

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

**Sadeq Gourmet Deli Llc,**

**Appellant,**

**v.**

**Case Number: C0257834**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support the Retailer Operations Division's assessment of a \$29,064.00 hardship civil money penalty (CMP) against Sadeq Gourmet Deli Llc (hereinafter "Sadeq Gourmet Deli Llc" or "Appellant") in lieu of a one year disqualification from the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(5), 7 CFR § 278.6(f)(1), and 7 CFR § 278.6(g) in its administration of the SNAP, when it imposed a hardship CMP of \$29,064.00 in lieu of a one year disqualification against Sadeq Gourmet Deli Llc.

**AUTHORITY**

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that "[A] food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS".

**CASE CHRONOLOGY**

The Department of Agriculture conducted an investigation of the compliance of Sadeq Gourmet Deli Llc with Federal SNAP law and regulations during the period September 18, 2022 through September 25, 2022. In a letter dated December 14, 2022, the Retailer Operations Division charged the Appellant with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three out of five compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of one year as provided in 7 CFR § 278.6(e)(5). The letter also stated that

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

The charge letter noted that per SNAP regulations Section 278.6(b), the Appellant has the right to present any information, explanation or evidence regarding the charges and must reply within 10 calendar days of the date of receipt of the charge letter. Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on December 15, 2022. Per Outlook confirmation of delivery, the charge letter was delivered to the Appellant's counsel via email on December 14, 2022 (Note: A charge letter dated was issued to the Appellant on October 27, 2022. It was received by the Appellant on November 8, 2022. The Appellant responded to the letter of charges via a telephone conversation with Retailer Operations Division staff on November 14, 2022. In addition, the Appellant's counsel provided a written response to the letter of charges on November 14, 2022. On December 14, 2022, the Retailer Operations Division rescinded the October 27, 2022 charge letter and a new charge letter, dated December 14, 2022, was issued to the Appellant).

In responses to the Retailer Operations Division of November 14, 2022 and December 14, 2022, the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated December 29, 2022 informing the Appellant that the violations cited in the charge letter occurred at the firm and that a one year period of disqualification was warranted. The determination letter also stated that the Appellant was eligible for a hardship CMP as Sadeq Gourmet Deli Llc is selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households. Thus, a hardship CMP in the amount of \$29,064.00 was imposed in lieu of the one year SNAP disqualification.

In an email correspondence of January 4, 2023, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to impose a hardship CMP in lieu of a one year disqualification of Sadeq Gourmet Deli Llc from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated January 20, 2023 and implementation of the hardship CMP was held in abeyance pending completion of this review.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

### **CONTROLLING LAW AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e) establish the authority upon which a one year disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2 (a) states, in part: “Coupons may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food.”

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

7 CFR § 271.2 states, in part: (1) Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption ....

7 CFR § 278.6(a) states, in part: “FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system...”

7 CFR § 278.6(e)(5) states, in part: “Disqualify the firm for 6 months if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as, but not limited to, the sale of common nonfood items due to carelessness or poor supervision by the firm’s ownership or management”.

7 CFR § 278.6(e)(6) states, in part: “Double the appropriate period of disqualification prescribed in paragraphs (e)(2) through (5) of this section as warranted by the evidence of violations if the same firm has once before been assigned a sanction.”

7 CFR § 278.6(f)(1) states, in part: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm subject to a disqualification is selling a substantial variety of staple food items, and the firm’s disqualification would cause hardship to food stamp households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices.”

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

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

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

## **SUMMARY OF THE CHARGES**

During an investigation conducted from September 18, 2022 through September 25, 2022, USDA conducted five compliance visits at Sadeq Gourmet Deli LLC. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated December 14, 2022. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during three of the five compliance visits and involved the sale of a variety of items best described in regulatory terms as “common nonfood items”. The misuse of SNAP benefits noted in Exhibits A, B, and D warrant a disqualification period of one year as provided in 7 CFR § 278.6(e)(6). The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

The Retailer Operations Division determined that the assessment of a hardship CMP of \$29,064.00 in lieu of a one year disqualification was the appropriate penalty for these violations as Sadeq Gourmet Deli LLC is selling a substantial variety of staple food items and the firm’s disqualification would cause hardship to SNAP households.

