

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

**105 Deli & Grill Inc,**

**Appellant,**

**v.**

**Case Number: C0190163**

**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 a finding that a six month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against 105 Deli & Grill Inc (hereinafter “105 Deli & Grill Inc” or “Appellant”) by the Retailer Operations Division of FNS.

**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 in its administration of the SNAP, when it imposed a six month period of disqualification against 105 Deli & Grill 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 105 Deli & Grill Inc with Federal SNAP law and regulations during the period January 3, 2017 through February 15, 2017. In a letter dated May 23, 2017, 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 six (6) out of seven (7) 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 Appellant, through counsel, responded to the charges in a letter dated May 31, 2017 stating that the store owner was not aware of the SNAP violations and they were never brought to his attention. A substantial portion of the Appellant's sales and revenues result from SNAP participation. A SNAP disqualification will impose a financial hardship on the firm. All employees are well trained on SNAP and other transactional activities. The owner manages the business by himself and is aware that the consequences of SNAP violations are severe. The owner always supervises and instructs employees to abide by the SNAP rules. The owner personally guards against the sale of nonfood items with SNAP benefits and the exchange of SNAP benefits for cash. The owner has some doubts over the issue of the investigation and whether the violations took place. The investigation makes him question the consistency of the store visits. The owner is willing to submit an affidavit attesting that he never intended to violate the SNAP rules and he would never allow any violations to occur while he is supervising the business. The owner will not take action or make changes in management before getting the facts and evidence through the information requested under the Freedom of Information Act. In support thereof, the Appellant submitted a signed Letter of Representation and a copy of the May 23, 2017 charge letter.

The record indicates that the May 31, 2017 response also included a request for information and documents from FNS with regard to the agency's case against 105 Deli & Grill Inc pursuant to the Freedom of Information Act (FOIA). FNS provided a response to counsel's FOIA request in a letter dated July 11, 2017. In a letter dated October 10, 2017, the Appellant's counsel filed a FOIA appeal of the documents provided by FNS in response to the FOIA request. The record reflects that FNS provided a response to counsel's FOIA appeal, dated September 14, 2020. On September 21, 2020, the Retailer Operations Division sent a 10 day letter to counsel providing the opportunity to respond to the letter of charges. The 10 day letter to respond was received by Appellant's counsel on September 29, 2020. No additional information was received from the Appellant or counsel.

After considering the Appellant's response and the evidence of this case, the Retailer Operations Division issued a determination letter dated December 2, 2020. The determination letter informed the Appellant that the firm was disqualified from the SNAP for a period of six months 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 civil money penalty 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.

In a letter postmarked December 11, 2020, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated December 29, 2020.

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, 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 promulgated through regulations 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, inter alia:

Coupons may be accepted by an authorized retail food store only from eligible households . . . only in exchange for eligible food.

7 CFR § 271.2 states, inter alia:

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, inter alia:

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)(5) states, inter alia:

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, inter alia:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when . . . the firm's disqualification would cause hardship to Food Stamp [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 THE CHARGES**

During an investigation conducted from January 3, 2017 through February 15, 2017, USDA conducted seven (7) compliance visits at 105 Deli & Grill Inc. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated May 23, 2017. The investigation report included Exhibits A through G which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during six (6) of the seven (7) 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 B, C, D, E, F and G 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).

### **APPELLANT'S CONTENTIONS**

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

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

- The Appellant is staffed by three employees who are well-trained to handle SNAP and other transactions. The owner is managing the business by himself and he is very aware that violations associated with SNAP or other vending transactions have severe consequences. Therefore, the owner always supervises and instructs employees to abide by all SNAP rules and regulations. The owner personally guards the EBT particularly from any unusual transactions related to the exchange of SNAP benefits for cash or any nonfood items in addition to other issues concerning SNAP transactions.
- The owner has some doubts over the issue of the conduct of the investigation. The owner has warned store employees and instructed them not to violate any SNAP rules and he has trained them on how to handle SNAP transactions. The owner questions the consistency of the store visits during the investigation. The owner is adamant that the violations noted in the investigation are very questionable. He knows there is zero tolerance for SNAP violations but also knows justice and fair approach to situations like this case by USDA reviewers is what makes the due process clause worth keeping. Comparing the charges and assessing the atmosphere in the firm frustrates the owner in regard to how such pity violations took place and why. The owner is willing to submit an affidavit attesting that he never intended to violate or break the law in any conduct concerning SNAP transactions or any other transactions. He would never allow any

violations to happen while he is supervising his business. The SNAP violations or other occurrences were never brought to his attention and he has no knowledge of them whatsoever. The owner doubts the charges based on the information he received and would like to contest the gathered data.

