

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

Brothers Grocery and Deli,

Appellant,

v.

Case Number: C0190421

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 Brothers Grocery and Deli.

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 Brothers Grocery and Deli with Federal SNAP law and regulations from May 2017 through October 2017. In a letter dated February 2, 2018, 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 four (4) out of six (6) 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 store via UPS on February 6, 2018.

The Appellant, through counsel, replied to the charges in a letter dated February 15, 2018. The Appellant acknowledged the violations took place as described in the investigation report and stated that corrective action had been taken to ensure that it would never happen again. The Appellant also requested a civil money penalty (CMP) in lieu of a six-month disqualification.

After reviewing the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated March 13, 2018. 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 dated March 20, 2018, 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 ... and 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) states, in part:

FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ... (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 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 from May 2017 through October 2017, the USDA conducted six (6) compliance visits at Brothers Grocery and Deli. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated February 2, 2018. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during four (4) of the six (6) compliance visits. The chargeable violations involved the sale of ten (10) ineligible items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a). These ineligible items included laundry detergent, fabric/dryer sheets, fabric conditioner, large trash bags, and oven bags as documented by Exhibits B, D, E and F. These violations were conducted by two (2) different clerks. A third clerk refused to exchange SNAP benefits for a bottle of laundry detergent in Exhibit C.

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its response to the charge letter and its request for administrative review, in relevant part:

- At least 80 percent of the store's customers are SNAP recipients.
- The owner acknowledges that the violations occurred as described in the investigation report and states that corrective actions have been taken to ensure that it will never happen again.
- The Appellant requests a hardship CMP or warning letter.

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

Authorization History

The USDA authorized Brothers Grocery and Deli for the SNAP on May 13, 2008. A store owner signed the initial SNAP application for Brothers Grocery and Deli on April 1, 2008 and the store's last reauthorization application on July 2, 2013. Both the initial application and the reauthorization application included a signed certification that the owner(s) 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.

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. The investigation report documents by a preponderance of the evidence that personnel at the store exchanged ineligible items for SNAP benefits. The Appellant does not dispute the findings of the investigation.

Violations Warrant a Six-Month Disqualification

The SNAP regulation at 7 CFR § 278.6(e)(5) states, in part that "FNS shall take action as follows against any firm determined to have violated the Act or regulations ... **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.] 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 Appellant, through counsel, states that a warning letter would be appropriate under the circumstances of this case. It is true that, in some cases, FNS may send a warning letter in lieu of a disqualification. SNAP regulations at 7 CFR §278.6(e)(7) state that FNS should "send the firm a warning letter if violations are too limited to warrant a disqualification." However, the investigation report documents that the chargeable violations in this case consisted of ten (10) non-food items exchanged for SNAP benefits over four (4) transactions. These violations were also conducted by two (2) different clerks. Although another clerk refused to exchange an ineligible item for SNAP benefits in Exhibit C, this does not ameliorate or mitigate the penalty for exchanging other non-food items for SNAP benefits. Therefore, the Retailer Operations Division correctly determined that the violations were not limited and that they warranted a six- month disqualification.

Corrective Action

The Appellant claims to have taken unspecified corrective actions to insure that these violations do not occur in the future. With regard to this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division's action. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that a store may 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 assessment on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations. Therefore, the Appellant's contention that corrective action has taken place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

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 Brothers Grocery and Deli, a large grocery store, would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores located within a one-mile radius of the Appellant store. Agency mapping systems show a total of 30 SNAP authorized stores within a one-mile radius and these include four (4) other large grocery stores, two (2) supermarkets and four (4) superstores.

Based on this evidence, a six-month disqualification of Brothers Grocery and Deli 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 Brothers Grocery and Deli 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 Brothers Grocery and Deli, 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

May 21, 2018