

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

C.C. Deli Grocery Inc,

Appellant,

v.

Case Number: C0190343

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 C.C. Deli Grocery Inc. (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 C.C. Deli Grocery Inc.

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, C.C. Deli Grocery Inc., was initially authorized for SNAP participation as a small grocery store on December 14, 2010. Between October 5, 2016, and October 31, 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 C.C. Deli Grocery Inc. accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold foam coffee cups, toilet paper, dishwashing liquid, and liquid cleanser in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated January 10, 2017, 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 response to the charges, the Appellant submitted a letter dated January 17, 2017. In its reply, the Appellant did not dispute the allegations, but requested a CMP in lieu of disqualification. In support of this request, the Appellant provided several pages of documentation to show that the firm had established and implemented an effective compliance policy and program to prevent violations of SNAP, as specified in 7 CFR § 278.6(i). The Appellant further argued that this was the firm's first violation and that the violations were committed when the owner was not present.

After reviewing the Appellant's response and further considering the evidence in the case, the Retailer Operations Division issued a determination letter dated September 28, 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 CMP was given, but that the Appellant was not eligible for a CMP because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked October 6, 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 October 5, 2016, and October 31, 2016, the USDA completed five compliance visits at C.C. Deli Grocery Inc. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the January 10, 2017, charge letter. The investigation report includes Exhibits A through E, and provides full details on the results of each compliance visit. SNAP violations were documented during four of the five visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report notes that the following nonfood items were purchased by an investigator and a confidential informant using SNAP benefits:

- One 25-count sleeve of foam coffee cups (*Dart* brand), Exhibit A
- One 1,000-sheet roll of toilet paper (*Scott* brand), Exhibit C
- One 12.6 fluid ounce bottle of dishwashing liquid (*Dawn* brand), Exhibit D
- One 15 fluid ounce bottle of deodorizing cleanser (*Breath O Pine* brand), Exhibit D
- One 12.6 fluid ounce bottle of dishwashing liquid (*Dawn* brand), Exhibit E

The report notes that in Exhibit B, the investigator attempted to purchase ineligible dishwashing liquid with SNAP benefits, but the male clerk on duty refused, explaining to the investigator that nonfood items cannot be purchased with SNAP benefits. In Exhibit E, the confidential informant attempted to exchange SNAP benefits for cash (i.e. trafficking), but this attempt was refused.

According to the report, one female clerk conducted all four violative transactions.

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

- Appellant would like to appeal the decision that the firm is ineligible for a hardship civil money penalty.
- Appellant acknowledges that there is a SNAP-authorized store nearby, but the average sale of that store is not comparable to the sales occurring daily at C.C. Deli Grocery, Inc.
- Other, larger authorized stores are rather distant from the Appellant firm.
- Considering the large number of households in the immediate area, and the large volume of sales at the Appellant store, a disqualification for six months would cause considerable hardship.
- Appellant requests that the evidence it previously submitted be reconsidered.

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

The Appellant has not provided any evidence or documentation to counter FNS's investigation report. Rather, the Appellant appears to acknowledge that the violations occurred, stating that a female cashier committed the violations when the store owner was not present. Because the violations themselves do not appear to be in dispute, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division. The balance of this review will address the Appellant's remaining contentions.

No Prior Violations

In its original response to the charge letter, the Appellant argued that FNS should consider the fact that this was the firm's first violation. This contention implies that because the firm does not have a history of program violations, the six-month disqualification determination should be overturned or reduced.

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. The purpose of this administrative 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 sanction against C.C. Deli Grocery Inc. 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 entirely in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. As such, there is no valid basis for this review to consider reversing or reducing the agency's disqualification decision.

Civil Money Penalty

In its original reply to the charges, the Appellant contended that a civil money penalty should be considered because the firm had established and implemented an effective compliance policy and training program to prevent violations of SNAP, as specified in 7 CFR § 278.6(i). The Appellant submitted several pages of documentation to support this argument.

In its request for administrative review, the Appellant stated that it would like to appeal the decision that the firm is ineligible for a hardship civil money penalty. While acknowledging the presence of another SNAP-authorized firm nearby, the Appellant argues that the "average sale of said retail store is incomparable to the amount of sale occurring daily at my deli." The Appellant further claims that larger authorized stores are "rather distant" from C.C. Deli Grocery Inc. Finally, the Appellant contends that due to the large volume of sales at the store and the large number of households in the immediate area, a disqualification of six months would cause considerable hardship.

With regard to the Appellant's claim that it had established and implemented an effective compliance policy and program as specified in 7 CFR § 278.6(i), it should be noted that this section of the regulations applies only to cases in which a firm has been assessed a permanent disqualification for trafficking. This alternative penalty is known as a trafficking civil money penalty (TCMP). However, the present case is not a trafficking case. Instead, this is a temporary disqualification for six months due to the exchange of SNAP benefits for ineligible, nonfood merchandise. In such a case, regulations do not allow a TCMP to be considered.

With respect to the Appellant's request for a hardship civil money penalty, it is the determination of this review that a hardship CMP is not appropriate. SNAP regulations at 7 CFR § 278.6(f)(1) state that a CMP in lieu of a temporary disqualification is allowable only 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 C.C. Deli Grocery Inc., 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 at least 19 comparable or larger SNAP-authorized stores located within a one-mile radius of C.C. Deli Grocery Inc., including a superstore and three supermarkets. There is also no evidence that the prices at the Appellant firm are substantially lower than at any of the other authorized stores in the area, nor is there any evidence that the foods offered at C.C. Deli Grocery Inc. are so unique that they could not be easily obtained elsewhere.

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. For these reasons and 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 no question that program violations of 7 CFR § 278.2(a) occurred during a USDA investigation. 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 merchandise, and in all other critically pertinent details. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, C.C. Deli Grocery Inc., 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

April 18, 2018