

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

13 Golden Deli Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0193140

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 six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP) as 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 13 Golden Deli Inc.

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 13 Golden Deli Inc. with Federal SNAP law and regulations from February 2017 to March 2017. In a letter dated May 10, 2017, 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 on three (3) 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 store by UPS on May 11, 2017.

The Appellant, through a designated representative, requested that the case be held in abeyance until it received case information under the Freedom of Information Act (FOIA). In addition, among other contentions, the Appellant indicated that the store questioned the consistency of the visits and the entire investigation. The Appellant also stated that a six-month disqualification would cause an economic hardship for his family.

The agency issued its official FOIA response on June 27, 2017. The Appellant then filed a FOIA appeal on September 22, 2017. The agency issued its decision on the FOIA appeal on August 31, 2020. The Retailer Operations Division then sent a letter, dated September 14, 2020, that the Appellant had ten (10) days to respond to the charges. This letter was delivered to the Appellant on September 15, 2020.

In a letter dated September 22, 2020, the Appellant, through counsel, noted that corrective action had been taken and the clerk who conducted the transactions had been fired. The Appellant requested a civil money penalty (CMP) in lieu of a six-month disqualification due to the low dollar value of the ineligible items exchanged for SNAP benefits.

After considering the Appellant's contentions and the evidence in the case, the Retailer Operations Division issued a determination letter dated September 30, 2020. 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.

In a letter postmarked October 6, 2020, the Appellant, through counsel, 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.

SUMMARY OF THE CHARGES

During an investigation conducted from February 2017 to March 2017, the USDA conducted four (4) compliance visits at 13 Golden Deli Inc. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated May 10, 2017. 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 (3) out of the four (4) compliance visits as documented by Exhibits B, C and D. The chargeable violations in Exhibits B, C and D involved the sale of the following ineligible non-food items in exchange for SNAP benefits:

- A ten (10) count box of 30 gallon clear "Red & White" trash bags.
- A roll of 37.5 square feet of aluminum foil
- A 25-ounce bottle of "Tide" with bleach alternative detergent

The chargeable violations in Exhibits B, C and D were committed by three (3) different clerks. One of these clerks refused to exchange cash for SNAP benefits in Exhibit D. Also, in Exhibit A, another clerk refused to exchange SNAP benefits for dish detergent. However, these refusals do not negate or mitigate the other violations documented in Exhibits B, C and D.

APPELLANT'S CONTENTIONS

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

- The Appellant requests a small fine or CMP as this is the store's first violation and the ineligible items sold were of a low-dollar value.
- The store had trained all of its workers, but a single worker decided to accept SNAP benefits in exchange for ineligible non-food items. That worker was fired.
- A six-month disqualification would cause a hardship for the owner's family as it relies upon income from the store.
- Hundreds of households will suffer if the store is disqualified for six (6) months as they rely upon the store and the products it sells.

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 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 were conducted under the direction of a USDA investigator and 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 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. It should be noted that the investigation report indicates that

three (3) different clerks participated in the violations and not a single clerk as claimed by the Appellant.

Violations Warrant a Six-Month Disqualification

The Appellant states that this is the store's first SNAP violation and that the ineligible items sold were of a low dollar value; therefore, it should be assessed a fine or CMP and not be subject to a 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.

Owner Responsibility

The store owner signed the SNAP authorization application for 13 Golden Deli Inc. on January 24, 2012. That application included a signed certification that the owner 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.

Corrective Action

The Appellant states the store has taken some corrective action by firing a store employee. Regarding this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is **limited** to what circumstances existed at the time of the violations that was the basis of the Retailer Operations Division's action. It is not within the authority of this review to consider what subsequent remedial actions may have been taken so that a store may 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 assessment on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations. Therefore, the Appellant's contention that corrective action has taken place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Hardship to the Business and its Owner

The Appellant contends that a six-month disqualification will create a hardship for the store and the owner's family as it relies upon the SNAP for its income. 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 personally or to the firm 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 13 Golden Deli Inc., a small grocery store, would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores in the area. The Retailer Operations Division determined through agency mapping systems that there are 64 SNAP authorized firms including two (2) superstores and a supermarket within a one-mile radius of 13 Golden Deli Inc. These larger SNAP authorized stores have a greater depth and breadth of staple food at comparable or likely better prices.

In addition, there is no evidence that 13 Golden Deli Inc. carries any specialty or international foods that cannot be obtained at these other stores. Based on this evidence, a six-month disqualification of 13 Golden Deli Inc. 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 13 Golden Deli Inc. 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 13 Golden Deli Inc., 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

January 19, 2021