

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

United Gourmet Deli,

Appellant,

v.

Case Number: C0194803

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a six month disqualification against United Gourmet Deli (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5 and 6), and § 278.6(f)(1) in its administration of the SNAP when it imposed a six month period of disqualification against Appellant on June 21, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period April 5, 2018, through April 29, 2018. The investigation determined that personnel at the Appellant firm accepted SNAP benefits in exchange for ineligible merchandise on six separate occasions. All six transactions were deemed clearly

violative and warrant a six month disqualification period. The items sold are best described in regulatory terms as common nonfood items and included items such as plastic cutlery, paper plates, paper towels, aluminum foil, trash bags, sandwich bags, matches, and sponges. The investigative report indicates that these violative transactions were handled by two separate clerks. The investigative report also notes that the firm refused to exchange SNAP benefits for cash on two occasions (Exhibits E and F).

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated May 31, 2018, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant, through counsel, responded to the charges in a telephone call to the Retailer Operations Division on June 5, 2018. No other response was received from Appellant. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated June 21, 2018, that it determined that violations had occurred at the firm, and that a six month period of disqualification from participating as an authorized firm in SNAP was warranted. This determination letter also states that Appellant’s eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

By letter dated June 26, 2018, Appellant, through counsel, appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. Subsequent correspondence was received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, 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 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) states that: 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, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states 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.

7 CFR § 278.6(e)(5) states 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.

7 CFR § 278.6(f)(1) states that: “FNS may impose a CMP 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. FNS may disqualify a store which meets the criteria for a CMP if the store had previously been assigned a sanction. A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions 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:

During the June 5, 2018, telephone call to the Retailer Operations Division:

- The items sold were not expensive;
- The employee that committed the violations has been instructed that the ineligible items sold in the investigation were not allowed to be purchased with SNAP benefits; and,
- A hardship CMP is requested.

The request for administrative review included contentions and also included a separate letter dated June 12, 2018, containing wording that it was supposedly emailed to the Retailer Operations Division:

- The owners admit to the violations, but were not involved in the conduct of them. The clerk identified in exhibits A, B, D, E, and F is not the boss and management was not involved;

- The store is a family owned business operating since 1972 and has been in the current location since 2008. The owners have been part of SNAP since 1996. The owners are very remorseful about the allegations and have taken more aggressive steps to ensure that store employees receive adequate training and proper supervision so the mistakes are eradicated going forward; and,
- If the ability to accept SNAP is lost, the business will be unduly harmed and the community will suffer undue hardship if the store is disqualified. The store is located in a suburban neighborhood at the entrance of a dead-end street. There is no other authorized retail store selling as large a variety of staple food items at comparable prices as shown by a review of the store dated February 26, 2015, that highlights the unbeatable prices and high quality of the food. The store has received 4.4 out of 5.0 stars on Google reviews.

In addition to common food items, the store sells freshly made hot and cold food items that are different than other stores. That the store is also twice the size of other stores creates twice the volume of customer traffic, and provides more variety at lower costs. Accordingly a CMP is requested in lieu of a disqualification.

Appellant submitted four photos of the neighborhood, a Yelp.com review praising the deli sandwiches, and a Google review summary showing 4.4 stars in support of these contentions.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, while the owners have taken more aggressive steps to ensure that store employees receive adequate training and proper supervision so the mistakes are eradicated going forward is a positive step, it does not provide any valid basis for dismissing the charges, or for mitigating the penalty imposed. While store ownership may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. Both the FNS SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application/reauthorization process. Store ownership did certify its understanding and agreement to abide by program rules and regulatory provisions when it initially applied to become a SNAP retailer and again when it applied for reauthorization. The ownership remains liable for all violative transactions handled by store personnel, whether

paid or unpaid, new, full-time or part-time regardless of the amount of time the owners are present at the subject firm.

Store ownership admits that the violations occurred, but that they were not involved in the conduct of them. The investigative report shows that employees working at the Appellant firm during the period under review transacted SNAP benefits for ineligible items on six separate occasions indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The transactions from the investigative report, including the store EBT POS receipts, have been matched to SNAP transactions posted on the dates in question with no discrepancies and a review of the investigative report shows no errors or discrepancies. There was no indication of involvement by the firm's ownership or management. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items. SNAP regulations state that FNS shall disqualify a store for a six month period 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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management.