- The amount of the ineligibles sold 5 U.S.C. § 552 (b)(6) & (b)(7)(C), such a small amount for such a large penalty.
- This is the Appellant's first occurrence of SNAP violations.
- The owner would like to make some changes in his business if he is certain that such violations occurred. The owner has trained employees, one of which decided to sell nonfood items with SNAP benefits. The responsible employee has since been fired.
- The Appellant is open 7 days per week from 6:00 am to 11:00 pm. By virtue of the location of the business and the community in which it is situated, a substantial portion of its sales (60%) and revenues result from its participation in SNAP. SNAP sales provide the income necessary to keep the business profitable so it can continue its operation. A SNAP disqualification means shutting down the owner's source of income to feed his family.
- The Appellant is located on a main street in the heart of Manhattan, New York and there are pedestrians and vehicle traffic 24-hours daily. A SNAP disqualification will impose hardship for the hundreds of SNAP households that rely upon the Appellant and the many products it carries.
- The Appellant requests the imposition of a small civil money penalty in lieu of a SNAP disqualification.

In support of these contentions, the Appellant, through counsel, submitted a signed Letter of Representation and a copy of the May 23, 2017 charge letter.

### **ANALYSIS AND FINDINGS**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

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. Additionally, a claim of having a record of participation in 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 those charges.

The FNS investigative report shows that two male employees working at the Appellant firm accepted SNAP benefits for ineligible nonfood items on six 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 amount of the ineligibles sold 5 U.S.C. § 552 (b)(6) & (b)(7)(C), such a small amount for such a large penalty. However, there is no regulatory threshold for the dollar value of the ineligible items purchased or for the timeframe in which they were purchased. The SNAP regulations do not establish any minimum dollar amount that exchanges of SNAP benefits for common ineligible nonfood items must exceed in order to be considered violative; therefore, any allegations that transactions involving “insignificant amounts” not being credible are baseless. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items. 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.

The Appellant contends that store employees are well-trained to handle SNAP and other transactions. The owner always supervises and instructs employees to abide by all SNAP rules and regulations. The owner personally guards the EBT particularly from any unusual transactions related to the exchange of SNAP benefits for cash or any nonfood items in addition to other issues concerning SNAP transactions.

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. 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 six month disqualification. The regulations do allow SNAP retailers to pay a hardship CMP, if eligible, as explained in the next section.

The Appellant is correct that the firm has no previous history of SNAP program violations or warnings. However, this does not necessarily mean that the firm has not been conducting violative transactions. Neither FNS nor the Appellant has sufficient data to conclusively prove that the firm was or was not conducting violative transactions prior to the start of the undercover investigation. However, the matter under review is the first time that the firm has been investigated by FNS and the results of the investigation showed SNAP violations conducted by two employees in six of the seven visits to the firm. While it is not definitive, it can be readily inferred that violative transactions were more likely than not occurring in previous months based on these investigatory visits.

The Appellant contends that the SNAP violations or other occurrences were never brought to the owner's attention and he has no knowledge of them whatsoever. However, there are no requirements in existing FNS regulations that require that stores suspected of trafficking or misusing SNAP benefits be provided with a written or verbal notification that violations of SNAP regulations may be occurring and the potential penalties. Warning letters are issued in those situations where the SNAP violations are of a limited nature that would not warrant a disqualification and therefore, would not have been appropriate in this situation.

With regard to the contention that the Appellant's rights to due process were violated, section 278.6(b)(1) of the SNAP regulations provides that upon charging a firm with SNAP violations, the letter informing the firm of the charges "shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter." This section further states that, "Any firm considered for disqualification, shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination." A review of the Retailer Operations Division's administrative actions regarding this matter indicates full compliance with applicable SNAP regulations, policies, and procedures. This disqualification is an administrative action and SNAP regulations provide for an administrative review of the action. 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.

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

### **Corrective Action**

The owner contends that he would like to make some changes in his business if he is certain that such violations occurred. The owner has trained employees, one of which decided to sell non-food items with SNAP benefits. The responsible employee has since been fired.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. 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 after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Financial Hardship**

With regard to the Appellant's contention that a SNAP disqualification will impose a financial hardship on the firm, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA.

Furthermore, 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, 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 contends that a SNAP disqualification will impose a hardship on SNAP customers. The Appellant requests consideration of the imposition of a civil money penalty in lieu of SNAP disqualification.

The Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty (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]. **5 U.S.C. § 552 (b)(7)(E).**

Based on the evidence, the disqualification of 105 Deli & Grill Inc would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division’s 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 therefore established that the violations as described in the letter of charges did in fact occur at 105 Deli & Grill Inc warranting a disqualification of six 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 nonfood 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 105 Deli & Grill Inc, the Appellant firm, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six month period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this six month period.

## **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

February 8, 2021