

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

358 Famous Deli LLC,

Appellant,

v.

Case Number: C0199569

Retailer Operations Division,

Respondent.

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 358 Famous Deli LLC (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 358 Famous Deli LLC.

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, 358 Famous Deli LLC, was initially authorized for SNAP participation as a small grocery store on September 9, 2014. Between March 1, 2018, and April 1, 2018, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigative report documented that personnel at 358 Famous Deli LLC accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold coffee filters, dish soap, steel

wool, trash bags, fabric softener, laundry detergent, and a sponge in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated May 15, 2018, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The charge letter states that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further states that under certain conditions and in accordance with 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In a faxed letter dated May 25, 2018, the Appellant replied to the charges, stating that the firm has been in business for approximately four years without any issues or problems with any of its permits or licenses. The Appellant argued that its employees are properly and regularly trained in SNAP procedures and stated that it trusts its employees to abide by the rules and not put the firm at risk of losing its licenses. The Appellant further stated that it had spoken with its cashiers and all denied allowing ineligible items to be sold with SNAP benefits. The Appellant argued that it is a rule-abiding business that is always in compliance with the programs in which the firm participates. It also provided its assurance that it would take every step necessary to prevent program violations. Finally, the Appellant argued that a six-month disqualification would put the firm in a difficult financial situation and requested that a civil money penalty be considered rather than disqualification.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated June 5, 2018. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the letter of charges 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 June 13, 2018, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the sanction 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 1, 2018, and April 9, 2018, the Food and Nutrition Service completed six compliance visits at 358 Famous Deli LLC. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the May 15, 2018, charge letter. The investigation report includes Exhibits A through F, and provides full details on the results of each compliance visit. SNAP violations were documented during four of the six 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 100-count box of coffee filters (*Mr. Coffee* brand), Exhibit B
- One 9-fluid-ounce bottle of dish soap (*Dawn* brand), Exhibit C
- One scrubber sponge (*SOS* brand), Exhibit C
- One 4-count box of steel wool pads (*SOS* brand), Exhibit D
- One 13-count box of kitchen trash bags (*Supreme* brand), Exhibit D
- One 10-fluid-ounce bottle of fabric softener (*Downy* brand), Exhibit E
- One 10-fluid-ounce bottle of laundry detergent (*Gain* brand), Exhibit E

The report indicates that in Exhibit A the investigator did not attempt to purchase any ineligible items. In Exhibit F, the clerk on duty refused to sell the investigator a bar of soap. In Exhibits E and F, the investigator attempted to obtain cash in exchange for SNAP benefits, but these requests were refused. According to the report, two different cashiers conducted the four violative transactions.

The charge letter states that the violations that occurred in Exhibits C, D, and E 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:

- Appellant's employees are well trained and are fully capable of processing SNAP transactions. Employees are trained both monthly and quarterly to ensure that proper SNAP procedures are understood and followed. These training sessions include discussions regarding what can and cannot be purchased with SNAP benefits as well

as the consequences for engaging in trafficking. The Appellant also has SNAP posters near the cash register, which are visible to everyone.

- Appellant trusts that its employees will abide by the rules and not put the firm at risk of losing any of its business licenses.
- Appellant has spoken with its cashiers about the investigation report and all of them deny ever allowing ineligible items to be sold for SNAP benefits. Appellant points to the two refusals in Exhibits E and F of the report as evidence of the cashiers' refusal to commit violations.
- Appellant firm is a rule-abiding business and the owner prides himself in running a business that is always in compliance with all programs in which the firm participates.
- The Appellant counts on every dollar to keep the business operating and requests that FNS consider any possible way to allow the store to remain authorized. The store is located in an area where SNAP redemptions represent the majority of the firm's income. A disqualification for six months would put the firm in a very difficult financial situation.
- If FNS concludes that violations did occur, Appellant requests a civil money penalty instead of disqualification.
- Appellant will continue to take every step necessary to prevent these types of violations from ever occurring in the future.

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 herein.

ANALYSIS AND FINDINGS

The Appellant has not provided any evidence or documentation to counter FNS's investigation report. While the cashiers supposedly deny having ever committed any violations, the Appellant has offered no evidence to support these claims. Because the Appellant has not offered any evidence to the contrary, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division and a six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Employee Training Program

The Appellant has argued that the firm is a rule-abiding business that is always in compliance with program rules. It contends that its employees are regularly and properly trained and are trusted to abide by the rules and not put the firm at risk of losing a license.

With regard to these contentions, this review concedes that the firm may well have a robust training program and that it may normally comply with program rules. However, the Appellant has offered no evidence that such a training policy exists at the store. A claim without supporting documentation is insufficient to prove that the store engages in training activities. However,

whether or not the Appellant has a training program is immaterial to this case. The regulations at 7 CFR § 278.6(e)(5) are clear that a firm is to be disqualified for six months if the evidence shows that personnel of the firm have committed violations such as the sale of common nonfood items due to carelessness or poor supervision. In this case, the evidence clearly shows that two different clerks on four separate occasions permitted ineligible nonfood items to be purchased with SNAP benefits. Such repetitive violations strongly suggest either a willful disregard of program rules or a lack of supervision by the firm's ownership or management. As such, the Appellant's training claims do not provide a valid basis for dismissing the charges or modifying the disqualification penalty

Remedial Actions to be Taken

The Appellant contends that it will take every necessary step to ensure that Program violations will not occur in the future.

With regard to this contention, it should be noted 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 circumstances that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions 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 subsequent to findings of program violations.

Hardship to Appellant

The Appellant has argued that it counts on every dollar to keep the business operating and claims that the store is located in an area where SNAP redemptions represent the majority of the firm's income. According to the Appellant, a disqualification for six months would put the firm in a very difficult financial situation.

With regard to this contention, it is recognized that some degree of financial or economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there are no provisions 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 administrative penalties based on a purported economic hardship to the store's ownership or to the firm itself 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 requirements, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellant's

contention that the firm may incur financial hardship as a result of a six-month disqualification from SNAP does not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

Civil Money Penalty

In the event that this review finds that the violations did occur as alleged, the Appellant requests that a civil money penalty be imposed instead of a disqualification.

With regard to this request, SNAP regulations at 7 CFR § 278.6(f)(1) permit a CMP in lieu of a temporary disqualification only in instances where a firm's disqualification would cause hardship to SNAP households. According to this regulation, hardship is defined as "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 358 Famous Deli LLC, a small grocery store, would not cause hardship to SNAP households because there are many other shopping options in the immediate area. According to agency records, there are three small grocery stores, two large grocery stores, and a superstore – all authorized to accept SNAP – located within a radius of less than two-tenths of a mile of 358 Famous Deli LLC. All of these stores very likely have similar or larger staple food inventory at comparable prices.

It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their SNAP benefits elsewhere. However, in accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Because such conditions do not exist in this case, the request for a hardship civil money penalty in lieu of disqualification cannot be granted.

CONCLUSION

Based on an analysis of all information in this case, this review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at 358 Famous Deli LLC 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. Pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, 358 Famous Deli LLC, 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 participation 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

November 28, 2018