

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

J S Atlantic Deli Grocery, Inc,

Appellant,

v.

Case Number: C0206492

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 J S Atlantic Deli Grocery Inc. (J S Atlantic Deli 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 April 24, 2018, through June 13, 2018. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on five separate occasions. As a result of evidence compiled during this investigation, by letter dated July 23, 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.

Appellant did not reply to the charges. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated August 7, 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.

On August 14, 2018, Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. Counsel requested documents under the Freedom of Information Act (FOIA) with its administrative review request. The administrative review was held in abeyance pending completion of an official response to Appellant's FOIA request. FNS responded to the FOIA on August 23, 2018.

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 § 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 . . . (emphasis added)

Section 278.6(e)(5) of the SNAP regulations 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.

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. . . . Coupons may not be accepted in exchange for cash . . . or for any other nonfood use.

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

J S Atlantic Deli Grocery is a small grocery originally authorized by FNS on January 6, 2015. During an investigation conducted between April 24, 2018, and June 13, 2018, a USDA investigator conducted six compliance visits at Appellant. A report of the investigation dated June 26, 2018, was provided to Appellant as an attachment to the charge letter. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during five of the six compliance visits and involved the sale of common ineligible items including Vaseline, mouthwash, bathroom tissue, soap, and deodorant. 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, D, E, and F furnished with the charge letter.

APPELLANT’S CONTENTIONS

Appellant made the following summarized contentions in its August 14, 2018, administrative review request, in relevant part:

- The owner vehemently denies that he had any knowledge that he or anyone involved with or employed by the business engaged in such activities.
- Sixty-five percent of the owner’s sales come from SNAP transactions.
- A disqualification will adversely affect the business and would cause irreparable injury and damage to the owner forcing him out of business.
- The store’s current employees will lose their jobs and member of the community will suffer hardships.

- The owner continuously trained and tested its employees since it was authorized in 2014.
- The owner has established and implemented an effective compliance policy and program to prevent violations of the SNAP which was in effect at the time of the violations.
- The owner has maintained an exemplary record and this allegation is the first occasion that ownership was aware of any violations by the firm.
- An unblemished record is further evidence of its continued compliance with the law and the owner's training and supervision of its employees.
- It would be irrational and illogical to accept and conclude that the owner of a solvent and successful business would jeopardize the business and its livelihood by risking a six-month disqualification in light of the meager amount of the alleged items sold.
- There are inadequacies in the report.
- The investigator failed to make a genuine effort to determine the true identity and full name of the clerks.
- The amount of the alleged ineligible sales is insignificant and that it raises a question about the credibility of the investigative reports.
- The investigator tried to entrap the employee where it alleged that the cashier refused to proceed cash.
- The time of the entry and departure are redacted and the time is important.
- Any surveillance camera in the store are self-erasing and the images taken during the investigative period are no longer available for viewing.
- The owner is entitled to know if there was one or more than one investigator.
- There were no cash register receipts provided and the owner states that cash register receipts are provided.
- Appellant requests a CMP.

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.

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.

Lack of Knowledge of SNAP Violations

Appellant states that the owner had no knowledge of any SNAP violations committed by anyone at the store. Although ownership allegedly had no involvement in, or knowledge of, 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 owner is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store owners 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.

Lastly, the store owner signed the FNS application to become a SNAP authorized retailer on December 19, 2014. That application included a certification and confirmation that the owner(s) 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 list of violations on the certification included the exchange of ineligible non-food items for SNAP benefits.

Investigative Report

Appellant contends that without the entry and departure times of each visit, Appellant cannot determine if there was sufficient time spent in the store to select multiple items. Counsel also explains that its surveillance cameras in the store are self-erasing and any images that were taken at the time of the investigation have since been erased. However, this information is not necessary to determine whether or not the transactions as reported actually took place. The purchase costs of the transactions involved in the investigation are documented on SNAP terminal receipts obtained during each compliance visit. Additionally, every transaction that occurs at Appellant’s firm appears on agency records and confirms the store’s SNAP authorization number, the date and time of the transaction, the amount of the transaction, and transaction method. A full list of transactions during the investigative period, including the violative transactions, was provide to Appellant in the agency’s official FOIA response. Appellant has offered no compelling information or supporting documentation which would constitute evidence that any relevant detail on the report is incorrect in any substantial respect.

Appellant, through counsel, contends that every customer who shops at the Appellant firm receives a cash register receipt along with an EBT receipt and that all individual products are clearly marked with a price. This contention is in response to the investigator’s report of “No Price Indicated” for some of the items purchased during the investigation and that no cash register receipts were provided.

As part of the agency’s FOIA response, copies of all receipts obtained during the investigation were provided to Appellant. The only copies provided were receipts from the EBT point-of-sale equipment, which shows the total purchase amount, but does not list the specific items purchased. According to the investigator, EBT receipts were given after each transaction, but

not cash register receipts. As a result, and because the price was not always listed on individual items as claimed, the investigator was not able to identify the price for every product purchased.

Appellant contends that it is important to note how many investigators there were. The first page of the Investigative report that was provided to Appellant with the charge letter clearly states that there was “1” investigator.

As mentioned earlier, the report of the investigation appears to be wholly credible and fully documented. Based on the information in the preceding paragraphs, the transactions identified on the investigative report unquestionably occurred at the Appellant’s store. Thus, the contentions that the investigative report did not include certain details do not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

No Previous Violations

Counsel contends that Appellant has not been notified of any previous 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.

Economic Hardship

Counsel reports that sixty-five percent of the owner’s sales come from SNAP transactions. Counsel further contends that a disqualification will adversely affect the business and would cause irreparable injury and damage to the owner forcing him out of business. 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.

Entrapment

Appellant argues that the investigator tried to entrap the employee where it alleged that the cashier refused to proceed cash. The presence of entrapment depends upon whether or not the

government's actions leading up to the violations amounted to inducing violative activity in persons who otherwise had no inclination to violate. There is no evidence, either in the report or provided by Appellant, that such coercion took place. From all indications, the clerks involved in the violations were willing participants, as they never refused to sell ineligible items and did not exhibit a reluctance to allow such transactions to take place. In this case, the investigator merely provided an opportunity for a suspected violator to engage in violations, and the store clerks readily participated. Such conduct on the part of the investigator does not constitute entrapment and does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Civil Money Penalty

Appellant, through counsel, states that the owner continuously trained and tested its employees since it was initially authorized in 2014. Counsel contends that the owner has established and implemented an effective compliance policy and program to prevent violations of the SNAP which was in effect at the time of the violations. Retailers that are charged with trafficking can request a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i). In such cases, retailers must submit evidence to demonstrate that the firm had established and implemented an effective compliance policy to prevent SNAP violations prior to the violations. However, since Appellant was not charged with trafficking, it is therefore not eligible for a trafficking CMP.

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 129 authorized stores located within a one-mile radius of Appellant. Thus, in its letter dated August 7, 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. 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 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

Based on the discussion above, the determination by the Retailer Operations Division to impose a disqualification of six months against J S Atlantic Deli Grocery from participating as an authorized retailer in SNAP is sustained.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. A new application for participation

in SNAP may be submitted ten (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 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

December 13, 2018