

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

**1408 Gourmet Deli Corp,
Appellant,**

V.

**Retailer Operations Division,
Respondent.**

Case Number: C0202743

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 of 1408 Gourmet Deli Corp (hereinafter Appellant), from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as initially imposed by the Retailer Operations Division. **However, the Determination Letter dated March 5, 2021, incorrectly stipulated a disqualification period of three (3) months, therefore, Appellant shall be disqualified from SNAP for a period of three (3) months.**

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 disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations 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 1408 Gourmet Deli Corp, with Federal SNAP law and regulations from July 19, 2018 through August 18, 2018. In a letter dated September 12, 2018, Retailer Operations Division charged the Appellant firm with accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on five (5) out of Six (6) 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).

In correspondence dated September 25, 2018, Appellant, through counsel, responded to the charge letter and generally stated that my client vehemently denies that he personally engaged in any type of illegal activity and was unaware, until the receipt of the letter of charges, that anyone else in his store or employed by him in this business is alleged to have engaged in such activities. FNS failed to make any effort during the investigation of this owner's store to determine the true identity and full name of the one clerk allegedly employed by the owner and specifically the identity of the clerk during each transaction who allegedly committed the wrongdoing as noted in transactions as set forth in Exhibits B through F. The amounts involved in the alleged sale of ineligible items are of such an insignificant amount that it raises a question about the appropriateness and credibility of the investigation. It should be further noted that any surveillance cameras in this store are self-erasing and the images taken from July 19, 2018 thru August 18, 2018, are no longer available for viewing. There is also no proof that any sale of an ineligible item ever occurred. There are no cash receipts or cash register receipt. Each customer receives a cash register receipt or tape when a purchase is made. The owner denies that sales were made without receipts. There is also a major issue as to what was exchanged or purchased, so that the entire substance of the sale of ineligible items allegation is not supported in the record. This charge cannot be sustained as a matter of fairness and justice to permanently disqualify this owner from participation in the Supplemental Nutrition Assistance Program. It is submitted that a six-month disqualification will have an adverse effect on his future business endeavors and that it would cause him irreparable injury and damage to his reputation in the business community. Appellant through counsel, submitted a Freedom of Information Act request.

The record reflects that the FOIA request was completed and Appellant, through counsel, was notified in correspondence dated October 4, 2018, received on October 5, 2018. In correspondence dated December 26, 2018, Counsel submitted an appeal to the completed FOIA request, and the documentation provided. In correspondence dated December 14, 2020, received December 21, 2020, counsel was notified that the FOIA appeal was completed. No additional response or documentation was provided by Appellant in response to the charge letter dated September 12, 2018.

After reviewing the evidence of the case and the Appellant's response, through counsel, Retailer Operations Division issued a determination letter dated March 5, 2021. The determination letter informed the Appellant it was disqualified from the SNAP for a period of three months in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the three-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 dated March 8, 2021, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The appeal was accepted, and the implementation of the three-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, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained 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 period of 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 food 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 1977, 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 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.”

APPELLANT’S CONTENTIONS

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

1. An FNS contractor conducted a field inspection at this location on or about the times of these alleged violations. That during that visit to the location by the unnamed FNS contractor, no violations occurred, the store was fully stocked, yet the unnamed FNS investigator claims that the sale of common ineligible non-food items occurred.

2. Prior to the issuance of the letter of charges against this firm, it should also be noted that there had been no prior compliance history. Again, proving that this owner has been in compliance with the rules and regulations of the SNAP.
3. My client vehemently denies that he personally engaged in any type of illegal activity and was unaware, until the receipt of the letter of charges, that anyone else in his store or employed by him in this business is alleged to have engaged in such activities.
4. During this investigation there is no description of the clerk, no name, no title, no means of identification or his relationship to the owner is set forth, after four visits to the store.
5. There is no proof that any sale of an ineligible item ever occurred. There are no cash receipts or cash register receipts. The owner denies that sales were made without receipts.
6. A six-month disqualification will have an adverse effect on his future business endeavors and that it would cause him irreparable injury and damage to his reputation in the business community.
7. I further submit that such an unblemished record is evidence of his continued compliance with the law and his training and supervision of his employees, up and including the present time.

