

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

197 Deli Grocery Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0189213

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support a finding that the six-month disqualification of 197 Deli Grocery Corp. (hereinafter 197 Deli Grocery Corp. or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program, as initially imposed by the Retailer Operations Division was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(1) and 7 CFR § 278.6(a) and (e)(5) in its administration of the SNAP, when it imposed a six-month period of disqualification against Appellant.

AUTHORITY

7 USC § 2023 and the 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 USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of March 31, 2016 through April 7, 2016. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. The items sold are best described in regulatory terms as common non-food items. As a result of evidence compiled during this

investigation, by letter dated May 31, 2016, the Retailer Operations Division charged ownership with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a) and noted the violations warranted a six-month disqualification period. The letter also stated that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification. Appellant did not timely reply to the charges. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated June 20, 2016, that the violations cited in the charge letter occurred at the firm and that a six-month period of disqualification was warranted. The letter stated that eligibility for a hardship CMP was not applicable as there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter dated June 27, 2016, Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The appeal was granted, and implementation of the sanction was held in abeyance pending completion of this review. At the same time that Appellant requested administrative review, it requested, through counsel, case documentation from FNS through the Freedom of Information Act (FOIA). This administrative review was held in abeyance pending completion of an official response to the Appellant's FOIA request. Counsel received the agency's response to the FOIA request on July 15, 2016.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear 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, 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 and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 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 § 271.2 states in part that, "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 § 278.2(a) specifies in relevant part, "Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food." Further, the citation specifies that "Coupons may not be accepted in exchange for cash . . . or for any other nonfood use."

7 CFR § 278.6(a) states, inter alia, that “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*, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system . . . ” (emphasis added)

Section 278.6(e)(5) of the SNAP regulations states, in part, that a firm is to be disqualified 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.”

In addition, 7 CFR § 278.6(f)(1) provides for civil money penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households benefit because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It reads, 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 SNAP households benefit because there is no other authorized retail food store in the area selling as large a variety of staple food items.”

APPELLANT’S CONTENTIONS

Appellant, through counsel, made the following summarized contentions in its June 27, 2016, request for review and its late reply to the charge letter also dated June 27, 2016, in relevant part:

- The vendor did not engage in trafficking.
- The vendor is not able to confront the witness who investigated the business.
- Irreparable harm, damage, and injury will be inflicted upon Appellant by a disqualification.
- It is illogical that a sale of approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the investigative visits would jeopardize the business.
- Appellant requests dismissal of the charges, or in the alternative, assessment of a reasonable civil money penalty.
- The owner of the business has diligently trained and tested his employees concerning SNAP requirements.
- Appellant’s record is unblemished after many years of a being SNAP authorized.
- The owner cannot be in attendance at all times and therefore must rely upon the competence, honesty, and good judgement of its employees.
- No less than 35% of the sales come from SNAP.
- Members of the community who regularly patronize this store will be severely inconvenienced and suffer extreme hardship.
- There are inadequacies regarding the investigation:
 - The investigator failed to obtain a positive identification of the clerk.
 - The investigator failed to provide the time of entry and departure and the time spent in the store on each visit which deprives the vendor the opportunity to

consider whether the investigation was for a sufficient period of time to be complete and thorough. Surveillance cameras in the store are self-erasing and any images that were taken at the time of the investigation have since been erased.

- None of the investigative reports contain the date it was completed by the investigator, which is important in determining the reliability of the report.
- Appellant denies that the receipts were not present and that there was no price indicated on items.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

INVESTIGATION DETAILS

197 Deli Grocery Corp. is a small grocery, originally authorized by FNS on February 5, 2013. During an investigation conducted from March 31, 2016 through April 7, 2016, a USDA investigator conducted five compliance visits at 197 Deli Grocery Corp. A report of the investigation dated April 14, 2016, was provided to Appellant as an attachment to the charge letter. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during four of the five compliance visits and involved the sale of common ineligible items including toilet paper, a lighter, and cigarettes. The violative transactions were conducted by one clerk. Upon review, the evidence indicates that Appellant established a record of selling non-food items, as defined by Section 271.2 of the regulations, on multiple occasions as noted in Exhibits A, B, C, and E furnished with the charge letter.

