

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

PJ Deli,

Appellant,

v.

Case Number: C0199380

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 PJ Deli (PJ Deli 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 July 25, 2017, through August 23, 2017. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. As a result of evidence compiled during this investigation, by letter dated November 14, 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 did not reply to the charge letter. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated November 30, 2017, 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 December 7, 2017, 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

PJ Deli is a convenience store, originally authorized by FNS on December 20, 2014. During an investigation conducted between July 25, 2017, and August 23, 2017, a USDA investigator conducted five compliance visits at Appellant. A report of the investigation dated October 26, 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 three of the five compliance visits and involved the sale of common ineligible items including foam plates, fabric softener, laundry detergent, and plastic spoons. 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 C, D, and E furnished with the charge letter.

APPELLANT’S CONTENTIONS

Appellant made the following summarized contentions in its request for review postmarked November 16, 2017, and subsequent correspondence dated January 25, 2018, in relevant part:

- The owner denies all the violations.
- The owner is not at the business all the time and hires five to six workers for the store.
- The owner knows very little of the workers’ doings and behavior.
- There were only three violations out of the five visits and they were not the owner’s mistakes.
- This is the store closest to the Marian Garden housing project.
- The workers may not have fully understood the nature of the program since some of them are part-time employees without being fully informed.
- The charge letter was not brought to the attention of the owner and therefore the owner did not reply to the charges.
- Upon receiving the disqualification letter, the owner terminated all employees.

- Suspension from the program will cause an economic hardship and will lead to the termination of all the newly hired employees.
- A disqualification will also create a hardship for residents of the nearby housing project.
- Appellant has no history of violations.

In support of its contentions, Appellant provided a letter from a customer supporting the owner of the business and indicating it will be a hardship if the store is disqualified.

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.

Ownership Involvement

Counsel contends that ownership did not conduct the transactions and the owner knows very little of the workers' doings and behavior. Although ownership was allegedly not involved in the violations, it cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Regardless of whom the ownership of a store may utilize to handle store business, the ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses 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.

Ownership signed the FNS application to become a SNAP authorized retailer on October 6, 2014, which included a certification and confirmation 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 for cash and as payment for ineligible items, a violation of the SNAP rules and regulations. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations. FNS sends all firms the SNAP Retailer Training Guide and instructional video in their approval package and requires ownership to share it with

all employees to ensure compliance with rules and regulations. Firms are required to read the SNAP Retailer Training Guide and watch the instructional video. These training materials are available in other languages.

Corrective Action

Counsel alleges that ownership terminated all of its employees. 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

Appellant contends that it has not had any previous SNAP violations. 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.

Economic Hardship

Appellant states that the disqualification will be a hardship and cause it to terminate its newly hired employees. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in 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 the firm resulting from imposition of such penalty. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

Did Not Received the Charge Letter

Counsel alleges that ownership was not aware of the charges because the letter was not brought to its attention. The regulations stipulate that FNS shall issue a notice to the firm by using any delivery method as long as the method provides evidence of delivery to inform the firm of the determination and review procedure. As such, the record shows that UPS delivered the charge letter to the correct address on record, on November 16, 2017, at 3:40 PM. A signature was required upon delivery. The signature documented by UPS was “5 U.S.C. § 552 (b)(6) & (b)(7)(C)”.

The case record shows that after considering the evidence of the case, the Retailer Operations Division determined that a permanent disqualification was warranted. The action followed the agency’s due process procedures which are two-fold in nature. First, the retailer is afforded an opportunity to reply to the charges as specified by the Retailer Operations Division. The second level of due process involves an administrative review.

The purpose of the administrative review process is to ensure that firms aggrieved by FNS’s adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to that adverse action becoming final. Appellant has been duly given, and has taken, the opportunity to present to USDA through the administrative review process whatever evidence and information it deems as pertinent in support of its position that the Retailer Operations Division’s adverse action should be reversed. That the owner did not reply to the charges does not provide any valid basis for dismissing the charges.

The violations were determined by the Retailer Operations Division to 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. Therefore, 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 Retailer Operations Division determined that there are seven authorized stores with a one-half mile radius of Appellant. Thus, in its letter dated November 30, 2017, 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 alleges that Appellant is the closest store to the Marion Garden housing authority. According to the FNS Retailer Locator, Appellant is located .09 miles from the housing project.

However, there are two other authorized stores located .13 miles and .27 miles from the apartments. According to the available evidence, one of these firms is a medium grocery with fresh meat.

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 PJ Deli 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

March 28, 2018