

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

**Dency Grocery LLC,**

**Appellant,**

**v.**

**Case Number: C0194466**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the USDA that there is sufficient evidence to support a finding that the six-month disqualification of Dency Grocery LLC (Dency Grocery or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program, 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 January 24, 2017, through February 21, 2017. 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 November 6, 2017, 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.

Appellant, through counsel, replied to the charges on August 16, 2017. Counsel requested documents under the Freedom of Information Act (FOIA). FNS responded to the FOIA request by letter dated August 24, 2017. Counsel provided its final reply to the charges on December 15, 2017, and explained that the transactions were not intentional and it requested a CMP. After giving consideration to the retailer's reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated January 4, 2018, 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.

In a letter postmarked January 12, 2018, Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The appeal was granted, and implementation of the sanction 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 clear 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 § 271.2 states in part that, "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 § 278.2(a) specifies in relevant part, "Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food." Further, the citation specifies that "Coupons may not be accepted in exchange for cash . . . or for any other nonfood use."

7 CFR § 278.6(a) states, inter alia, that "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 . . ." (emphasis added)

Section 278.6(e)(5) of the SNAP regulations states, in part, that a firm is to be disqualified 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 or poor supervision by the firm’s ownership or management.”

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**

Dency Grocery is a small grocery, originally authorized by FNS on December 12, 2011. During an investigation conducted between January 24, 2017, and February 21, 2017, a USDA investigator conducted five compliance visits at Appellant. A report of the investigation dated October 3, 2017, was provided to Appellant as an attachment to the charge letter. 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 common ineligible items including toilet paper, disinfectant spray, Styrofoam plates, laundry detergent, and a candle. 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 B, C, D, and E furnished with the charge letter.

### **APPELLANT’S CONTENTIONS**

Appellant, through counsel, made the following summarized contentions in its request for review postmarked January 12, 2018, in relevant part:

- The errors were inadvertent oversights, not knowingly, deliberate and intentional.
- The errors were not substantial or frequent.
- Disqualification will cause hardship for SNAP recipients.
- Appellant has been compliant with the SNAP regulations from the time it was authorized to accept benefits and has monitored any suspicious activity designed to misuse the program.
- The Department erred in denying the CMP.
- The clerk involved has been retrained and sanctioned.
- The owner has instituted additional training to all of her employees.
- The owner increased the number of hours it is present at the store.
- The owner believes that the clerk incorrectly believed that necessitates were eligible for SNAP purchases.
- The clerk on duty refused the investigator’s attempt at trafficking cash.

In support of its contentions, Appellant provided two photographs of Santa Mart Manchego Cheese and Rottis Queson de Hoja that counsel alleges are not available in the geographical area near Appellant.

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 charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted by 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 documentation presented by the Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm.

### **Intent**

Appellant, through counsel, contends that the violations were inadvertent oversights, not knowingly, deliberate and intentional. The violation of exchanging ineligible items for SNAP benefits as described in the SNAP regulations at 7 CFR § 278.2(a) and 7 CFR § 278.6(e)(5) does not require an element of intent on the part of the violator. Therefore, whether or not the employee intended to violate SNAP regulations by exchanging non-food items for SNAP is irrelevant.

7 CFR § 278.6(e)(5) states, as noted above, 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.

### **Corrective Action**

Counsel reports that the owner has implemented additional training and is at the firm more often. 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 within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's contention

that it took corrective action to prevent future violations does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **No Previous Violations**

Counsel reports that Appellant has been compliant with the SNAP regulations from the time it was authorized to accept benefits and has monitored any suspicious activity designed to misuse the program. A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

### **Refused Cash**

Appellant, through counsel, states that the violations were not substantial and that the clerk on duty refused the investigator's attempt at trafficking cash. The Retailer Operations Division did note that the Appellant only exchanged minor non-food items for SNAP benefits and refused to exchange cash during the investigation. For this reason, the Retailer Operations Division did not charge Appellant for a more serious violation and only assessed a six-month disqualification. If Appellant had exchanged cash for SNAP benefits during the investigation, the store would have been permanently disqualified.

## **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 Retailer Operations Division determined that there are 30 other traditional retailers authorized within a one-mile radius of Appellant, including two super stores and four supermarkets which have comparable or better staple food stock than Appellant. Thus, in its letter dated January 4, 2018, 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.

Counsel reports that Appellant is the only store in the area that sells Santa Mart Manchego Cheese and Rottis Queso de Hoja. Appellant provided two photographs of the two types of cheese. There was no additional evidence provided to support that Appellant carried this cheese products prior to its disqualification such as invoices. These two cheese selections were not visible in the photographs from the last store visit. Regardless, the regulations do **not** require that stores in the area sell the **same** staple food items. Instead, the regulations require that there be a store that sells **as large a variety** of staple food items. There are supermarkets and super stores in the area that offer several varieties of cheese, a larger variety than what is available at Appellant. That Appellant may offer two varieties of cheese that may not be offered at other stores does not equate to a household hardship as defined by the regulations.

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. Nevertheless, the determination of the Retailer Operations Division that the six-month disqualification of Dency Grocery 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**

A review of the evidence in this case confirms that the Retailer Operations Division's initial determination to impose a six-month disqualification in lieu of a CMP was proper. The record documents that the Retailer Operations Division properly considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations. Appellant is located in an area where there are other authorized SNAP retailers, selling as large a variety of staple food items at comparable prices. Given the evidence under review, the CMP was appropriately denied. Therefore, the six-month disqualification of Appellant from participating as an authorized retailer in the SNAP is sustained.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 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

April 25, 2018