

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

160 Crescent Deli & Grocery Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0239050

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 160 Crescent Deli & Grocery Corp. (hereinafter “Appellant”) by FNS’s 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 160 Crescent 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, 160 Crescent Deli & Grocery Corp., was initially authorized for SNAP participation as a small grocery store on September 27, 2007. Between December 2, 2020, and December 8, 2020, 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 160 Crescent Deli & Grocery Corp. accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. According to the report, the Appellant firm sold all-purpose scrubber sponges, plastic sandwich bags, steel wool pads, and

dishwashing liquid in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible food.

In a letter dated January 19, 2021, 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 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 agency record shows that on January 21, 2021, the Appellant, through its accountant, contacted the Retailer Operations Division by e-mail and telephone. According to the accountant, the firm's owner questioned the investigation report's description of one of the clerks involved in the transactions. The accountant further stated that she would provide a response to the allegations by February 1, 2021. However, the record shows that no additional response was made.

After further considering the evidence in the case, the Retailer Operations Division issued a determination letter dated February 3, 2021. 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 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 February 10, 2021, 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 December 2, 2020 and December 8, 2020, FNS completed four compliance visits at 160 Crescent Deli & Grocery Corp. The agency's record indicates that a report of the investigation was provided to the Appellant as an attachment to the January 19, 2021 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 three of the four visits; specifically, the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the firm allowed the investigator to purchase the following nonfood items:

- Two packages of all-purpose scrubber sponges (*Chore Boy* brand), Exhibit A
- One 50-count box of plastic sandwich bags (*Red & White* brand), Exhibit B
- One 4-count box of steel wool pads (*Brillo* brand), Exhibit B
- One 12.6-ounce bottle of dishwashing liquid (*Joy* brand), Exhibit C
- One 50-count box of plastic sandwich bags (*Red & White* brand), Exhibit C

The report indicates that in Exhibit D, the clerk on duty refused to allow an exchange of SNAP benefits for cash (i.e. trafficking). According to the report, two different clerks conducted the three violative transactions. The charge letter states that the violations that occurred in Exhibits A, B, and C warrant a disqualification from SNAP for 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:

- The owner has owned the business for 14 years without any legal problems.
- The firm requests reconsideration of the disqualification because the business is going through financial hardship as a result of the COVID-19 pandemic.
- A disqualification will force the store to close because SNAP is one of the biggest sources of income for the business, leaving the owner and his family in a difficult financial situation.
- The store’s employees will likewise be affected, as they will be unemployed, leaving their families in need.
- The Appellant states that it is living in hard times and struggling to keep the doors open.
- Appellant requests a civil money penalty in lieu of disqualification.
- There are no stores around that carry the same products. The firm also has elderly clients that cannot walk very far.
- The violations were a mistake that will never happen again.
- The owner requests a second chance for the sake of his family.

In support of its contentions, the Appellant submitted eight photographs of the neighborhood surrounding the store. The Appellant argues that the photographs show that there are no other stores in the area that sell the products that the Appellant sells.

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 information or evidence to counter FNS’s investigation report. In fact, the Appellant has stated that the violations were a mistake that will never happen again. Because the violations themselves do not appear to be in dispute, it is the finding of this

review, through a preponderance of the evidence, that SNAP violations did occur as charged and a penalty is warranted.

No Prior Violations / Violations were a Mistake

The Appellant argues that the store owner has owned the business for 14 years without any legal problems. The Appellant further indicates that the violations were a mistake and will never happen again.

While the Appellant may have been authorized for several years without any sanctions, the regulations are clear that when program violations do occur, specifically the exchange of ineligible nonfood items for SNAP benefits due to employee carelessness or poor supervision by the firm's ownership or management, a six-month disqualification is the required penalty, even on the first occasion. This review acknowledges that the violations might have been mistakes or accidental, but these are not valid reasons to dismiss the charges. It is worth noting that in accordance with SNAP regulations, a six-month disqualification is the shortest possible penalty for program violations like the ones that occurred in this case.

Based on the actions of the clerk in Exhibit D, it is likely that some training or supervision relating to SNAP occurred at the store, particularly in relation to exchanging SNAP benefits for cash. However, with three consecutive program violations occurring over a period of one week by two different cashiers, it is apparent to this review that carelessness or poor supervision was commonplace at this store. Accordingly, this review finds that a six-month disqualification penalty is appropriate and is entirely in line with SNAP regulations. This penalty is also consistent with sanctions imposed upon other retailers that have committed similar violations. As such, a reversal or modification to the penalty is not appropriate.

Hardship to Appellant

The Appellant contends that the store is experiencing financial hardship as a result of the COVID-19 pandemic and argues that a disqualification would force it to close because SNAP is one of its biggest sources of income. The Appellant argues that such a sanction would leave the owner and his family in a difficult financial situation. A store closure would also negatively affect the employees, as they would be unemployed, leaving their families in need. The owner requests a second chance for the sake of his family.

With regard to these contentions, SNAP regulations do not permit this review to consider dismissing or modifying the disqualification 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 financial 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 for similar violations.

Hardship to SNAP Households / Civil Money Penalty

The Appellant requests a civil money penalty in lieu of disqualification, arguing that there are no other stores in the area that carry the same products. The Appellant also claims that it has elderly customers who cannot walk very far. To support this contention, the Appellant submitted eight color photographs of the surrounding neighborhood.

With regard to this contention, it is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store is disqualified and households are forced to use their benefits elsewhere. To address potential hardship situations that SNAP households might incur when a firm is disqualified, regulations at 7 CFR § 278.6(f) allow, in certain circumstances, for a civil money penalty to be imposed instead of disqualification. Paragraph (f)(1) of this regulation states that this alternative sanction is allowed when a 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."

This review agrees with the Retailer Operations Division that a disqualification of 160 Crescent 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 dozens of similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of 160 Crescent Deli & Grocery Corp., including a full-service supermarket less than 500 feet away – roughly a two-minute walk. There is also no evidence that 160 Crescent Deli & Grocery Corp. sells food that is not available nearby and no evidence that the inventory at other stores in the area is not comparably priced. Because hardship conditions do not exist in this case, a CMP in lieu of disqualification is not an available option.

CONCLUSION

Based on a review of all available 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 160 Crescent 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. Furthermore, the contentions and evidence provided by the Appellant do not persuade this review to dismiss or modify the penalty in any way. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, 160 Crescent 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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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

June 7, 2021