

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

118-07 Alexander Deli Grocery Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0211239

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against 118-07 Alexander Deli Grocery Corp. (hereinafter “Appellant”) by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a six-month disqualification against 118-07 Alexander Deli Grocery Corp.

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

FNS records show that the Appellant firm, 118-07 Alexander Deli Grocery Corp., was initially authorized for SNAP participation as a small grocery store on April 20, 2015. Between March 8, 2019, and March 11, 2019, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigation report documented that personnel at 118-07 Alexander Deli Grocery Corp. accepted SNAP benefits in exchange for ineligible items on four separate occasions. According to the report, the Appellant firm sold bathroom tissue, trash bags, and sponge scrubbers in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible foods.

In a letter dated April 9, 2019, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the acceptance of SNAP benefits in exchange for ineligible nonfood merchandise warranted a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

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

After further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated April 26, 2019. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the charge letter and that a six-month disqualification penalty would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that consideration for a hardship CMP was given, but that the Appellant was not eligible for a CMP because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked May 2, 2019, the Appellant appealed the agency's determination by requesting an administrative review. The request was granted and implementation of the disqualification has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is found in the Food and 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)(5) establish the authority upon which a six-month disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

7 CFR § 271.2 states, in part:

Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot food and hot food products prepared for immediate consumption...

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store...if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations.... **Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction;** for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section. [Emphasis added.]

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

7 CFR § 278.6(e) states, in part:

FNS shall take action as follows against any firm determined to have violated the Act or regulations...The FNS regional office shall:

(5) Disqualify the firm for 6 months if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management.

7 CFR § 278.6(f)(1) states, in part:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm subject to a disqualification is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to [SNAP] households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices.

INVESTIGATION DETAILS

During an undercover investigation conducted between March 8, 2019, and March 11, 2019, the Food and Nutrition Service completed four compliance visits at 118-07 Alexander Deli Grocery Corp. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the April 9, 2019, charge letter. The investigation report includes Exhibits A through D, and provides full details on the results of each compliance visit. SNAP violations were documented during each of the four visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the following nonfood items were purchased by an investigator using SNAP benefits:

- One roll of bathroom tissue (*Scott* brand), Exhibit A
- One 10-count box of trash bags (*Red & White* brand), Exhibit B
- One roll of bathroom tissue (*Marcal* brand), Exhibit C
- One 8-count box of trash bags (*Home Select* brand), Exhibit C
- One 3-count package of sponge scrubbers (*UFO* brand), Exhibit D
- One roll of bathroom tissue (*Marcal* brand), Exhibit D

The report indicates that in Exhibits C and D, the clerks on duty refused to allow an exchange of SNAP benefits for cash (i.e. trafficking). The report states that three different clerks conducted the violative transactions.

The charge letter states that the violations that occurred in Exhibits A, B, C, and D, warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- When the Appellant owner saw the investigation report, he realized who the employee was who committed the violations. That person has been fired and will no longer work for the firm. At this time, all corrective action has been implemented in order to avoid such violations from reoccurring.
- Appellant requests that the store not be disqualified since it has been collaborating with FNS and is taking full responsibility. Appellant also asks for a reduction of the disqualification period from six months to three months.
- If the firm is disqualified, it will be difficult for the store to remain open since many of the firm's customers participate in SNAP and the store will lose a great amount of sales.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

The Appellant has not provided any evidence or documentation to counter FNS's investigation report. In its request for administrative review, the Appellant acknowledged that violations occurred and claimed full responsibility for them. Because the violations themselves do not appear to be in dispute, it is the determination of this review that a six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Remedial Actions Taken

The Appellant contends that after reviewing the investigation report, it realized who the employee was that committed the violations. It claims that the employee has been fired, and all corrective action has been implemented in order to avoid future violations.

With regard to this contention, it must be stated that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the facts that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions, such as termination of employment, that may have been taken or that will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a

waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented after the discovery of program violations.

Hardship to Appellant

The Appellant claims that if the store is disqualified, it will be difficult to remain open since many of its customers participate in SNAP. The Appellant contends that a disqualification will cause the store to lose a great amount of business.

With regard to this contention, SNAP regulations do not permit this review to consider a waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself. To allow an exemption from penalties based on a purported economic hardship to the firm or its ownership would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA. Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program requirements, but also to those retailers who have been disqualified from the program in the past for similar violations.

Accordingly, the Appellant's request for a reduced sanction or dismissal of the charges based on potential economic hardship to the firm cannot be granted.

Civil Money Penalty

Although not requested by the Appellant, this review evaluated the firm's eligibility for a civil money penalty (CMP) in lieu of a six-month disqualification. To address potential difficulties that SNAP households might face when a firm is disqualified, regulations at 7 CFR § 278.6(f)(1) allow for a CMP to be imposed instead of disqualification when the firm's disqualification would cause "hardship" to SNAP households. According to this regulation, hardship occurs when there is "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices."

It is the determination of this review that a disqualification of 118-07 Alexander Deli Grocery Corp., a small grocery store, would not cause hardship to SNAP households because there are many other shopping options in the area. According to agency records, there are at least 20 similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of 118-07 Alexander Deli Grocery Corp., including a superstore less than a block away. There is also no evidence that 118-07 Alexander Deli Grocery Corp. sells its inventory at unusually low prices in comparison to nearby stores. Because hardship conditions do not exist in this case, a civil money penalty in lieu of disqualification is not an available option.

CONCLUSION

Based on a review of all information in this case, this administrative review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at 118-07 Alexander Deli Grocery Corp. during a USDA investigation. All transactions cited in the letter of

charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record appears to be specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood merchandise, and in all other critically pertinent details. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, 118-07 Alexander Deli Grocery Corp., is sustained.

In accordance with the Act and regulations, the disqualification penalty shall become effective 30 days after receipt of this decision. A new application for SNAP authorization may be submitted 10 days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision.

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

JON YORGASON
Administrative Review Officer

August 13, 2019