

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

Lambert Deli Grocery Corp,

Appellant,

v.

Case Number: C0202221

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 a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Lambert Deli Grocery Corp. (hereinafter “Appellant”) by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a six-month disqualification against Lambert Deli Grocery Corp.

AUTHORITY

7 U.S.C. § 2023 and its 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

FNS records show that the Appellant firm, Lambert Deli Grocery Corp., was initially authorized for SNAP participation as a small grocery store on December 6, 2016. Between July 19, 2018, and July 26, 2018, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigative report documented that personnel at Lambert Deli Grocery Corp. accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold scour pads, plastic sandwich bags, plastic snack bags, plastic cups, dish soap, fabric softener, laundry detergent, and a scrub sponge in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated August 14, 2018, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The charge letter states that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further states that under certain conditions and in accordance with 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In a letter dated August 27, 2018, the Appellant replied to the charges and stated a transfer of the firm's ownership had taken place. According to the Appellant, the firm's owner transferred 100 percent of his stock to the new owner on August 1, 2018. As to the allegations listed in the charge letter, the Appellant stated that it had an established SNAP training program in which employees were instructed on what could and could not be sold to persons using SNAP benefits. The Appellant stated that due to this training, it trusted that its employees would abide by the rules and not put their employment at risk by committing violations. The Appellant further stated that it had questioned everyone who may have been involved in the situation, and all deny ever allowing the purchase of ineligible items with SNAP benefits.

The Appellant also stated that it emphasized with its employees the prohibition against trafficking. To demonstrate the employees' proficiency with this rule, the Appellant pointed out the incident in Exhibit D of the investigator's report in which the clerk on duty refused to give the investigator cash in exchange for SNAP benefits.

Finally, the Appellant apologized for its employees' alleged misconduct and stated that the firm's owner did not participate in or approve of any of the alleged violations.

In support of its response, the Appellant provided three pages of documentation of employee SNAP training courses that supposedly took place at the firm in 2017 and 2018. Additionally, the Appellant provided a copy of a stock transfer agreement and other related documents which indicate that a transfer of the firm's ownership took place on August 1, 2018.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated September 6, 2018. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the letter of charges and that a six-month disqualification penalty would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that consideration for a hardship CMP was given, but that the Appellant was not eligible for a CMP because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked September 17, 2018, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the sanction has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 AND REGULATIONS

The controlling law in this matter is found in the Food and 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)(5) establish the authority upon which a six-month disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for 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.... **Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction;** for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section. [Emphasis added.]

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

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...The FNS regional office shall:

(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 nonfood items due to carelessness or poor supervision by the firm's ownership or management.

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 subject to a disqualification is selling a substantial variety of staple food items, and 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.

INVESTIGATION DETAILS

During an undercover investigation conducted between July 19, 2018, and July 26, 2018, the Food and Nutrition Service completed four compliance visits at Lambert Deli Grocery Corp. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the August 14, 2018, charge letter. The investigation report includes Exhibits A through D, and provides full details on the results of each compliance visit. SNAP violations were documented during each of the four visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the following nonfood items were purchased by an investigator using SNAP benefits:

- One 3-count package of scour pads (*Scotch-Brite* brand), Exhibit A
- One 80-count box of plastic sandwich bags (*Good Sense* brand), Exhibit A
- One 40-count box of plastic snack bags (*Ziploc* brand), Exhibit B
- One 20-count package of plastic cups (*Sunset* brand), Exhibit B
- One scrubber sponge (*SOS* brand), Exhibit C
- One 12.6-fluid-ounce bottle of dish soap (*Dawn* brand), Exhibit C
- One 10-fluid-ounce bottle of fabric softener (*Downy* brand), Exhibit D
- One 10-fluid-ounce bottle of laundry detergent (*Tide* brand), Exhibit D

The report indicates that in Exhibit D, the investigator attempted to obtain cash in exchange for SNAP benefits (i.e. trafficking), but this was refused by the clerk on duty. According to the report, the same cashier conducted all four violative transactions. The charge letter states that the violations that occurred in Exhibits A, B, C, and D warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

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

- As stated previously to the Retailer Operations Division, the Appellant owner sold his shares of the business on August 1, 2018. This is the date in which the transfer of the stocks occurred and the date when the new owner took over the store.