ANALYSIS AND FINDINGS

Owner not involved with the Violations

Appellant, through counsel, contends that the owner is not able to be at the store at all times and he must rely on the good judgment and honesty of his employees. With regard to this contention, Appellant signed and submitted a Supplemental Nutrition Assistance Program Application for Stores (FNS-252) on July 22, 2014. This signed application included a certification and confirmation 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." Violations listed on this certification include accepting SNAP benefits as payment for ineligible items.

Regardless of whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of its

employees would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Refusal to Traffic

Appellant argues that the clerk did not engage in trafficking. The regulations at 7 CFR §278.6(e)(5), noted above, are clear that the first sanction for violations such as the sale of common nonfood items due to careless or poor supervision by the firm's ownership or management is to be a disqualification period of six months. The refusal to traffic, while noteworthy, does not eliminate the documented allegation that the firm allowed the sale of ineligible items during four compliance visits made by the investigator. Therefore, that Appellant's employee refused to traffic does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Concerns about the Investigation and Report Identification of the Clerk

Appellant contends that the investigator failed to identify the clerk. It is important to note that the compliance visits by the investigator were conducted undercover. Attempts by an investigator to gather detailed identifying information about store clerks, would almost certainly raise suspicion of the clerks and would potentially identify the customer as an undercover investigator. This could not only jeopardize the safety of the investigator, but would very likely compromise the investigator's efforts to ascertain the firm's compliance with Federal SNAP law and regulations in the store's everyday conditions. The lack of the clerk's full identification, therefore, does not invalidate the violative activity that took place in the store.

Time of Entry and Departure

Appellant contends that without the entry and departure times of each visit, Appellant cannot determine if there was sufficient time spent in the store to select multiple items. Counsel also explains that its surveillance cameras in the store are self-erasing and any images that were taken at the time of the investigation have since been erased. In its FOIA request, Appellant, through counsel, asked for a record of the investigator's entry and exit times. In response to this request, FNS's FOIA office stated:

... (W)e are withholding the requested information in full under 5 U.S.C. §552 (b)(6) and (b)(7)(C), as providing the precise times the vendor's store was entered and exited could reasonably be expected to disclose the identity of the Investigator. You mention that your client has a self-erasing surveillance camera. FNS cannot confirm this and will continue to withhold the information. This information is withheld to protect the identity of the Investigator.

However, this information is not necessary to determine whether or not the transactions as reported actually took place. The purchase costs of the transactions involved in the investigation are documented on SNAP terminal receipts obtained during each compliance visit. Additionally,

every transaction that occurs at Appellant's firm appears on agency records and confirms the store's SNAP authorization number, the date and time of the transaction, the amount of the transaction, and transaction method. A full list of all transactions during the investigation period, including the violative transactions, was provided to Appellant in the agency's official FOIA response. Appellant has offered no compelling information or supporting documentation which would constitute evidence that any relevant detail on the report is incorrect in any substantial respect.

Report Date

Appellant, through counsel, claims that none of the Investigative Transaction Reports include the date of when it was signed by the Investigator. Appellant argues that without this information, it is impossible to know whether the details of the investigation were potentially "reduced to memory," thereby affecting the accuracy and reliability of the report.

The investigation reports appear to be fully credible. Each investigative pass was fully documented by the investigator likely on the same day the visits were conducted. There is no reason or evidence to suggest otherwise. Furthermore, documentation in the record confirms the items purchased were donated to and signed for by a charitable organization following the transactions. Documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, and the date the donation was made. Items purchased in Exhibits A, C, and E were donated on the same day as the store visit and the items purchased in Exhibit B were donated three days later. Thus, the investigator promptly completed its investigation protocol and the record documents such.

