food items allegation is not supported in the record as there is no amounts of any item which was allegedly exchanged for SNAP benefits. As indicated in the Report of Positive Investigation, there are no prices of any of the of the items allegedly purchased, so that the FNS cannot identify which items were purchased or whether they were merely given to the undercover investigator to assist them as they entrapped the clerk;
- It is important to note that it is admitted by the FNS that the Investigator failed in his or her attempt to induce the employee to accept SNAP benefits in exchange for common ineligible non-food items, to which the clerk refused on December 15, 2021, as noted in Exhibit "A". It is admitted by the FNS that the Investigator failed in his or her attempt to induce the employee to accept SNAP benefits in exchange for cash which the clerk refused on January 18, 2022, as noted in Exhibit "F". No cash for EBT benefits were ever exchanged;
- The firm is open 24/7 daily and SNAP accounts for 40 percent of sales. Should the FNS determine that this firm and owner violated Section 278.2(a) of the SNAP regulations, then and in that event, pursuant to Section 278.6(f)(1) 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 and cure any issue with one employee. That where the firm and owner are subject to a six month disqualification it is within the discretion of the FNS to impose a minor civil penalty in lieu of a six month disqualification as the imposition of the sanction in this case would be unjustified, inappropriate, cruel, and unusual punishment for no violation;
- The firm has met the criteria listed in SNAP regulations, Section 278.6(i) and has

established and implemented an effective policy and program to prevent violations of the SNAP. Documentation of firm policy as well as invoices for stock are available upon request;

- A six month disqualification of the firm will have an adverse effect on the owner's future business endeavors and would cause him irreparable injury and damage to his reputations in the business community. He would not knowingly or intentionally jeopardize his source of business and his reputation by engaging in the illegal activity charged especially when he has invested large sums of money to renovate the store to provide financial support to his family;
- Furthermore, the owner has maintained an exemplary record since 2017. Counsel further submits that such an unblemished record is evidence of his continued compliance with the law and his training and supervision of his employees;
- The business is staffed by four full-time employees and the owner has continuously trained and tested his employees concerning SNAP requirements since being authorized in 2017. The training program consists of two weeks of intensive, hands on classes overseen by the owner. He works with each employee during this period, teaching them the SNAP rules and regulations. He provides them with handouts and other printed materials to study and learn prior to their full employment in the store. Each employee is tested 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. Training documents acknowledged by all employees can be provided upon request. Counsel reviewed the requirements for a trafficking CMP;
- Counsel described the neighborhood around the store, store layout, and what food items the store stocks, including cans of Enfamil selling at \$20.00 each which are commonly sold in volume. By virtue of its hours, ownership cannot be in attendance at all times. Therefore, he relies upon the competence, honesty, and good judgment of his employees, particularly the clerks and cashiers, during his absence;
- Finally, the FNS failed to establish intent, which is an essential element for its decision to disqualify the owner for six months; and,
- It is further submitted that where this owner's reputation in the community is being impugned and his ability to ever again obtain permission to participate in SNAP in the future is being denied, he should not be disqualified for any period. Thus, it is hereby requested that the determination be rescinded or in lieu of such disqualification, a minor civil money penalty be imposed.

Appellant submitted no evidence or other rationales in support of these contentions.

ANALYSIS AND FINDINGS

Regarding Appellant's vehement denial, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the action at the time such action was made. In an appeal of an adverse action, the Appellant bears the

burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. 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. Additionally, a claim of having a record of participation in 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.

It is noted that Appellant's administrative review request references the Appellant firm and its owner being permanently disqualified; however, the USDA FNS charge letter dated March 4, 2022, makes no mention of a permanent disqualification stating only that the Appellant firm was being charged with accepting SNAP benefits for ineligible non-food items that would warrant a disqualification period of six months. Several additional misstatements were noted in Appellant's briefs that include:

- The request for administrative review makes several references to one clerk being responsible for the violative transactions when the investigative report clearly identifies two separate clerks as being responsible for the violations in Exhibits C, D, E, and F.
- Appellant claims that the Report of Positive Investigation contains no prices for most of the items purchased; however, the report clearly shows the prices for 21 of the 29 items purchased with eight items noted as having "no price indicated".
- Appellant claims that an FNS contractor conducted an on-site "field inspection" of the subject firm on or about the times of the alleged violations; however, FNS records show that the only contractor inspection of the Appellant firm occurred on April 11, 2018, nearly four years prior to the start of the investigation.

The number and serious nature of these patently false statements raises the fundamental question of whether counsel for the Appellant was, in fact, referring to the Appellant firm or to a different store.

The FNS investigative report shows that two employees working at the Appellant firm, not one as claimed by Appellant, accepted SNAP benefits for ineligible items on four separate occasions during the investigative period indicating a series of SNAP violations most likely resulting from little or no training and poor or no supervision. The report shows that the nature and scope of the violations under review do violate SNAP regulations, and the transaction amounts cited in the report also match FNS transaction records for the dates in question. Additionally, a review of the report shows no errors or discrepancies. There is no regulatory threshold for the dollar value of

the ineligible items purchased or for the timeframe in which they were purchased. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items. SNAP regulations explicitly state that FNS shall disqualify a store for a six month period 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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management. The applicable regulations do not specify intent as being a required element for a six month disqualification.

