

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

D Heights Deli & Grocery Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0203573

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the six-month disqualification of D Heights Deli & Grocery Corp. (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(1) and 7 CFR § 278.6(a) and (e)(5) in its administration of the SNAP, when it imposed a six-month period of disqualification against Appellant.

AUTHORITY

7 USC § 2023 and the 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 USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of April 10, 2018, through April 19, 2018. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. As a result of evidence compiled during this investigation, by letter dated May 16, 2018, the Retailer Operations Division charged ownership with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a) and noted the violations warranted a six-month disqualification period. The letter also stated that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

On June 9, 2018, Appellant requested document under the Freedom of Information Act (FOIA). The FOIA Office issued its response to the FOIA on June 14, 2018. Counsel appealed the FOIA response on September 17, 2018. On November 17, 2020, the FOIA office issued its final response. On November 10, 2020, the Retailer Operations Division provided Appellant with ten days to provide any information in response to the charges. Appellant did not submit anything additional in response.

After reviewing the evidence, the Retailer Operations Division notified Appellant in a letter dated January 6, 2021, that the violations cited in the charge letter occurred at the firm and that a six-month period of disqualification was warranted. The letter stated that eligibility for a hardship CMP was not applicable as there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

By letter dated January 14, 2021, Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal was granted and implementation of the withdrawal has been 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, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 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 § 278.6(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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system . . .

7 CFR 278.6(e)(5) states, in part, that a firm is to be disqualified for six months:

[I]f 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 § 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.

In addition, 7 CFR § 278.6(f)(1) provides for civil money penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households benefit because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It reads, 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 SNAP households benefit because there is no other authorized retail food store in the area selling as large a variety of staple food items.

SUMMARY OF CHARGES

D Heights Deli & Grocery Corp. is a convenience store originally authorized by FNS on January 6, 2015. During an investigation conducted between April 10, 2018, and April 19, 2018, an investigator conducted four compliance visits at Appellant. A report of the investigation dated July 10, 2020, was provided to Appellant as an attachment to the charge letter. The investigation report included Exhibits A through D, which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during each of compliance visits and involved the sale of common ineligible items including plastic cups. Upon review, the evidence indicates that Appellant established a record of selling non-food items, as defined by Section 271.2 of the regulations, on multiple occasions as noted in Exhibits A, B, C, and D, furnished with the charge letter.

APPELLANT’S CONTENTIONS

Appellant made the following summarized contentions in its administrative review request dated January 14, 2021, and additional information dated February 16, 2021, in relevant part:

- The owner has always been in compliance with the rules but unfortunately cannot be present 24 hours per day.
- The employees are adequately trained.
- The employees occasionally make mistakes.
- If any worker makes repeated mistakes, the owner removes them from working behind the counter.
- The trafficking transaction was refused.
- The report came late and the client’s cameras are self-erasing.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

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 by an 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 documentation presented by the Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm.

The Retailer Operations Division determined that the violations committed by Appellant represent the first sanction for the firm and evidence carelessness or poor supervision. 7 CFR §278.6(e)(5) states that FNS shall disqualify a firm for six 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 and poor supervision by the firm's ownership or management. The imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

Civil Money Penalty

7 CFR § 278.6(f)(1) 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 available evidence shows that within a one-mile radius of Appellant, there are 55 other authorized convenience stores located within a one-mile radius of Appellant. Thus, in its letter dated January 6, 2021, the Retailer Operations Division determined that a hardship CMP would not be appropriate, as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices. Some degree of inconvenience to SNAP customers is inherent whenever any SNAP authorized retailer is disqualified. For example, the normal shopping pattern of SNAP customers may be temporarily altered during the period of disqualification. Thus, the determination of the Retailer Operations Division that the six-month disqualification of Appellant from the SNAP would not create a hardship to customers, as differentiated from potential inconvenience, is sustained and a civil money penalty in lieu of disqualification is not appropriate in this case.

CONCLUSION

The determination by the Retailer Operations Division to impose a six-month disqualification against Appellant from participating as an authorized retailer in SNAP is sustained. In accordance with the Food and Nutrition Act and the regulations, this penalty shall become effective 30 days after receipt of this letter. A new application for SNAP authorization may be submitted ten 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 7 USC § 2023 and 7CFR § 279.7. 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's owner resides or is 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 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

March 16, 2021