## **APPELLANT’S CONTENTIONS**

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

- The owner vehemently denies that he personally engaged in any type of illegal activity and was unaware, until the receipt of the charge letter, that anyone else in the store or employed by the owner is alleged to have engaged in such activities.
- Since being authorized to participate in the SNAP, the Appellant has maintained an exemplary record and this allegation is the first occasion in which a member of the firm and its management are aware of conduct of any SNAP violations. Such an unblemished record is evidence of the Appellant’s continued compliance with the law and training and supervision of employees up and including the present time.
- FNS has failed to establish intent, which is an essential element of the basis for its decision to disqualify the firm.
- An FNS contractor conducted a field inspection at this location on or about the times of these alleged violations. During that visit no violations occurred and the store was busy and fully stocked.
- By virtue of the hours that this retail grocery store is open for business, the owner cannot be in attendance at all times. Therefore, he must rely upon the competency, honesty, and good judgment of store employees, particularly the clerks and cashiers, during his absence. The owner denies that the incidents forming the basis of the complaint as set forth in the letter of charges took place.
- A review of the letter of charges reveals the inadequacies and insufficiencies of the investigation conducted by FNS and a lack of evidence requiring dismissal of the charges.
- The owner witnessed the investigator placing items in his own shopping bag before approaching the store counter and he was going to put more items in his bag but the owner stopped him and actually grabbed the items from the investigator to prevent him from putting them in the bag. The owner could not see everything that the investigator put into his bag or everything that he did.

- The investigator failed to make any effort during the investigation to determine the true identity and full name of the clerk who allegedly committed the wrongdoing as noted in the Exhibits. There is no description of the clerk, no name, no title, no means of identification or his relationship to the owner after five undercover visits to the store.
- The owner denies that the description of individuals alleged to be clerks in this store as set forth in the investigation reports are employed in this store. These are wholly fabricated as they are not identified by name or any identification.
- In each of the Exhibits, there is no time of entry and departure by anyone to and from the subject premises. There is no information about time spent in the store by the investigator which is important for the following reasons: (a) was the time sufficient for the investigator to complete the selection of the multiple items from the various locations in this grocery store, wait in line at the counter, have the purchases totaled at said counter and pay for same, and (b) based on the hour of any given day, the owner herein can identify the clerk who was on duty at the time. The clerk's identity is of importance particularly when it will directly impact a business. In addition, any surveillance cameras in the store are self-erasing and the images taken during the investigation are no longer available for viewing.
- The name of anyone connected with the investigation has never been disclosed and the owner is entitled to know whether there was a planned investigation, the documentation regarding the tactics used in the operation, and who was involved.
- There are no cash receipts or cash register receipts. The price of each product at the Appellant 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.
- The receipts of the transactions do not match what was purchased.
- There is also a serious flaw in this case as to what was exchanged or purchased under the SNAP, so the entire substance of SNAP benefits for ineligible nonfood items allegation is not supported in the record as it is clear that the cashier was seeking to operate within the SNAP regulations. Furthermore, there is no specific allocation to the receipt to such items, so that FNS cannot identify which items were purchased or whether they were merely given to the investigator to assist them as they entrapped the clerk when they pleaded and begged for such items.
- The amount involved in the alleged sale of ineligible items is of such an insignificant amount that it raises a question about the appropriateness and credibility of the investigative reports. That where the value of such items are not indicated, particularly compared to the failed attempt by the investigator to induce the employees in Exhibits C and E to allow ineligible nonfood items to be purchased with SNAP benefits and the failed attempt by the investigator in Exhibit E to exchange SNAP benefits for cash, evidences that the penalty imposed is unduly harsh and excessive.
- These incompetence, inadequacies, inaccuracies and insufficiencies affect the reliability, veracity and sufficiency of the investigation reports and the meager and questionable sale of ineligible items charged.
- As there have been no named employees designated by FNS as individuals who have violated the SNAP regulations, there have been no violating employee(s) who have been disciplined.
- Prior to the issuance of the charge letter, there had been no compliance history proving that this owner has been in compliance with the rules and regulations of the SNAP.