- The firm's employees have all been well trained and all are aware of the rules and regulations of the SNAP program. The owner was personally involved in the training, which occurred twice a year. Appellant referred to the training documents that were previously provided to the Retailer Operations Division.
- During the training sessions, the owner emphasized to his employees the importance of avoiding trafficking. This training is demonstrated in the clerk's refusal to engage in trafficking in Exhibit D.
- Appellant apologizes for the alleged violations and requests reconsideration of the disqualification.
- The Appellant owner did not participate in or approve of any of the alleged violations.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The Appellant has not provided any evidence or documentation to counter FNS's investigation report. In its initial response to the charges, the Appellant stated that it had talked to its employees and all of them denied having committed any violations, but no evidence of this claim was provided. In its reply to the charge letter, the Appellant also apologized for the alleged violations. Such an apology appears to be an acknowledgement by the Appellant that violations may have occurred. Because the Appellant has offered no evidence to the contrary, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division and a six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Sale of Store

The Appellant has claimed that the store was sold effective August 1, 2018. To support this argument, the Appellant submitted several pieces of evidence showing that all of the owners' shares in the business were transferred to a new owner as of August 1, 2018. Though not explicitly stated, this contention implies that because the former owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is no longer affiliated with the store, the disqualification action should be dismissed.

Unfortunately, the sale of the firm has no bearing in this matter. As noted earlier, the entire investigation took place during the month of July 2018. Administrative action must be taken against the individuals who owned the firm at the time the violations were committed. Because the sale of the firm did not take place until August 1, 2018, the disqualification action taken against 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is wholly appropriate and was done in accordance with SNAP regulations.

SNAP Training Program

The Appellant contends that it had a SNAP training program at the time of the investigation and stated that all of its employees were well trained and well aware of SNAP rules and regulations.

As evidence of this claim, the Appellant referred to Exhibit D of the investigation report, which shows that the clerk on duty refused to engage in trafficking with the investigator. To support its training claims, the Appellant provided documentation showing that semiannual training occurred at the firm during 2017 and 2018.

Unfortunately, the existence of a training program provides no basis for a dismissal or reduction of the disqualification action. If this had been a trafficking/permanent disqualification case, such evidence might have been valuable. But in a temporary disqualification case focused on the sale of ineligible items, regulations do not permit a civil money penalty or any other sanction in lieu of disqualification based on the existence of a training program at the firm.

Further, it is the determination of this review that the Appellant's supposed training program was insufficient to prevent program violations. Regulations at 7 CFR § 278.6(e)(5) state that FNS "shall disqualify the firm ... if ... 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 this case, the clerk on duty permitted ineligible item to be purchased with SNAP benefits every time the investigator attempted to do so. If this was not a willful disregard for the rules, then it was almost certainly a situation of carelessness or improper supervision. That the clerk refused to engage in trafficking only strengthens the argument that the firm's training related to the sale of ineligible items was insufficient. As such, a six-month disqualification is the appropriate sanction.

Civil Money Penalty

Although not requested by the Appellant, this review evaluated the Appellant's eligibility for a hardship civil money penalty (CMP) in lieu of a six-month disqualification. Regulations at 7 CFR § 278.6(f)(1) permit a CMP in lieu of disqualification when the firm's disqualification would cause hardship to SNAP households. According to this regulation, hardship to SNAP households is defined as "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices."

It is the determination of this review that a disqualification of Lambert Deli Grocery Corp., a small grocery store, would not cause hardship to SNAP households because there are many other shopping options in the area. According to agency records, there are numerous comparable or larger SNAP-authorized retail stores located within a one-mile radius of Lambert Deli Grocery Corp., including a full-line superstore less than a quarter of a mile away.

It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their SNAP benefits elsewhere. However, in accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Because such conditions do not exist in this case, a hardship civil money penalty in lieu of disqualification is not an option.

CONCLUSION

Based on an analysis of all information in this case, this review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Lambert Deli Grocery Corp. during a USDA investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record appears to be specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood merchandise, and in all other critically pertinent details. Pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, Lambert Deli Grocery Corp., is sustained.

In accordance with the Act and regulations, the disqualification penalty shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted 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 Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

March 18, 2019