SNAP benefits, in general, are only authorized to be used for the purchase of foods for the household to eat as well as seeds and plants which produce food for the household to eat. The common nonfood items purchased are clearly not edible foods and are not plants or seeds, so one has to question the level of training these employees received by store ownership and/or management. The basic concept of "if you can't eat it, you can't buy it using SNAP" is not a difficult one for employees to grasp, yet these employees allowed the purchase of ineligible items using SNAP benefits on multiple occasions. Had an effective compliance policy and program been in effect at the firm, it is unlikely that these 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 these employees. Additionally, had store ownership and/or management been supervising these 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 these employees were deficient in their knowledge of SNAP rules and regulations had it periodically spot checked their 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 license 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 these 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. Common sense dictates that these actions more likely than not represented an ongoing pattern of SNAP violations at the Appellant firm. As previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight and training on the part of ownership to ensure employees, especially new employees, are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store ownership to not have a program of ongoing supervision of employee performance and conduct by periodically monitoring store transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the firm or conducting other activities that would jeopardize the licenses and income that the firm is dependent upon. 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 next section.

A review of the investigative report shows no errors or discrepancies and a comparison of the dates/times/amounts on the POS receipts issued by the Appellant firm to the USDA investigator correspond to the dates/times/amounts provided to FNS by the firm's EBT processor when it submitted the transactions to FNS for reimbursement. Other evidence provided (photos of the items purchased and detailed donation records signed by a local charitable organization) also support the details provided in the investigative report. While a firm that has previously received warnings of possible violations or that has been sanctioned before could receive a more severe penalty, SNAP regulations do not provide any grounds for dismissing or reducing penalties for those firms that have not received warnings or previously been sanctioned. The record shows no evidence that the Appellant firm received any prior warnings or has been sanctioned and there is no evidence that the firm's ownership or management intentionally violated SNAP regulations.

Appellant is correct that the firm has no previous history of SNAP program violations or warnings. However, this does not necessarily mean that the firm has not been conducting violative transactions. Neither FNS nor Appellant has sufficient data to conclusively prove that the firm was or was not conducting violative transactions prior to the start of the undercover investigation. However, the results of the investigation showed SNAP violations conducted by two store employees in four of the five visits to the firm that included attempts to purchase ineligible items. While it is not definitive, it can be readily inferred that violative transactions were more likely than not occurring in previous months based on these investigatory visits.

Regarding Appellant's other contentions, no statutory or regulatory requirements exist for USDA investigative personnel to positively identify store employees that have committed violations of SNAP rules and regulations. The descriptions contained in the Report of Positive Investigation are provided only to assist store ownership in identifying those employees responsible for the violative transactions. Many variables can affect the description of an employee (e.g., whether the employee was sitting or standing or on a platform, the fit of their clothing, changing hair styles/lengths/colors, etc.) so these descriptions may not be one hundred percent accurate which does not mean that the violations did not occur. Disclosing the identity of investigative personnel would cause a clearly unwarranted invasion of personal privacy. SNAP regulations do not establish any minimum dollar amount that exchanges of SNAP benefits for common ineligible nonfood items must exceed in order to be considered violative, therefore any allegations that transactions involving "insignificant amounts" not being credible are baseless. While the firm did stock baby food and formula, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products at a WIC vendor using WIC vouchers, not SNAP EBT at the Appellant firm.

Regarding a warning letter, there are no requirements in existing FNS regulations that require stores suspected of trafficking or misusing SNAP benefits be provided with a written or verbal notification that violations of SNAP regulations may be occurring and the potential penalties. Warning letters are issued in those situations where the SNAP violations are of a limited nature that would not warrant a disqualification and therefore would not have been appropriate in this situation.

Appellant offered no evidence to validate any of its claims. Since Appellant's contentions are only assumptions, not facts, and no basis has been presented to substantiate them, they are found to be without merit.

With regards to Appellant's contention that its rights to due process were violated, section 278.6(b)(1) of the SNAP regulations provides that upon charging a firm with SNAP violations, the letter informing the firm of the charges "shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter." This section further states that, "Any firm considered for disqualification, shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination." A review of Retailer Operations' administrative actions regarding this matter indicates full compliance with applicable SNAP regulations, policies, and procedures. This disqualification is an administrative action and SNAP regulations provide for an administrative review of the action. The Act and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a State court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

Based on this discussion, the decision by the Office of Retailer Operations and Compliance to disqualify the firm for a six month period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications. The matter under review is a term disqualification of six months and does not involve trafficking therefore a trafficking CMP cannot be considered under 7 CFR § 278.6(i).

A hardship CMP as an optional penalty in lieu of a six month disqualification was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and its disqualification would create a 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. FNS records show there are at least 14 comparably sized or larger SNAP retailers located within a 0.18 mile radius of Appellant's location that includes three supermarkets, three medium grocery stores, two small grocery stores, and six convenience stores. The nearest small grocery store is approximately 1.5 short blocks from Appellant's location while the nearest supermarket is 1.5 blocks away. There are many additional larger stores slightly further away. All of the comparable stores stock adequate varieties of food in all four staple food categories and in perishables as required by FNS.

The nearby stores appear readily accessible to SNAP recipients and offer a variety of staple foods comparable to, or better than, those offered by Appellant. It is acknowledged that some level of inconvenience to SNAP users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be

altered. Inconvenience, however, does not rise to the level of hardship required by the regulations.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged and as admitted by the store owner. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA investigator and signed under penalty of perjury. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail. Accordingly, the determination by the Office of Retailer Operations and Compliance to impose a disqualification of six months against the Appellant firm from participating as an authorized retailer in SNAP is sustained. Furthermore, the Office of Retailer Operations and Compliance properly determined that Appellant was not eligible for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this decision. A new application for SNAP participation may be submitted ten (10) days prior to the expiration of the six month disqualification period. When eligible, 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 877-823-4369.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

April 25, 2022