- Should FNS determine the Appellant violated Section 278.2(a) of the SNAP regulations, pursuant to Section 278.6(f)(1), the agency should impose a civil money penalty as a sanction in lieu of disqualification as it would be a violation of due process to prosecute the 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 listed in 7 CFR 278.6(i) in that it had developed and implemented an effective compliance policy and program which was in operation prior to the occurrence of the SNAP violations. The owner was not aware of, did not approve, did not benefit from, or was not in any way involved in the conducted or approval of the alleged sale of common ineligible items as set forth in the charge letter and it is only the first occasion in which a member of firm management has become aware that FNS has alleged conduct of supposed violations by the firm.
- Since being authorized to accept SNAP benefits, the Appellant has continuously trained and tested employees concerning the SNAP regulations and requirements regarding the prohibitions against sales of ineligible items and exchanging SNAP benefits for cash and implemented an effective policy and program to prevent violations of the SNAP.
- The Appellant's training program consists of two weeks of intensive, hands on classes, overseen by the store owner. He works with each employee during this period, teaching them the rules and regulations of the SNAP. He mandates the viewing of the FNS video and provides them with handouts and other printed materials, which they must read, study, and learn prior to their full employment in the store. Upon the conclusion of the two-week period, the owner gives each employee a test to ensure their compliance with the SNAP regulations. Any employee that is suspected of failing to comply with the policies of the store is immediately terminated.
- There have been no re-occurrences of the incidents that are alleged in the charge letter.
- A substantial portion of the Appellant's sales and revenues (approximately 70%) result from its participation in the SNAP. SNAP sales provide the income necessary to keep the business profitable so it can continue its operation. A SNAP disqualification would so adversely affect this business that it would cause irreparable injury and damage to the owner's reputation in the business community.
- A SNAP disqualification would impose a hardship on area SNAP customers. The Appellant is at all times continually well stocked with a large quantity of staple food inventory specifically designed to accommodate low-income customers. The Appellant is located in a busy commercial area along a shopping area and near bus stops. The Appellant provides necessary items to the community comprised of low income houses, all with large families which are all within a two-block radius. The neighborhood has a high concentration of minority populations and almost half of the population lives below the poverty line and receives public assistance. There are also family homeless shelters, nursing homes, rehabilitation centers, senior living centers, and other commercial enterprises in the immediate area. The closest supermarket is located several blocks away and closes early in the evening.
- The Appellant should be offered a civil money penalty in lieu of disqualification per Section 278.6(a), as a disqualification would cause hardship to participating households and the owner requests an immediate hearing to determine same.
- Counsel has filed a FOIA demand and requests that any decision or determination herein be held in abeyance until counsel is furnished the information and data demanded, and a final response is submitted. Without this additional information the Appellant will not be afforded

an opportunity to properly defend, answer and address these charges and as a result, will be deprived of due process.

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

## **ANALYSIS AND FINDINGS**

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

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.

The owner vehemently denies that he personally engaged in any type of illegal activity and was unaware, until the receipt of the charge letter, that anyone else in the store or employed by the owner is alleged to have engaged in such activities.

However, the FNS investigative report shows that employees working at the Appellant firm accepted SNAP benefits for ineligible nonfood items on three separate occasions during the investigative period indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. 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.

The Appellant contends that the price of each product at the 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. Investigative personnel stand by their report that the items listed in the investigation report were, in fact, purchased and have documentation on file that confirms the items listed were donated to and signed for by a charitable organization following each transaction. Also supporting the conclusion that the investigation did take place at the subject store are EBT receipts obtained during the investigation whose transaction amounts correspond exactly to the purchase amounts and times indicated in each of the Exhibits of the investigation report, and clearly bear the name and address of the subject store. Therefore, the evidence supports the conclusion that the Appellant was not misidentified as the offending store and that the SNAP violations as noted occurred.

