

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

N H Deli & Grocery Corp.,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0213265

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 that a six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

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 N H Deli & Grocery Corp.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulation at 7 CFR § 279.1 provides 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 USDA conducted an investigation of the compliance of N H Deli & Grocery Corp. with Federal SNAP law and regulations in October and November 2018. In a letter dated November 27, 2018, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for merchandise which included ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred during four (4) out of four (4) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a six-month disqualification period as provided in 7 CFR § 278.6(e)(5). The Appellant was informed it could respond to the charges within ten (10) calendar days following delivery of the charge letter. The charge letter was delivered to the Appellant on November 28, 2018 as documented by a UPS delivery notification in the case record.

In an emailed letter dated December 3, 2018, the Appellant, through counsel, requested case file information under the Freedom of Information Act (FOIA). The agency issued its official FOIA response on February 5, 2019. The Appellant then filed a FOIA appeal on May 6, 2019. The agency issued its decision on the FOIA appeal on February 3, 2021. The Retailer Operations Division then sent a letter, dated February 5, 2021, that the Appellant had ten (10) days to respond to the original charges.

The Appellant through former counsel responded to the initial charges in an email and letter dated February 15, 2021. However, the Appellant informed the Retailer Operations Division that it had a new representative and provided a letter of representation dated February 16, 2021. The Appellant's accountant/new representative submitted a response to the charge letter on February 26, 2021.

After considering the evidence in the case and the responses from both the Appellant's former counsel and the Appellant's accountant/new representative, the Retailer Operations Division issued a determination letter dated April 1, 2021. The determination letter informed the Appellant it was disqualified from the SNAP for a six-month period in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices. The determination letter was delivered to the Appellant on April 6, 2021 as documented by a UPS delivery notification in the case record.

In a letter dated April 7, 2021, the Appellant, through its authorized representative, requested an administrative review of the Retailer Operations Division's determination. The request for review was granted. Upon acceptance of the administrative review request, implementation of the six-month disqualification was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an 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 law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e) establish the authority upon which a 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 ... 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:

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....

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 non-food items** due to carelessness or poor supervision by the firm’s ownership or management. [Emphasis added.]

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’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**. [Emphasis added.]

SUMMARY OF THE CHARGES

During an investigation conducted in October and November 2018, the USDA conducted four (4) compliance visits at N H Deli & Grocery Corp. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated November 27, 2018. The investigation report included Exhibits A through D which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during all four (4) compliance visits as documented by Exhibits A, B, C, and D. The chargeable violations in Exhibits A, B, C and D involved the sale of eight (8) common ineligible non-food items in exchange for SNAP benefits. The violations were all conducted by the same clerk. This clerk also refused to exchange cash for SNAP benefits in Exhibit D. However, this refusal does not negate or mitigate the chargeable violations documented in Exhibits A, B, C, and D.

APPELLANT'S CONTENTIONS

The Appellant, through its authorized representative, made the following summarized contentions in its reply to the charge letter and its request for administrative review, in relevant part:

- This store owner did not commit any violations and these transactions probably did not take place at his business.
- During the visit the owner was away due to sickness and he has no way to confirm the legitimacy of the charges.
- The owner's helpers are all well trained and the owner usually asks his helpers to read through the online SNAP refresher training materials on a monthly basis.
- This business has been always in compliance and never had any violations since opening.
- Almost on a daily basis the owner turns away customers requesting cash exchanges and he refuses the sales of ineligible items. Even the investigation report shows the business to be in compliance and that the owner and his helpers rejected many ineligible transactions/sales. His business refused many attempts by the investigator to exchange cash for SNAP benefits.
- This business and the owner were unfairly treated as similar businesses have been issued only a warning letter or allowed to pay a penalty.
- In the alternative, the Appellant requests a CMP in lieu of a six-month disqualification.

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

ANALYSIS AND FINDINGS

Investigation Report

The Appellant states that the violations did not take place at his business. The Appellant also states that the investigation report shows that the business is in compliance and that the owner and his helpers rejected many ineligible transactions and refused many attempts by the investigator to exchange cash for SNAP benefits.

Regarding the Appellant's contentions, the investigation report and other evidence in the case record documents that the violations were conducted at N H Deli & Grocery Corp. and that the

store clerk did not refuse any ineligible item. The store clerk only refused a single attempt to exchange cash for SNAP benefits not “many attempts.”

The investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation in the case record that confirms specific details of the transactions. The investigation report documents by a preponderance of the evidence that personnel at the store exchanged ineligible items for SNAP benefits.

Owner Accountability

The Appellant states that the store owner did not conduct any violations and was not present at the store during the investigation as he was ill. Regarding these contentions, store owners are at all times accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store owners to disclaim accountability for the acts of persons chosen to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

In addition, the store owner signed the most recent SNAP reauthorization application for N H Deli & Grocery Corp. on February 7, 2018. That application included a signed certification that the owner(s) would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations including accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible non-food items.

Violations Warrant a Six-Month Disqualification

The Appellant states that this was the store’s first SNAP violation and requests reconsideration of the six-month disqualification. However, the SNAP regulation at 7 CFR § 278.6(e)(5) states, in part, that “FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ... **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 non-food items due to carelessness or poor supervision** by the firm’s ownership or management.” [Emphasis added.]

The investigation report documents that the number of chargeable violations over multiple transactions in this case equate to carelessness or poor supervision by ownership. Therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification, **the least severe penalty** allowed by regulation under these circumstances. This review does not have the authority to waive or reduce the regulatory six-month disqualification in this case.

Hardship to the Store

In its response to the charge letter, the Appellant stated that a permanent disqualification will create a financial hardship for the store and its owner. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the owner, the firm or its employees resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

HARDSHIP CIVIL MONEY PENALTY

The Retailer Operations Division determined that the Appellant was not eligible for a hardship CMP under 7 CFR § 278.6(f)(1). That regulation reads, in part, “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.” [Emphasis added.]

The case record documents that the Retailer Operations Division determined that a six-month disqualification of N H Deli & Grocery Corp., a convenience store, would not cause a hardship to SNAP households as there are 140 comparable or larger SNAP authorized stores within a one-mile radius. These include 36 small grocery stores, 13 medium grocery stores, five (5) large grocery stores, eight (8) supermarkets and five (5) superstores. This also includes two (2) other convenience stores, two (2) small grocery stores and a medium grocery within 0.25 miles of the Appellant firm. In particular, the nearby grocery stores, supermarkets and superstores likely carry a greater selection and depth of stock at likely better prices than a convenience store like N H Deli & Grocery Corp. Lastly, there is also no evidence that N H Deli & Grocery Corp. carries any specialty or international foods that cannot be obtained at these other SNAP authorized locations.

Based on the analysis above, a six-month disqualification of N H Deli & Grocery Corp. would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division decision not to assess a hardship CMP in lieu of a six-month disqualification is **sustained** as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is established that the violations as described in the letter of charges did in fact occur at N H Deli & Grocery Corp. warranting a disqualification of six (6) months in accordance with 7 CFR § 278.6(e)(5). That regulation states that FNS **shall** “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 non-food items due to carelessness or poor supervision by the firm’s ownership or management.” Therefore, the decision to impose a

six-month disqualification, **the least severe penalty** allowed by regulation, against N H Deli & Grocery Corp., Appellant, is appropriate and the action is **sustained**.

In accordance with the Act and regulations, the six-month period of disqualification shall become effective thirty (30) days after receipt of this letter. The Appellant may submit a new application for SNAP authorization ten (10) days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

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.

RONALD C. GWINN
Administrative Review Officer

August 13, 2021