

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

A & J Deli LLC #1,

Appellant,

v.

Case Number: C0195577

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 there is sufficient evidence to support a six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP) as initially imposed by the Retailer Operations Division.

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 A & J Deli LLC #1.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulation 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 A & J Deli LLC #1 with Federal SNAP law and regulations in July and August 2017. In a letter dated November 1, 2017, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for merchandise which included

ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three (3) out of five (5) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5). The Appellant was informed it could respond to the charges within ten (10) calendar days following delivery of the charge letter.

The charge letter was delivered to the Appellant via UPS on November 3, 2017. The Appellant did not reply to the charge letter.

After reviewing the evidence in the case, the Retailer Operations Division issued a determination letter dated November 21, 2017. The determination letter informed the Appellant it was disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a hardship civil money penalty (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 six-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 postmarked November 28, 2017, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The request for review was granted. Upon acceptance of the administrative review request, implementation of the six-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, might 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 covered 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 disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

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 that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the “Food and Nutrition Act of 2008, as amended, for the purchase of 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....

7 CFR § 278.6(e)(5) states, in part:

*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 non-food items due to carelessness or poor supervision by the firm’s ownership or management. [Emphasis added.]*

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’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.

SUMMARY OF THE CHARGES

During an investigation conducted in July and August 2017, the USDA conducted five (5) compliance visits at A & J Deli LLC #1. A report of the investigation was

provided to the Appellant as an attachment to the charge letter dated November 1, 2017. 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 three (3) of the five (5) compliance visits. The chargeable violations involved the sale of the following ineligible items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a):

- Small bag of Tide laundry detergent 260g;
- Roll of GP Georgia-Pacific preference 2-Ply Embossed White Bath Tissue;
- Two (2) small bags of ARIEL with Downy laundry detergent 330g;
- Box of Suavitel Field Flowers Fabric Conditioner 20 sheets;
- Box of 8 count DURABLU Steel Wool Soap Pads;
- Bottle of Suavitel Cuidado Superior fabric softener 450 ml.

The above violations were conducted by two (2) different clerks. A third clerk in Exhibit E refused to exchange cash for SNAP benefits.

APPELLANT'S CONTENTIONS

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

- In three (3) of the five (5) visits, the store owner's brother conducted the transactions. He was visiting from the Dominican Republic and was helping out in the store. He has no experience in business and barely speaks any English. In Exhibit A, the brother overcharged the SNAP customer 5 U.S.C. § 552 (b)(6) & (b)(7)(C) which was a simple error. The Appellant admits that the store owner's brother sold ineligible items for SNAP benefits in Exhibits C and D. However, the Appellant states that the brother did not understand the distinction between eligible and ineligible foods and that this was an unintentional act during a busy time and should not warrant a six-month disqualification.
- In Exhibit B, the store owner states he gave the investigator the ineligible products without charging for them. The Appellant's counsel states that three (3) of the eligible items 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on the investigation report and that if sugar was purchased for the store's usual price 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that would mean the store owner is telling the truth.
- The Appellant store owner's wife refused to exchange cash for SNAP benefits in Exhibit E and no violations were committed.
- In summary, the investigation does not show a pattern of conduct where the SNAP regulations were routinely violated or overlooked and the six-month disqualification should be reversed.
- The Appellant has operated the store for eight (8) years without being charged for any type of violations.

- The store owner and his family will suffer a hardship if the store is subjected to a six-month disqualification.

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

Investigation Report

The investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions.

A review of the case record documents that the Appellant was charged with selling ineligible items for SNAP benefits in violation of SNAP regulations based on the findings of Exhibits B, C and D of the investigation report. The Appellant states that there was a simple 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cent overcharge in Exhibit A; however, the transactions in Exhibit A were not considered by the Retailer Operations Division in assessing the six-month disqualification.