The Appellant contends that the amount involved in the alleged ineligible sale activities is of such an insignificant amount that it raises a question about the appropriateness and credibility of the investigative reports. However, there is no regulatory threshold for the dollar value of the ineligible items purchased or for the timeframe in which they were purchased. While the Appellant is correct that the employees in Exhibits C and E refused to accept SNAP benefits in exchange for ineligible nonfood items and the employee in Exhibit E refused to traffick SNAP benefits, the acceptance of SNAP benefits for ineligible items as noted in Exhibits A, B, and D is a violation of the SNAP rules and regulations and warrants a disqualification as a SNAP retail food store for a period of one year. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items.

The 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. However, the SNAP regulations state that this sanction shall be doubled as warranted by the evidence of violations if the same firm has once before been assigned a sanction. 7 CFR § 278.6(e)(6) of the SNAP regulations states, "Double the appropriate period of disqualification prescribed in § 278.6(e)(5) as warranted by the evidence of violations if the same firm has once before been assigned a sanction". FNS's records indicate that the Appellant was sanctioned a six month SNAP disqualification via a determination letter received on February 22, 2021 for selling ineligible nonfood items with SNAP benefits during an undercover compliance investigation that was conducted from January 5, 2021 through January 15, 2021. 5 U.S.C. § 552 (b)(7)(E). As such, the Appellant's contention that prior to the issuance of the charge letter there had been no compliance history is incorrect.

The Appellant contends that it had developed and implemented an effective compliance policy and program which was in operation prior to the occurrence of the SNAP violations. Since being authorized to participate in the SNAP, the owner has continuously trained and tested his employees concerning the SNAP rules relating to the prohibitions against sales of ineligible items and exchanging cash for SNAP benefits.

However, had an effective compliance policy and program been in effect at the firm, it is unlikely that the employees would have made such obvious mistakes. The more likely explanation is that store ownership and/or management failed to properly train and subsequently supervise the employees. Additionally, had store ownership and/or management been supervising the employees through occasionally monitoring them using videotape, if available, or in person, it would have readily noticed that they were allowing the sale of ineligible nonfood items in exchange for SNAP benefits. It also would have been immediately evident to store ownership and/or management that the employees were deficient in their knowledge of SNAP rules and regulations had it periodically spot checked the employees' knowledge and abilities by asking questions about SNAP eligible/ineligible items. Either of these basic supervisory techniques would have provided a no cost method for store ownership and/or management to ensure that store employees were not putting the firm's SNAP authorization at risk.

These are clear signs of poor or no supervision by store ownership and/or management. It is highly improbable, based on the willingness of the employees to exchange SNAP benefits for ineligible nonfood items, that the only instances of SNAP violations were those transactions identified as part of the FNS undercover investigation. These actions more likely than not represent an ongoing pattern of SNAP violations at the Appellant firm.

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. As noted previously, 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 one year disqualification as the Appellant had been previously sanctioned a six month SNAP disqualification. The regulations do allow SNAP retailers to pay a hardship CMP, if eligible, as explained in the Civil Money Penalty section of this Final Agency Decision.

With regard to the Appellant's contention that FNS should impose a civil money penalty as a sanction in lieu of SNAP 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, 7 CFR § 278.6(d)(2) & (3) of the SNAP regulations provides that "The FNS office making a disqualification or penalty determination . . . shall consider . . . any prior action . . . to warn the firm about the possibility that violations are occurring . . .". The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn the Appellant about the possibility that violations were occurring because there were no prior warnings.

With regard to the Appellant's contention that, rather than just verifying violations, the investigator offered and persuaded the store clerk to violate seems to imply that the investigator engaged in activity commonly referred to as entrapment. Generally, the entrapment that is forbidden by law depends on whether or not the activity leading up to the violation amounted to putting the activity in the mind of a person who had no prior inclination to violate, and leading him/her to do so for the first time. The U.S. Department of Agriculture's Office of General Counsel maintains that if investigators merely provide an opportunity for a suspected violator to continue on a course of criminal conduct, such activity will not constitute entrapment. In this regard, the investigation record does not contain any evidence indicating activity characteristic of entrapment, nor had the retailer provided substantial evidence to support the claim of entrapment.

