

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

Cypress 138 Deli Grocery Corp.,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0258888

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 Cypress 138 Deli Grocery 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 Cypress 138 Deli Grocery 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

Cypress 138 Deli Grocery Corp. was initially authorized to participate in SNAP on May 19, 2017. Between October 24, 2022, and November 1, 2022, the USDA conducted an undercover investigation of Cypress 138 Deli Grocery Corp. to ascertain the firm’s compliance with Federal SNAP law. Agency records show that during the investigation Appellant appeared to have violated SNAP regulations by accepting SNAP benefits in exchange for ineligible non-food items on three separate occasions.

In a letter dated December 6, 2022, 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 its representative, replied to the Retailer Operations Division's charges in writing on December 16, 2022. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

The Retailer Operations Division issued a determination letter, dated January 19, 2023. 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 February 9, 2023, Appellant, through its representative, 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, an appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. This means an 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(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

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.

SUMMARY OF INVESTIGATION

During an undercover investigation conducted between October 24, 2022, and November 1, 2022, FNS completed five compliance visits at Cypress 138 Deli Grocery Corp. A report of the investigation was provided to Appellant as an attachment to the charge letter, dated December 6, 2022. The report included Exhibits A through E and provided full details on the results of each compliance visit. SNAP violations documented during three of the five visits included the exchange of ineligible non-food merchandise for SNAP benefits. The report noted that the following ineligible non-food items were sold in exchange for SNAP benefits: sandwich bags, trash bags, and toilet paper.

The report noted that an investigator attempted to exchange SNAP benefits for ineligible non-food merchandise in Exhibit C, but the attempt was refused by the clerk on duty. In Exhibit D, the investigator did not attempt to purchase any ineligible items. In Exhibit E, the clerk allowed the

sale of ineligible items but refused the investigator's attempt to exchange SNAP benefits for cash. The charge letter states that the violations that occurred in Exhibits A, B, and E 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:

- Appellant denies the allegations and requests reconsideration of the disqualification determination.
- A disqualification would cause a financial hardship to Appellant.
- Appellant's employees are well-trained. Appellant has an established training policy program conducted semi-annually to ensure proper procedures are understood.
- The store's employees have denied selling ineligible items in exchange for SNAP. Because of the training provided, Appellant trusts its employees.
- In Exhibit C, the clerk refused to sell plastic plates and bowls.
- In Exhibit E, the clerk refused to exchange EBT benefits for cash.
- Appellant requests a civil money penalty in lieu of disqualification.

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 Operations 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 material error or discrepancy. The investigation report appears to be specific and thorough regarding the dates of the violations, the critical facts related thereto, and is supported by documentation that confirms the details of the transactions. The record further indicates that the Retailer Operations Division has documented the transactions in which personnel at the store allegedly 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.

Employee Training

Appellant contends it has properly trained staff in the handling of SNAP transactions. In support of this contention, Appellant noted that the store personnel refused to sell plastic plates and bowls in exchange for SNAP benefits in Exhibit C. In Exhibit E, the clerk refused to exchange SNAP benefits for cash. In addition, Appellant provided training logs to the Retailer Operations Division to support its contention that it trained its employees.

With regard to these contentions, the law is clear that when program violations occur, specifically the exchange of ineligible nonfood items for SNAP benefits due to employee carelessness or poor supervision by the firm's ownership or management, a six-month disqualification is the required penalty, even on the first occasion.

Based on the clerk's refusal to sell ineligible items in Exhibit C and the refusal to engage in trafficking in Exhibit E, it is likely that some training related to SNAP had previously taken place. However, the investigation report shows that of the five compliance visits made to the firm, ineligible products were sold in exchange for SNAP benefits during three visits. The Retailer Operations Division attributed the violations to the carelessness or poor supervision by the firm's ownership or management," pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations, for which the regulatory penalty is a disqualification of six months. This is the minimum penalty in this circumstance, and accounts for the elements of 7 CFR § 278.6(d). Accordingly, the sanction imposed by the Retailer Operations Division in this case fully conforms to SNAP regulations and is consistent with sanctions imposed upon other stores that have committed similar first-time violations.

Sufficiency of the Investigative Report

Appellant contends its staff denied selling ineligible items in exchange for SNAP benefits. Because of the store training provided, Appellant trusts its employees.

With regard to this contention, this review again notes that the investigative report is signed by the investigator under penalty of perjury and appears to be credible and fully documented. Available evidence shows that the transactions identified in the investigative report 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.

Every SNAP transaction that occurred at Appellant's firm appears on agency records along with the store's SNAP authorization number, the transaction date and time, the transaction amount, and the transaction method. Appellant has offered no compelling evidence showing that these violative transactions did not take place. Accordingly, the violations in Exhibits A, B, and E were sanctionable and warrant the six-month disqualification imposed by the Retailer Operations Division.

Hardship to Appellant

Appellant claims that a six-month disqualification would result in financial hardship to the business.

With regard to this contention, SNAP regulations do not permit this review to consider dismissing or modifying a disqualification penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself. To allow an exemption from penalties based on a purported financial 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 economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers that are complying fully with program requirements, but also to those retailers that have been disqualified from SNAP for similar violations.

Hardship Civil Money Penalty (CMP)

Appellant requests a CMP in lieu of disqualification.

Regarding this request, 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 Cypress 138 Deli Grocery Corp. 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 Cypress 138 Deli Grocery Corp., a small grocery 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 sized or larger SNAP authorized retail stores located within a one-mile radius of Cypress 138 Deli Grocery Corp., including two superstores, eleven supermarkets, one large grocery store, and twenty medium 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 Cypress 138 Deli Grocery Corp. 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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

AMIE CHURCHILL
Administrative Review Officer

April 19, 2023