It is highly improbable, based on the readiness of store employees to exchange SNAP benefits for ineligible items, that the only instances of SNAP violations were the six identified as part of the FNS undercover investigation and more likely than not that this represented an ongoing pattern of SNAP violations at the Appellant firm. As previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight and training on the part of ownership to ensure employees, especially new employees, are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store ownership to not have a program of ongoing supervision of employee performance and conduct to ensure store employees were not stealing from the firm or conducting other activities that would jeopardize the licenses and income that the firm is dependent upon.

SNAP benefits, in general, are only authorized to be used for the purchase of foods for the household to eat as well as seeds and plants which produce food for the household to eat. The common nonfood items purchased during the investigation of the Appellant firm are clearly not edible foods and are not plants or seeds, so one has to question the level of training that store employees received by store ownership and/or management. The basic concept of "if you can't eat it, you can't buy it using SNAP" is not a difficult one for employees to grasp, yet store employees allowed the purchase of multiple ineligible items using SNAP benefits on six separate occasions. Had an effective compliance policy and program been in effect at the firm, it is unlikely that these employees would have made such obvious mistakes. The more likely explanation is that store ownership and/or management failed to properly train and subsequently supervise store employees. Additionally, had store ownership and/or management been supervising store employees through occasionally monitoring them using videotape, if available, or in person, they would have readily noticed that employees were accepting SNAP benefits in exchange for ineligible nonfood items. It also would have been immediately evident to store ownership and/or management that store employees were deficient in their knowledge of SNAP rules and regulations had they periodically spot checked their knowledge and abilities by asking questions about SNAP eligible/ineligible items and how to correctly process transactions using a

SNAP EBT card. Either of these basic supervisory techniques would have provided a no cost method for store ownership and/or management to ensure that store employees were not putting the store's SNAP license at risk. These are clear signs of poor or no supervision by store ownership and/or management and the lack of an effective training program.

Based on this discussion, the decision by the Retailer Operations Division to disqualify the firm for a six month period is the appropriate penalty in this situation and there is not any valid basis for dismissing the charges or for mitigating the penalty imposed. The regulations do allow SNAP retailers to pay a hardship CMP under certain conditions as explained in the next section.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications.

A hardship CMP as an optional penalty in lieu of a six month disqualification was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and its disqualification would create a 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. Contrary to Appellant's contentions, FNS records show there are 35 other comparably sized or larger SNAP retail stores located within a 1.0 mile radius of the Appellant firm that includes four supermarkets, two large grocery stores, and seven medium grocery stores with the two closest supermarkets located 0.39 and 0.47 miles away. There also is a small grocery store and a convenience store located on the same block. All of the comparable or larger stores stock adequate varieties of food in all four staple food categories and in perishables as required by FNS. The many nearby stores appear readily accessible to SNAP recipients, especially since the area is serviced by mass transit, and offer a variety of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at other stores. It is recognized that some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience, however, does not rise to the level of hardship required by the regulations.

Regarding Appellant's contentions, the preprinted statements purportedly from SNAP recipients stating it would be a hardship for them if they were not able to shop at the store are not supported by the evidence that shows numerous larger stores in the vicinity offering a greater quantity and variety of staple food products than could be found at Appellant's minimally stocked convenience store. It is also noted that the reviews and ratings cited in Appellant's contentions address only the hot and cold prepared foods sold at the Appellant business, not the groceries, and that the sale of hot foods in exchange for SNAP benefits is a violation of federal regulations.

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 or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty 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. Furthermore, 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, ownership'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.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged and as admitted to by store ownership. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA special agent and signed under penalty of perjury. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate 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. Accordingly, the determination by the Retailer Operations Division to impose a disqualification of six months against the Appellant firm from participating as an authorized retailer in SNAP is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. A new application for participation in SNAP may be submitted ten (10) days prior to the expiration of the six month disqualification period. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS retailer web site. Any questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (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.

ROBERT T. DEEGAN
Administrative Review Officer

October 23, 2018