Regarding the Appellant's other contentions, no statutory or regulatory requirements exist for 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. The store entry/exit times could also be used to identify investigative personnel and cannot be provided. The owner's denial of cash register tapes not being provided to the USDA investigator does not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur.

Based on this discussion, the decision by the Retailer Operations Division to disqualify the firm for a one year period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Financial Hardship**

Regarding the Appellant's contention that the imposed hardship civil money penalty would impose a financial hardship on the firm, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the 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 who are complying fully with program regulations, but also to those retailers who have been sanctioned in the past for similar violations. Therefore, the Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **FOIA**

The Appellant contends that counsel has filed a FOIA demand and requests that any decision or determination herein be held in abeyance until counsel is furnished the information and data demanded, and a final response is submitted. Without this additional information the Appellant will not be afforded an opportunity to properly defend, answer and address these charges and as a result, will be deprived of due process. However, as of the date of this Final Agency Decision, no FOIA request was submitted by counsel to the FNS FOIA office.

It is also important to note that 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 appeal for records. According to recently published regulations: "278.6(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."

With regard to the Appellant's contentions with respect to lack of due process, prior to a disqualification determination, the firm was given ample opportunity to reply to the charge letter and provide any information to justify as legitimate the transaction patterns detailed in the charge letter

Attachments. The Appellant, through counsel, provided information in responses to the letter of charges on November 14, 2022 and December 14, 2022. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

The second level of due process involves an administrative review, of which the Appellant, through counsel, has likewise availed itself and in the process of which the Appellant was granted an additional three weeks within which additional information may be provided in support of the request for review. Therefore, any evidence and information that the Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to the Appellant's right to a fair and thorough review. The Appellant has exercised its opportunity to reply to the charge letter and its administrative review rights, and by doing so has availed itself of the full complement of the agency's statutory obligations with regard to due process.

### **Hearing Request**

With regard to the Appellant's request for an immediate hearing, this disqualification is an administrative action and the SNAP regulations do not provide for a hearing, but rather for an administrative review of the action. As noted previously, 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.

### **CIVIL MONEY PENALTY**

The Appellant contends that a SNAP disqualification would impose a hardship on area SNAP customers and requests the imposition of a hardship civil money penalty in lieu of a SNAP disqualification. The Retailer Operations Division correctly concluded that the Appellant was eligible for a hardship CMP in lieu of a one year SNAP disqualification as Sadeq Gourmet Deli Llc is selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households. Thus, a hardship CMP in the amount of \$29,064.00 was imposed in lieu of the one year SNAP disqualification.

The case record documents that the Retailer Operations Division correctly calculated the amount of the hardship CMP under 7 CFR § 278.6(g). That regulation states that the hardship CMP is to be calculated on a formula which includes the SNAP redemption volume of the store during the twelve months prior to the firm being notified of the violations. Modifications to the hardship CMP may occur only when there is an error in calculation or the amount exceeds the agency limit. The Retailer Operations Division correctly determined, using the methodology described in 7 CFR § 278.6(g), that the calculated amount of the hardship CMP was \$29,064.00.

### **CONCLUSION**

Accordingly, the determination by the Retailer Operations Division to assess a hardship CMP in the amount of \$29,064.00 in lieu of a one year disqualification from participating as an authorized retailer in the SNAP is sustained. Based on the discussion above, the amount of the hardship CMP

was properly computed by the Retailer Operations Division. Please note that if the penalty is not paid, the one year SNAP disqualification will be imposed. The Appellant may contact the FNS Financial Management Accounting Division at 1-703-605-0483 to discuss a monthly payment plan, or follow the instructions in the Retailer Operations Division's letter dated December 29, 2022, regarding payment options.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. In the event a one year disqualification is imposed for failure to pay the CMP, or some lesser disqualification period reflecting the unpaid portion of the CMP, the Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the disqualification period. When eligible, the Appellant may reapply for SNAP authorization using the application instructions contained on the FNS web site. Questions regarding the application process can be answered by the FNS Retailer Service Center at 1-877-823-4369.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

LORIE L. CONNEEN  
ADMINISTRATIVE REVIEW OFFICER

April 4, 2023