

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

New Way Deli & Grocery Corp.,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0258828

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 New Way 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 New Way 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

New Way Deli & Grocery Corp. was initially authorized to participate in SNAP on December 11, 2012. Between November 17, 2022, and November 21, 2022, the USDA conducted an undercover investigation of New Way Deli & Grocery Corp. to ascertain the firm’s compliance with Federal SNAP law. Agency records show that during the investigation Appellant violated SNAP regulations by accepting SNAP benefits in exchange for ineligible non-food items on three separate occasions.

In a letter dated December 14, 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.

The record shows that Appellant did not respond to the charge letter.

After further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated January 9, 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 January 18, 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 November 17, 2022, and November 21, 2022, FNS completed three compliance visits at New Way Deli & Grocery Corp. A report of the investigation was provided to Appellant as an attachment to the charge letter, dated December 14, 2022. The report included Exhibits A through C and provided full details on the results of each compliance visit. SNAP violations documented during each of the three 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: trash bags, sandwich bags, multi-purpose scrubbers, liquid fabric conditioner, and fabric conditioner sheets.

The report noted that an investigator attempted to exchange SNAP benefits for cash in Exhibit C but was refused. 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:

- This is the first time the firm has had a problem with SNAP compliance.
- The investigation only included three visits to the store.
- The clerk refused to exchange SNAP benefits for cash.
- The violations could have been mistakes and were not intentional.
- Appellant regularly rejects customer requests to exchange cash or ineligible items for SNAP benefits.
- Appellant has trained staff in the proper handling of SNAP transactions.
- Appellant was treated unfairly as similar businesses were offered a CMP or warning letter.
- Appellant fired the clerk responsible for the SNAP violations.
- Appellant requests a CMP.
- Disqualification could create a hardship for Appellant.

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.

In response to the charge letter and on administrative review, Appellant did not offer any evidence or alternative theories to counter the agency's investigative report. In fact, Appellant, concedes that the violations occurred, claiming they were a mistake. Because the violations themselves do not appear to be in dispute, this review finds, by a preponderance of the evidence, that program violations did occur as charged by the Retailer Operations Division and a six-month

disqualification is warranted. The balance of this review will address Appellant's remaining contentions.

First SNAP Violation

Appellant maintains that this is the first time the store has had an issue related to SNAP. While this may be true, 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 the violations upon which they are based.

Appellant is correct that the clerk rejected attempts to traffic at the firm. A refusal to traffic does not negate the other violations that occurred. Trafficking is a more serious violation that carries a more severe penalty. Appellant contends the violations were not intentional. The investigation report shows that of the three times that nonfood violations were attempted, store personnel permitted them three times. Repeatedly entrusting an unsupervised, inexperienced and/or untrained clerk(s) to handle SNAP benefits is reasonably viewed as careless or the exercise of poor supervision. Accordingly, the Retailer Operations Division attributed the violations to "carelessness, or poor supervision by the firm's ownership or management," pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations, which results in a disqualification of six months. This penalty is only permitted if the firm has not been previously sanctioned. This is consistent with Appellant's contention that it committed violations in error. Therefore, a six-month disqualification for the violations committed, the minimum penalty allowed by regulations, is the appropriate sanction in this case.

Employee Training/Unfair Treatment

Appellant contends it has properly trained staff in the handling of SNAP transactions. Further, Appellant contends it was treated unfairly as similar businesses were offered a CMP or warning letter.

Based on the clerk's refusal to engage in trafficking in Exhibit C, it is likely that some training related to SNAP had previously taken place. However, the record plainly shows that store personnel committed program violations by allowing the sale of ineligible items every time the investigator visited the store. Based on these actions, it is apparent to this review that employee carelessness or poor supervision was more prevalent at this store than it should have been. Accordingly, a six-month disqualification penalty is proper and is entirely in line with SNAP regulations at 7 CFR § 278.6(e)(5). This penalty is also consistent with sanctions imposed upon other retailers that have committed similar violations.

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. This regulation defines hardship 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 determined that a six-month disqualification of New Way 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 New Way Deli & Grocery Corp., a convenience store, would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are a number of similarly stocked or larger SNAP authorized retail stores located within a mile radius of New Way Deli & Grocery Corp., including nine superstores, 15 supermarkets, five large grocery stores, 22 medium grocery stores, and 38 small grocery stores. There is also no evidence that Appellant sells its inventory at unusually low prices in comparison to nearby stores. Given that hardship conditions have not been established, this review agrees with the Retailer Operations Division's determination that a hardship CMP may not be assessed in lieu of disqualification.

Remedial Actions Taken

Appellant contends it has taken remedial action by firing the clerk responsible for the violations.

It should be noted that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken, or that will take place, so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty based on alleged or planned corrective actions implemented after findings of program violations.

Therefore, Appellant's contention that corrective action has taken place does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

Hardship to Appellant

Appellant claims that a six-month disqualification could result in financial hardship to the store.

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.

CONCLUSION

This review finds, by a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at New Way 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

March 8, 2023