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

FNS initially authorized 1408 Gourmet Deli Corp as a convenience store on October 3, 2014. During an investigation from July 19, 2018 through August 18, 2018, the USDA conducted six (6) compliance visits at Appellant's store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated September 12, 2018. The investigation report included Exhibits A through F, which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during five (5) of the six (6) compliance visits. They involved the sale of two (2) 20 count packages of Sunset red party cups, two (2) 10 oz bottles of Tide Original laundry detergent, one (1) 10 count box of Red & White trash bags, one (1) 14 ounce container of Ajax with bleach cleanser, one (1) 32 ounce bottle of Red & White lemon all-purpose cleaner, one (1) 30 count box of Red & White trash bags, one (1) pack of Newport 100s cigarettes, one (1) 25 ounce bottle of Tide Original laundry detergent, two (2) 1-pint bottles of Clorox bleach. The clerk refused the exchange of an undisclosed amount of SNAP benefits for cash in exhibit F.

With regard to Appellant's contentions, through counsel, it is important to note that as owner of the store, Appellant is liable for all volatile transactions handled by either paid or unpaid store personnel. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food Stamp Act and the enforcement efforts of the USDA. Additionally, 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.

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 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, as amended, 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, 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.

Furthermore, it is important to clarify for the record that the purpose of this review is to determine if the earlier decision of the Retailer Operations Division, to disqualify Appellant from participation in the SNAP for a period of six months, was in fact a correct one. It is not within the scope of this review to consider what subsequent actions Appellant may have taken so that its store may begin to comply with program requirements.

It is important to note that 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. There is no provision in the Act, regulations, or agency policy that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

Appellant, through counsel, contends that during this investigation, no description of the clerk, no name, no title, no means of identification or his relationship to the owner is set forth. With regard to this contention, the investigative report has been carefully reviewed and does not include any evidence of inconsistencies or errors. The report clearly recounts activities wherein personnel at 1408 Gourmet Deli Corp, exchanged SNAP benefits for ineligible items. Furthermore, the descriptions of the clerk involved in the transactions is based on the Investigator's perception and may not perfectly match the clerk's actual height and weight. The investigative report also indicates that the clerks were standing on a step or platform and therefore gave the clerk an appearance of being taller than he may have been. There is also no requirement to obtain the clerks name, title, or relationship to the owner.

Based on the analysis above and the evidence presented in this case, it appears that the violations cited in the Charge letter and the Investigative report were conducted at Appellant's store and therefore, Appellant's contentions, through counsel, do not provide valid grounds for dismissal of the current charges or for mitigating the impact of those charges

Based on a review of the evidence in this case, there is no question that program violations did occur. A clerk working at Appellant sold common ineligible items to an FNS investigator on five (5) separate investigative visits. The investigative record is specific and accurate with regard to the dates of the violations, the exchange of SNAP benefits for ineligible items, and in all other critically pertinent detail. As such, the contentions presented do not constitute valid grounds for dismissal of the current charges of violations, or for mitigating the impact of those charges. Based on a review of the evidence in this case, it appears that the SNAP violations at issue did, occur as charged.

CIVIL MONEY PENALTY

Retailer Operations Division considered 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 **three-month** disqualification because there were at least 171 authorized retailers within a one-mile radius of Appellant including a number of super stores, small, medium, and large grocery stores, and other convenience stores and all are selling as large a variety of staple foods at comparable prices.

CONCLUSION

The documentation presented by Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm. 7 CFR § 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 common nonfood items due to carelessness or poor supervision by the firm's ownership or management.

The violations were determined by Retailer Operations Division to represent the first sanction for the firm and evidence carelessness and poor supervision. Therefore, the imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

It is therefore established that the violations as described in the letter of charges did in fact occur at the Appellant firm warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). Based on the discussion herein, the decision to impose a six-month disqualification against 1408 Gourmet Deli Corp is appropriate and the action is sustained **however, the Determination Letter dated March 5, 2021, incorrectly stipulated a disqualification period of three (3) months, therefore, Appellant shall be disqualified from SNAP for a period of three (3) months.**

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

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

September 16, 2021