Regarding Exhibit B, the Appellant states that the evidence supports the store owner's contention that the ineligible items were given to the investigator "for free." However, this contradicts the investigation report which states that the store exchanged SNAP benefits for a small bag of laundry detergent (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) and bath tissue (no price indicated). The Appellant's allegation appears to be speculative and does not meet the preponderance of the evidence standard of this review.

However, even if the Appellant's claim regarding the transactions in Exhibit B was accepted as more likely than not to be true, the violations documented in Exhibits C and D alone would be sufficient to warrant a six-month disqualification. The Appellant admits that the violations documented in Exhibits C and D were committed by the store owner's brother.

Violations Warrant a Six-Month Disqualification

The SNAP regulation at 7 CFR § 278.6(e)(5) states, in part:

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 non-food items due to carelessness or poor supervision by the firm's ownership or management.

FNS considers the sale of a total of three (3) inexpensive non-food items over one, two or three transactions to equate to carelessness and the lack of thorough supervision on the part of ownership or management. The investigation report documents that the chargeable violations in this case consisted of seven (7) inexpensive non-food items exchanged for SNAP benefits over three (3) transactions; therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification. One clerk refused to exchange cash for SNAP benefits in Exhibit E, but this does not ameliorate or mitigate the penalty for exchanging non-food items for SNAP benefits.

The Appellant states that any sales of ineligible items would have been unintentional and the result of honest mistakes. Regarding this contention, neither SNAP law nor regulations require an element of intent on the part of the violator where ineligible items are exchanged for SNAP benefits. Therefore, whether or not the clerks in this case intended to violate SNAP regulations is not relevant.

Owner Accountability

The Appellant admits that the violations documented in Exhibits C and D were committed by the store owner's brother who was helping out while visiting from another country and that the brother did not fully understand the SNAP regulations and the distinction between eligible and ineligible items. Regarding this contention, the store owner signed the SNAP application for A & J Deli LLC #1 on March 16, 2012 and acknowledged that he was aware of the SNAP regulations and understood those regulations. That 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." The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations including accepting SNAP benefits in exchange for ineligible non-food items.

In addition, an authorization packet was sent to the firm when it was first authorized and contained training materials which gave guidance on SNAP rules and regulations. SNAP authorized firms are responsible for reviewing the training materials, providing training for its employees, and generally familiarizing themselves with all SNAP rules and regulations pertaining to retailers. It is therefore no excuse that the store owner's brother was not trained or was otherwise unfamiliar with the SNAP rules and regulations. 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 and Nutrition Act of 2008 and the enforcement efforts of the USDA.

No Prior Violations

The Appellant states that the store has operated for eight (8) years without being charged for any type of violations. Regarding this contention, 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 those charges.

Hardship to Business, Store Owner and Family

The Appellant contends that the temporary disqualification will create a hardship for the store, its owner and his family as it relies on the SNAP as a small business. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the ownership personally or the firm resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

CIVIL MONEY PENALTY

The Retailer Operations Division determined that the Appellant was not eligible for a hardship CMP under 7 CFR § 278.6(f)(1). That regulation 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.”

The case record documents that the Retailer Operations Division determined that a six- month disqualification of A & J Deli LLC #1, a small grocery store, would not cause a hardship to SNAP households as there are 13 comparable or larger SNAP authorized stores located within a one-mile radius of A & J Deli LLC #1. These SNAP authorized stores include a large grocery store and two (2) superstores.

Based on this evidence, a six-month disqualification of A & J Deli LLC #1 would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division decision not to assess a

hardship CMP in lieu of a six- month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is established that the violations as described in the letter of charges did in fact occur at A & J Deli LLC #1 warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). That regulation states that FNS shall “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 non-food items due to carelessness or poor supervision by the firm’s ownership or management.” Therefore, the decision to impose a six-month disqualification, the least severe penalty allowed by regulation, against A & J Deli LLC #1, Appellant, is appropriate and the action is sustained.

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

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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, 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.

RONALD C. GWINN
Administrative Review Officer

February 8, 2018