

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

Hellen Deli Grocery Corp,

Appellant,

v.

Case Number: C0207812

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, when it imposed a six-month disqualification against Hellen Deli Grocery Corp.

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 Hellen Deli Grocery Corp. with Federal SNAP law and regulations in July 2018. In a letter dated August 15, 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 four (4) 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 August 16, 2018.

The Appellant owner responded to the charges in a faxed document on August 27, 2018. The owner apologized for the violations and stated that she did not participate in the violations. Among other contentions, the Appellant store owner stated that the firm had a quarterly training program and stated that the employee identified in the report is well trained and denied conducting the violations. The Appellant requested a civil money penalty (CMP) in lieu of a six-month disqualification.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated September 5, 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 (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. The determination letter was delivered on September 6, 2018.

In a letter postmarked September 17, 2018, the Appellant 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 in July 2018, the USDA conducted four (4) compliance visits at Hellen Deli Grocery Corp. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated August 15, 2018. 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 all four (4) compliance visits. The chargeable violations involved the sale of seven (7) ineligible non-food items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a). These ineligible items consisted of two (2) packages of “Xtra” heavy duty scour pads; a 6-count package of “Quality

Home” cleaning sponges; a 2.6 fluid ounce bottle of “Ajax” dish soap; an 80-count box of “Hefty” sandwich bags; a 4-count box of “Brillo” steel wool soap pads; and a 250 gram bag of “Foca” laundry detergent. These violations were conducted by the same clerk. This clerk also refused to exchange cash for SNAP benefits as documented in Exhibit D.

APPELLANT’S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The store owner apologizes for the alleged violations.
- The store has a SNAP training program in place and employees are well-trained on items that should not be exchanged for SNAP benefits including hot foods, alcoholic beverages, detergent, etc.
- A majority of the store income is derived from EBT revenue. A six-month disqualification would cause a severe financial hardship for the firm.
- If the SNAP program finds that the violations did occur as outlined in the investigative report, the Appellant requests a CMP in lieu of a six-month disqualification.

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

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.”

The chargeable violations in this case consisted of seven (7) non-food items exchanged for SNAP benefits over four (4) transactions. FNS considers the sale of multiple 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. Although the clerk in Exhibit D refused to exchange SNAP benefits for cash, this does not ameliorate or mitigate the penalty for exchanging SNAP benefits for non-food items as documented by Exhibits A, B, C and D. Therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification.

Investigation Report

The Appellant states that the store employee involved in these transactions denies that he exchanged ineligible items for SNAP benefits. However, 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.

Owner Responsibility

The store owner signed the SNAP authorization application for Hellen Deli Grocery Corp. on June 12, 2015. That application included a signed certification that the owner 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 as repayment on credit accounts or in exchange for ineligible non-food items.

Regardless of whom the owner of a store may utilize to handle store business, the owner is accountable for the monitoring and handling of SNAP benefit transactions. To allow store owners to disclaim accountability for the acts of persons whom the owners choose to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Training Program

The Appellant states that the owner has an ongoing training program that it provides to its employees to discuss different scenarios for SNAP transactions. While that may be commendable, it does not mitigate or ameliorate the penalty for exchanging SNAP benefits for ineligible non-food items. Therefore, this contention is not relevant to the circumstances of this case.

Hardship to Firm

The Appellant contends that a six-month disqualification will create a hardship for the store as it relies on the SNAP as a small business. With regard to this contention, it is recognized that some

degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the ownership personally or the firm resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

HARDSHIP 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 Hellen Deli Grocery Corp., a small grocery store, would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores in the area. The Retailer Operations Division determined there are 211 comparable or larger SNAP authorized stores located within a one-mile radius of Hellen Deli Grocery Corp. These SNAP authorized stores include twelve (12) large grocery stores, 19 supermarkets, and ten (10) superstores. Based on this evidence, a six-month disqualification of Hellen Deli Grocery Corp. 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 Hellen Deli Grocery Corp. 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 Hellen Deli Grocery Corp., 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

November 7, 2018