

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

New York Deli And MKT Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0247239

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 \$20,820.00 hardship civil money penalty (CMP) against New York Deli And MKT Inc (hereinafter "New York Deli And MKT Inc" or "Appellant") in lieu of a six month 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 \$20,820.00 in lieu of a six month disqualification against New York Deli And MKT Inc.

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 New York Deli And MKT Inc with Federal SNAP law and regulations during the period August 20, 2021 through August 23, 2021. In a letter dated September 22, 2021, 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 four compliance visits. The letter further informed the Appellant that the violations warranted a

disqualification period of six months 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 September 23, 2021.

The record reflects that on September 24, 2021, the Appellant requested an extension in time for providing a response to the letter of charges. By letter dated September 27, 2021, the Retailer Operations Division granted the Appellant's time extension request to October 15, 2021.

In responses to the Retailer Operations Division of September 24, 2021, October 4, 2021, and October 19, 2021, the Appellant 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 November 8, 2021 informing the Appellant that the violations cited in the charge letter occurred at the firm and that a six month period of disqualification was warranted. The determination letter also stated that the Appellant was eligible for a hardship CMP as New York Deli And MKT Inc 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 \$20,820.00 was imposed in lieu of the six month SNAP disqualification.

Via email correspondence of November 16, 2021, the Appellant requested an administrative review of the Retailer Operations Division's decision to impose a hardship CMP in lieu of a six month disqualification of New York Deli And MKT Inc from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated November 18, 2021 and implementation of the hardship CMP was held in abeyance pending completion of this review. In an email correspondence of December 17, 2021, the Appellant submitted additional information in support of the request for administrative 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(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 August 20, 2021 through August 23, 2021, USDA conducted four compliance visits at New York Deli And MKT Inc. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated September 22, 2021. 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 three of the four 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 C warrant a disqualification as a SNAP retail food store for a period of six months. 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 \$20,820.00 in lieu of a six month disqualification was the appropriate penalty for these violations as New York Deli And MKT Inc is selling a substantial variety of specialty/ethnic staple food items and the firm’s disqualification would cause hardship to SNAP households.

APPELLANT’S CONTENTIONS

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

- The owner is troubled to learn of the alleged SNAP violations.
- The Appellant’s video recording is limited to 14 days and due to hurricane Ida, the store faced network and system disruptions.
- The owner spoke to all store clerks who deny that they sold ineligible nonfood items with SNAP benefits.
- The investigator stated in Exhibit A that he “Presented the EBT card to the clerk for purchase”. However, this is an incorrect statement as the EBT POS device is placed outside the cashier’s area and only faces the customer. The EBT POS device is outside of Plexiglas so there is no need to present it to the cashier.
- Also, it is not reasonable that the investigator can determine the exact age and descriptions of the cashiers.
- It is questionable that the investigation report does not include item prices for some of the items purchased.
- The taxable items have a “tax” stamp on the price.
- The owner disputes the total amount as purchased by the investigator in Exhibit B. All items have prices marked on each product. The Appellant’s calculated total amount including 8% tax is \$17.33 versus \$17.13 noted by the investigator.
- Also, the investigator’s statement notes that “I gave the clerk the EBT card”. However, the store’s system does not allow cards to be accepted by the clerk. The customer inserts the EBT card to a card reader and with Plexiglas, the clerk cannot view the card. There is no required action by employees to verify or review an EBT card—it is strictly a self-service machine.
- The owner disputes the total amount as purchased by the investigator in Exhibit C. The Appellant’s calculated total amount including 8% tax is \$14.01 versus \$13.77 noted by the investigator.
- The employee in Exhibit D did not allow ineligible nonfood items to be purchased with SNAP benefits or allow SNAP benefits to be exchanged for cash.
- A SNAP disqualification would impose a hardship on area customers who have limited access to personal transportation. Also, the store sells a variety of specialty/ethnic foods that are not available at other stores in the area.
- The Appellant has been in business for over 30 years and has never been cited for prior SNAP violations.

- The owner will ensure that SNAP training takes place with all employees to include himself. The Appellant will stay updated and informed of all policies and procedures by accessing the guidelines of the SNAP and P-EBT regulations.
- The Appellant requests a reduction in the amount of the civil money penalty as the amount is exorbitant and the Appellant will be finally strapped to come up with that amount.