Register Receipts and Prices

Appellant, through counsel, contends that every customer who shops at the Appellant firm receives a cash register receipt along with an EBT receipt and that all individual products are clearly marked with a price. This contention is in response to the investigator's report of "No Price Indicated" for some of the items purchased during the investigation and that no cash register receipts were provided.

As part of the agency's FOIA response, copies of all receipts obtained during the investigation were provided to the Appellant. The only copies provided were receipts from the EBT point-of-sale equipment, which shows the total purchase amount, but does not list the specific items purchased. According to the investigator, EBT receipts were given after each transaction, but not cash register receipts (see p. 3 of each exhibit in the report). As a result, and because the price was not always listed on individual items as claimed, the investigator was not able to identify the price for every product purchased.

As mentioned earlier, the report of the investigation appears to be wholly credible and fully documented. Based on the information in the preceding paragraphs, the transactions identified on the investigative report unquestionably occurred at the Appellant's store. Thus, the contentions

that the investigative report did not include certain details do not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Confronting the Witness

Appellant, through counsel, contends that it has not been afforded an opportunity to confront the witnesses to the alleged violations. Neither the Food and Nutrition Act of 2008, nor the SNAP regulations provide for evidentiary proceedings at the administrative level of review. Therefore, such proceedings are not included in the administrative review process. Rather, 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.

No Previous Violations

Counsel contends that Appellant has an unblemished record. A record of participation in the 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 the violations upon which they are based. The regulations at 7 CFR § 278.6(e)(5), noted above, are clear that the first sanction for violations such as the sale of common nonfood items due to careless or poor supervision by the firm's ownership or management is to be a disqualification period of six months. 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.

Hardship to Appellant

Appellant, through counsel, explains that a six month disqualification will create a serious hardship on the business, as no less than 35% of its business is from SNAP. Appellant further argues that it is not logical that a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) sale would jeopardize Appellant's business. 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 on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from the assessment of administrative penalties based on a purported economic hardship to the Appellant or firm would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 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 a valid basis for dismissing the charges or for mitigating the penalty imposed.

Civil Money Penalty

Appellant, through counsel, requests a reasonable monetary penalty in lieu of the six month disqualification. Counsel states that members of the community who regularly patronize this store will be severely inconvenienced and suffer extreme hardship. 7 CFR § 278.6(f)(1) 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.” Internal FNS policy memoranda clarifies the regulation by defining “in the area” to mean within a one-mile radius for an urban store such as 197 Deli Grocery Corp.

The available evidence shows that there are 42 small groceries, 21 medium groceries, six large groceries, seven supermarkets, and 14 super stores located within a one-mile radius from Appellant. Thus, in its letter dated June 20, 2016, the Retailer Operations Division determined that a hardship CMP would not be appropriate, as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices. Some degree of inconvenience to SNAP customers is inherent whenever any SNAP authorized retailer is disqualified. For example, the normal shopping pattern of SNAP customers may be temporarily altered during the period of disqualification. Nevertheless, the determination of the Retailer Operations Division that the six-month disqualification of 197 Deli Grocery Corp. from the SNAP would not create a hardship to customers, as differentiated from potential inconvenience, is sustained and a civil money penalty in lieu of disqualification is not appropriate in this case.

CONCLUSION

Based on a review of the evidence, the record indicates that the program violations at issue did occur at Appellant. The charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were carried out by a USDA investigator. The investigative record is specific, thorough, and fully documented with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail.

A review of the evidence in this case confirms that the Retailer Operations Division’s initial determination to impose a six month disqualification in lieu of a CMP was proper. The record documents that the Retailer Operations Division properly considered Appellant’s eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations. Appellant is located in an area where there are other authorized SNAP retailers, selling as large a variety of staple food items at comparable prices. Given the evidence under review, the CMP was appropriately denied. Therefore, the six month disqualification of Appellant from participating as an authorized retailer in the SNAP is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owners resides 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), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

MARY KATE KARAGIORGOS
ADMINISTRATIVE REVIEW OFFICER

September 13, 2016
DATE