

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

Kazi Deli/ Vapor Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0204483

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 Kazi Deli/ Vapor Inc. (Kazi 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 March 14, 2018, through September 11, 2018. 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 September 25, 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, through counsel, replied to the charges by letter on October 12, 2018. Appellant denied the charges and requested documents under the Freedom of Information Act. FNS responded to the FOIA request on October 25, 2018. By letter dated April 25, 2019, the Retailer Operations Division provided Appellant with ten days to provide any additional information to refute the charges. By letter dated May 1, 2019, counsel referred the Retailer Operations Division to its October 12, 2018 response.

After giving consideration to the retailer's original reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated May 28, 2019, 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 June 4, 2019, Appellant, through counsel, 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 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 . . .

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.

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

Kazi Deli is a convenience store originally authorized by FNS on April 8, 2016. During an investigation conducted between March 14, 2018, and September 11, 2018, a USDA investigator conducted four compliance visits at Appellant. A report of the investigation dated September 20, 2018, 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 three of the four compliance visits and involved the sale of common ineligible items including deodorant, dish detergent, aluminum foil, toothpaste, toothbrush, and bleach. 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, and D furnished with the charge letter.

APPELLANT'S CONTENTIONS

Appellant made the following summarized contentions in its May 28, 2019, administrative review request, and subsequent correspondence dated July 8, 2019, in relevant part:

- Appellant continues to deny all charges.

- Appellant believes that the investigation had substantial and material errors that do not warrant a finding of violations.

In support of its contentions, Appellant provided a copy of its October 12, 2018, reply to the charges.

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

Appellant denies that transactions occurred. Appellant believes that the investigation had substantial and material errors that do not warrant a finding of violations. However, Appellant did not submit any evidence to support its allegations. 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. Additionally, investigative results are supported by documentation that confirms specific details of each transaction. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made and the official's initials next to the items donated. 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.

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 55 other authorized stores located within a one-mile radius from Appellant, including three supermarkets and one super store. Thus, in its letter dated May 28, 2019, 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

The determination by the Retailer Operations Division to impose a disqualification of six months against Kazi Deli 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 30 days after receipt of this letter. A new application for participation in SNAP 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

August 13, 2019