In support of these contentions, the Appellant submitted the following information for review:

- Numerous food stock photos showing specialty/ethnic foods;
- Listings of food items (with prices) stocked at the Appellant (includes Spanish, Korean, and Asian/ethnic foods, spices, and sauces); and
- Two photos of checkout counter area with EBT POS device.

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.

Prior to becoming authorized to participate in the SNAP, the Appellant completed and submitted a SNAP Application for Retail Stores. 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. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The charges of violations are based on the findings of a formal USDA investigation conducted of the compliance of New York Deli And MKT Inc with Federal SNAP law and regulations. The transactions cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. Investigators are trained thoroughly before entering any retail establishment and all protocols, including but not limited to what can and cannot be said. Investigators sign, under penalty of perjury, that investigative reports are true and correct. All transactions are fully documented and a complete review of this documentation has yielded no known error or discrepancy in the reported findings. 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 that confirms specific details of the transactions. The investigation report documents by a preponderance of the evidence that the store employee(s) committed SNAP violations by accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a) on three out of four compliance visits.

The documentation on record includes EBT receipts and photos showing that six ineligible nonfood items and eleven eligible food items were purchased with SNAP benefits by the investigator. Also on record is documentation that confirms that the ineligible nonfood items and the eligible food items were donated to and signed for by a charitable organization following the transaction. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made, and the official's initials next to the items donated. Moreover, the total purchase costs of each of the transactions involved in the investigation is documented on SNAP terminal receipts obtained during each transaction and matches the reported purchase totals indicated in the investigation report.

The regulations establish that an authorized food store may be disqualified from participating in SNAP when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The acceptance of SNAP benefits for ineligible items is a violation of the SNAP rules and regulations. The Appellant contends that this is the first time that the firm has been charged with violating the SNAP regulations. However, 7 CFR Section 278.6(e)(5) specifies that FNS shall “disqualify the firm for six months if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as, but not limited to, the sale of nonfood items due to carelessness or poor supervision by the firm's ownership or management.” Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification.

However, the Retailer Operations Division determined that the assessment of a hardship CMP of \$20,820.00 in lieu of a six month disqualification was the appropriate penalty for these violations as New York Deli And MKT Inc is selling a substantial variety of specialty/ethnic staple food items and the firm's disqualification would cause hardship to SNAP households.

With regard to the Appellant's contentions with respect to tax being charged on the SNAP transactions noted in the investigation report, the SNAP regulations state that all SNAP transactions of eligible food items are tax free and adding tax to eligible SNAP transactions in any form is a violation of the SNAP program.

With regard to the Appellant's contentions with respect to the investigator's descriptions of the clerks, the matter of descriptions is often subjective in nature and may involve descriptive features that are relative with respect to the point of view of the observer. For example, a short investigator may view taller clerks as being much taller than they really are, and a young investigator may believe older clerks are much older than they really are.

There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective actions implemented subsequent to findings of program violations. Therefore, the Appellant's contentions that the owner will ensure that SNAP training of employees takes place and that the firm will stay updated and informed of all policies and procedures by accessing the guidelines of the SNAP and P-EBT regulations do not provide any valid basis for dismissing the charges or mitigate the penalty imposed.

Regarding the Appellant's contention that the imposed hardship civil money penalty would be 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 disqualified from the program 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.

CIVIL MONEY PENALTY

The Appellant requests a reduction in the amount of the civil money penalty as the amount is exorbitant and the Appellant will be finally strapped to come up with that amount.

The Retailer Operations Division correctly concluded that the Appellant was eligible for a hardship CMP in lieu of a six month SNAP disqualification as New York Deli And MKT Inc is selling a substantial variety of specialty/ethnic staple food items and the firm's disqualification would cause hardship to SNAP households. Thus, a hardship CMP in the amount of \$20,820.00 was imposed in lieu of the six month 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 \$20,820.00.

CONCLUSION

Accordingly, the determination by the Retailer Operations Division to assess a hardship CMP in the amount of \$20,820.00 in lieu of a six month 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 six month 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 November 8, 2021, 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 six month 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 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

January 7, 2022