

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

Best Gourmet Deli & Grill, Inc,

Appellant,

v.

Case Number: C0210644

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 finding that a six month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Best Gourmet Deli & Grill, Inc. (Appellant) by the Retailer Operations Division of FNS.

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 period of disqualification against Best Gourmet Deli & Grill, Inc. on October 9, 2019.

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

The Department of Agriculture conducted an investigation of the compliance of Best Gourmet Deli & Grill, Inc. with Federal SNAP law and regulations during the period March 6, 2019 through March 25, 2019. In a letter dated April 16, 2019, the Retailer Operations Division charged the Appellant with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations

occurred on four out of five compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

In responses to the Retailer Operations Division of April 17, 2019, April 18, 2019, and May 21, 2019, the Appellant, through counsel, replied to the charges therein stating that it denies all charges and stresses and confirms that all SNAP sales are legitimate and according to SNAP rules. The charges are based on analysis and speculation. The business has a high volume of sales and is located in a poverty area where residents rely on EBT for food. EBT is the only source of income for most of the customers in the area. These customers and their children utilize the store multiple times on a daily basis to purchase food. They visit the store at least two times per day.

The record indicates that in the May 21, 2019 response, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against Best Gourmet Deli & Grill, Inc. pursuant to the Freedom of Information Act (FOIA). The record reflects that FNS provided a response to counsel's FOIA request, dated June 4, 2019, and received no further communication from the Appellant or counsel with regard to the agency's response.

After considering the Appellant's replies and the evidence of this case, the Retailer Operations Division issued a Determination Letter dated October 9, 2019. The Determination Letter informed the Appellant that 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 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 October 15, 2019, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated November 25, 2019. 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, the Appellant bears the burden of proving by a 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, 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulations 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, inter alia:

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, inter alia:

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, inter alia:

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, inter alia:

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, 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 Food Stamp [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 from March 6, 2019 through March 25, 2019, USDA conducted five compliance visits at Best Gourmet Deli & Grill, Inc. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated April 16, 2019. 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 a variety of items best described in regulatory terms as "common nonfood items". The misuse of SNAP benefits noted in Exhibits B, C, D, and E warrant a disqualification as a SNAP retail food store for a period of six months. The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the replies to the Charge Letter and in the administrative review request, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies all charges and stresses and confirms that all SNAP sales are legitimate and according to SNAP rules. The charges are based on analysis and speculation. The investigation report came too late and the surveillance cameras in the store are self-erasing. As such, the Appellant has no way to verify the transactions in question. The Appellant believes it is being unfairly treated. The store owner is always in compliance with the rules but unfortunately, he cannot be present at the store 24 hours per day. The owner has adequately trained employees. These employees, however, occasionally make mistakes and the owner corrects them immediately. The investigation report shows that the majority of the transactions were in compliance. In particular, trafficking was refused. The nature of the violations is not major or trafficking.
- If any employee repeats a mistake, he/she would be released. The owner trains employees and educates them regularly. The owner has put efforts to avoid such violations by training employees.
- The business has a high volume of sales and is located in a poverty area where residents rely on EBT for food. EBT is the only source of income for most of the customers in the area. These customers and their children utilize the store multiple times on a daily basis to purchase food. They visit the store at least two times per day.

ANALYSIS AND FINDINGS

SNAP Violations

The Appellant contends that it denies all charges and stresses and confirms that all SNAP sales are legitimate and according to SNAP rules. The charges are based on analysis and speculation. The investigation report came too late and the surveillance cameras in the store are self-erasing. As such, the Appellant has no way to verify the transactions in question. The Appellant believes it is being unfairly treated.

The investigation report that was provided to the Appellant with the April 16, 2019 Charge Letter 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 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. The investigator

stands by his/her report that the ineligible items listed in the investigation report were, in fact, purchased at Best Gourmet Deli & Grill, Inc. by the investigator on the dates indicated and FNS has documentation on file that confirms the items listed were donated to and signed for by a charitable organization following each transaction. The penalty imposed by the Retailer Operations Division is based on the occurrence of violative SNAP transactions involving the sale of ineligible items with SNAP benefits during the on-site investigation of Best Gourmet Deli & Grill, Inc.

In appeals of adverse actions, the Appellant bears the burden of proving by a 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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. The Appellant did not provide any evidence in support of its claim that the violations cited in the Charge Letter did not occur.

The Appellant contends that the store owner is always in compliance with the rules but unfortunately, he cannot be present at the store 24 hours per day. The owner has adequately trained employees. These employees, however, occasionally make mistakes and the owner corrects them immediately. The investigation report shows that the majority of the transactions were in compliance. In particular, trafficking was refused. The nature of the violations is not major or trafficking.

The Appellant's contentions cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at Best Gourmet Deli & Grill, Inc. Regardless of whom the ownership of a store may utilize to handle store business (i.e., regardless of whether a store owner, store manager, store clerk, friend, family member, etc. was involved in the violative transactions), ownership is accountable for the proper handling of SNAP benefit transactions.

Prior to becoming authorized to participate in the SNAP on July 1, 2015, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store's employees---paid, unpaid, new, temporary, full-time, part-time, etc. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. In this case, the individual who committed the SNAP violations was not specifically identified during the investigation. A six month disqualification is the appropriate sanction for violations which result from employees

not being fully aware of the SNAP rules, the carelessness of employees, or due to inadequate supervision by the store owner.

As 7 CFR § 278.6(e)(5) of the SNAP regulations states, “Disqualify the firm for six months if ... the evidence shows that personnel of the firm have committed violations ... due to the carelessness or poor supervision by the firm’s ownership or management”. The Appellant’s implied contention that the SNAP violations were inadvertently made by a store employee while the owner was not present cannot be accepted as a valid basis for diminishing the penalty. 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 and the enforcement efforts of the USDA.

Corrective Action

The Appellant contends that if any employee repeats a mistake, he/she would be released. The owner trains employees and educates them regularly. The owner has put efforts to avoid such violations by training employees.

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 the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant’s contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

The Appellant contends that the business has a high volume of sales and is located in a poverty area where residents rely on EBT for food. EBT is the only source of income for most of the customers in the area. These customers and their children utilize the store multiple times on a daily basis to purchase food. They visit the store at least two times per day.

The Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty (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.” [Emphasis added]. **5 U.S.C. § 552 (b)(7)(E).**

Based on the evidence, the disqualification of Best Gourmet Deli & Grill, Inc. would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the

Retailer Operations Division's 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 therefore established that the violations as described in the letter of charges did in fact occur at Best Gourmet Deli & Grill, Inc. 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 nonfood 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 Best Gourmet Deli & Grill, Inc., the Appellant firm, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six month period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this six month period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to 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, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

January 15, 2020