

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

Al-Bathaa Deli Grocery Corp,

Appellant,

v.

Case Number: C0185334

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 Al-Bathaa Deli Grocery Corp. (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 Al-Bathaa 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, Al-Bathaa Deli Grocery Corp., was initially authorized for SNAP participation as a small grocery store on September

27, 2013. Between March 30, 2016, and April 6, 2016, 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 Al-Bathaa Deli Grocery Corp. accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. According to the report, the Appellant firm sold fabric softener, dishwashing liquid, liquid cleaner, dryer sheets, and a scrub sponge in exchange for SNAP benefits, which benefits may only be used in exchange for eligible foods.

In a letter dated June 2, 2016, 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 stated that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated 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 letter dated June 10, 2016, the Appellant, through counsel, responded to the charges, stating that USDA has erroneously concluded that the firm engaged in the misuse of SNAP benefits. The Appellant contended that neither the owner nor anyone involved with the firm engaged in any violative activities. The Appellant further argued that the investigative report was inadequate and stated that in a matter so serious as this, it would have expected USDA to have investigated and evaluated the specific activities of the store.

Along with its response to the charges, the Appellant, through counsel, submitted a request for a number of documents related to the investigation. This request was made under the Freedom of Information Act (FOIA).

FNS completed its FOIA response on July 12, 2016. However, the Appellant was dissatisfied with the response and submitted an appeal dated August 29, 2016. The FOIA appeal was then completed on June 27, 2017, and delivered to the Appellant on July 12, 2017. It should be noted that the store remained authorized during the full FOIA process.

After receiving the agency's decision regarding its FOIA appeal, the Appellant was given 10 additional days to provide any information to supplement its response to the original charge letter. However, no additional information or documentation was submitted by the Appellant.

After further consideration of the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated August 1, 2017. This letter informed the Appellant that it was the determination of the Retailer Operations Division that the 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 civil money penalty was given, but that the Appellant was not eligible for this alternative penalty 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 August 10, 2017, 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 30, 2016, and April 6, 2016, the USDA completed four compliance visits at Al-Bathaa Deli Grocery Corp. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the June 2, 2016, charge letter. The investigation report includes Exhibits A through D, which provide 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 notes that the following nonfood items were purchased by an investigator using SNAP benefits:

- One scrub sponge (*SOS* brand), Exhibit B
- One 450-milileter bottle of fabric softener (*Downy* brand), Exhibit C
- One 12.6 fluid ounce bottle of dish liquid (*Ajax* brand), Exhibit C
- One 15 fluid ounce bottle of cleaner (*Mistolin* brand), Exhibit D
- One 12.6 fluid ounce bottle of dish liquid (*Ajax* brand), Exhibit D
- One 40-sheet box of dryer sheets (*Suavitel* brand), Exhibit D

The report notes that in Exhibit D, the investigator attempted to exchange SNAP benefits for cash (i.e. trafficking), but the clerk refused. In Exhibit A, the clerk also refused to permit the purchase of a scrub sponge in exchange for SNAP benefits, but the same clerk committed the violations in Exhibits B, C, and D.

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

- In light of the fact that there is no evidence to support the charges, and since this is the first allegation brought against the Appellant, the decision to disqualify the firm for six months should be overturned. The decision by USDA was arbitrary and capricious as it was “unwarranted in law or without justification in fact.”
- To establish a violation of the regulations, “the Government must show by admissible evidence that food stamp coupons were accepted by plaintiff as payment for ineligible items.” It is respectfully submitted that the Government fails to meet its burden.
- The firm’s owner has no history or prior violations and the owner depends on the income derived from SNAP to sustain its business. The owner has no intentions of benefitting from any violations of SNAP.

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

Claim of Insufficient Evidence

The Appellant, through counsel, has argued that there is no evidence to support the charges. It claims that the decision by the Retailer Operations Division was arbitrary and capricious and “unwarranted in law or without justification in fact.” The

Appellant further contends that the government has failed to meet its burden of showing “by admissible evidence” that SNAP benefits were exchanged for ineligible items.

Unfortunately, these arguments submitted by the Appellant have no merit whatsoever. Both statute and regulations are very clear that a firm which commits program violations may be subject to a period of disqualification. SNAP regulations to this regard are listed on pages 3 and 4 of this document. Further, the Retailer Operations Division provided the Appellant with ample evidence to support the charges, including a full, detailed report of the investigation which took place at the store during the period in question. The evidence in this case is compelling and the associated penalty for committing program violations is wholly in line with established law and regulations. Conversely, the Appellant has not offered a single piece of evidence to dispute the account of the investigation.

Accordingly, this review finds that the preponderance of the evidence in this case weighs substantially in favor of the Retailer Operations Division. This review finds that it is more likely true than not true that program violations did occur at the Appellant store as outlined in the June 2, 2016, charge letter.

No Prior Violations

The Appellant, through counsel, contends that this is the first allegation brought against the firm. It also claims that the firm’s ownership has no history of program violations. As such, the Appellant argues that the six-month disqualification determination should be overturned.

With regard to this contention, SNAP regulations at 7 CFR § 278.6(e)(5) require that when serious violations occur, such as the exchange of common nonfood items for SNAP benefits, a six-month disqualification is the necessary penalty, even on the first occasion, regardless of a firm’s prior compliance with program rules. As noted earlier, the purpose of this review is to determine whether or not the Retailer Operations Division took appropriate action, consistent with SNAP regulations, in its imposition of a six-month disqualification against Al-Bathaa Deli Grocery Corp. As long as the administrative action taken by the agency fully conforms to SNAP regulations, this review has no authority to dismiss or reduce a period of disqualification.

In this case, the sanction imposed by the Retailer Operations Division is in entirely line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. There is not a valid basis for this review to consider reversal of the agency’s disqualification decision.

Hardship to Appellant

The Appellant, through counsel, has stated that it depends on the income derived from SNAP to sustain its business.

With regard to this contention, it must be noted that hardship to the firm itself or to its owners is not a factor when deciding whether or not the disqualification determination should be reversed or whether or not a lesser penalty, such as a civil money penalty, can be applied. It is recognized that some degree of economic hardship to the firm is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of possible financial hardship to either the firm or the firm's ownership resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship 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 rules, but also to those retailers who have been disqualified from the Program in the past for similar violations. Therefore, the Appellant's contention that it may incur economic hardship as a result of the disqualification does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Civil Money Penalty

Although not requested by the Appellant, this review evaluated the Appellant's eligibility for a civil money penalty (CMP) in lieu of a six-month disqualification. SNAP regulations at 7 CFR § 278.6(f)(1) state that a CMP in lieu of a temporary disqualification is allowable when the 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 Al-Bathaa 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 similar or larger SNAP-authorized retail stores located within a one-mile radius of Al-Bathaa Deli Grocery Corp., including more than 25 superstores or supermarkets.

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. Therefore, pursuant to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be granted in this case.

CONCLUSION

Based on a review of the evidence in this case, there is little question that program violations of 7 CFR § 278.2(a) occurred during a USDA investigation at Al-Bathaa Deli Grocery Corp. 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 is specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood items, 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, Al-Bathaa 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 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

February 21, 2018