

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Lia Deli Grocery Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0192152

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 Lia Deli Grocery Corp. by the Retailer Operations Division. It is also USDA's final decision that a civil money penalty in lieu of disqualification is not appropriate in this case.

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 Lia 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, Lia Deli Grocery Corp., was initially authorized for SNAP participation as a small grocery store on June 26, 2014. Between October 19, 2016 and December 6, 2016, 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 Lia Deli Grocery Corp. accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. According to the report, the Appellant firm sold copper scrubbing pads, laundry detergent, and steel wool soap pads in exchange for SNAP benefits, which benefits are only permitted to be used in exchange for eligible foods.

In a letter dated March 3, 2017, 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 stated that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated 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.

The record shows that the Appellant did not respond to the charge letter.

After further considering the evidence in the case, the Retailer Operations Division issued a letter of determination dated April 13, 2017. This letter informed the Appellant that it was the determination of the Retailer Operations Division that the 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 retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked April 22, 2017, 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.

It should be noted that in both the Appellant's request for review and in a subsequent letter postmarked May 24, 2017, the Appellant claimed that it never received the March 3, 2017 charge letter. However, agency tracking records show that the charge letter was received by the firm on Monday, March 6, 2017 at 1:05 p.m.

Despite this evidence and because of the Appellant's insistence that it had not received the charge letter, the administrative review officer sent the Appellant a letter dated June 13, 2017. Enclosed with this letter was a copy of both the charge letter and the investigation report. The review officer then gave the Appellant one more opportunity to provide any kind of reply or documentation in response to the charge letter and in support of its request for administrative review. The Appellant did so, providing a written response in a letter postmarked June 21, 2017. The response is outlined below in the section entitled, "Appellant's Contentions."

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, *inter alia*:

[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, *inter alia*:

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, *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.... **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, *inter alia*:

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, *inter alia*:

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, *inter alia*:

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 October 19, 2016 and December 6, 2016, the USDA completed six compliance visits at Lia Deli Grocery Corp. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the March 3, 2017 charge letter. The investigation report included Exhibits A through F, which provided full details on the results of each compliance visit. SNAP violations were documented during three of the six visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report noted that the following nonfood items were purchased by an investigator using SNAP benefits:

- One junior copper scrubbing pad, Exhibit B
- One 5.7-ounce box of Ultra laundry detergent (*Tide* brand), Exhibit B
- One 4-count box of steel wool soap pads (*Brillo* brand), Exhibit C
- One bag of laundry detergent (*Tide* brand), Exhibit C
- One 25-fluid ounce bottle of detergent (*Gain* brand), Exhibit D
- One 4-count box of steel wool soap pads (*Brillo* brand), Exhibit D

The report noted that the firm's personnel did not, at any time, refuse to allow ineligible merchandise to be purchased with SNAP benefits. However, on two occasions in which the investigator attempted to exchange SNAP benefits for cash (i.e., trafficking), the clerk refused. These refusals are noted in Exhibits E and F. It is noted that no violations were attempted by the investigator in Exhibit A.

The charge letter states that the violations that occurred in Exhibits B, C, and D warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). According to the report, three different clerks conducted the three violative transactions during the investigation.

APPELLANT'S CONTENTIONS

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

- Appellant request that FNS consider that it is the firm's first violation, that it was an inexperienced clerk, and that the investigator requested money twice and was refused both times.
- The Appellant understands its responsibilities and wants to comply both now and in the future.
- Appellant is willing to accept a fine that it can afford.
- Appellant requests that the firm be able to continue accepting SNAP benefits.

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 did not, at any point, provide evidence or documentation to counter FNS's investigation report. Rather, the Appellant appears to acknowledge that the violations occurred, stating it was the firm's first violation and that an inexperienced clerk committed the infractions. Therefore, is the determination of this review that program violations did occur as charged by the Retailer Operations Division. The balance of this review will address the Appellant's remaining contentions.

No Prior Violations

The Appellant has argued that FNS should take into consideration the fact that this is the firm's first violation. The Appellant further argued that when the investigator attempted to exchange SNAP benefits for cash, the store clerks refused.

With regard to these contentions, SNAP regulations at 7 CFR § 278.6(e)(5) require that when serious violations occur, such as the exchange of common nonfood items for SNAP benefits, a six-month disqualification is the necessary penalty, even on the first occasion, regardless of a firm's prior compliance with program rules and regardless of the firm's refusal to engage in trafficking. As noted earlier, the purpose of this review is to determine whether or not the Retailer Operations Division took appropriate action, consistent with SNAP regulations, in its imposition of a six-month disqualification against Lia Deli Grocery Corp. As long as the administrative action taken by the agency fully conforms to SNAP regulations, this review has no authority to dismiss or reduce a period of disqualification.

In this case, the sanction imposed by the Retailer Operations Division is in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. Therefore, the firm's prior compliance with program rules and its partial

compliance during the investigation does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Inexperienced Clerk

The Appellant argues that the violations were committed by an inexperienced clerk. This contention implies that FNS should consider a lesser penalty or perhaps a waiver of the penalty altogether.

With regard to this contention, the record shows that the Appellant owner signed an application to participate as a SNAP retailer on May 7, 2014. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time. An owner is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations. Regardless of which clerks are operating the cash register at a given time or whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible 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 its employees would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA.

Additionally, it should be noted that the violations were committed by three different individuals, not just one, as the Appellant seems to suggest. Therefore, the contention that the violations were the fault of an inexperienced clerk does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Promise of Future Compliance

The Appellant has stated that it understands its responsibilities and that it wants to comply with SNAP now and in the future.

It must be clarified here that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the Appellant was charged with committing program violations and at the time that the Retailer Operations Division made its determination. It is not the authority of this review to consider any subsequent remedial actions that may take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations.

It is apparent to this review that the Appellant is genuine in its desire to rectify the mistakes that were made by the firm during the investigation. However, when determining whether or not the Retailer Operations Division appropriately applied Federal law and regulations, it is not the authority of this review to consider an appellant's sincere apologies or its promises to comply with program requirements in the future.

Therefore, the Appellant's contention that the firm will now comply with SNAP regulations does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

Civil Money Penalty

The Appellant states that in lieu of disqualification, the firm is willing to accept a monetary fine that it can afford.

Unfortunately, a monetary fine is not permissible in this situation. SNAP regulations at 7 CFR § 278.6(f)(1) state that a civil money penalty in lieu of a temporary disqualification is only allowable when the firm's disqualification would cause hardship to SNAP households. According to this regulation, hardship 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 Lia Deli Grocery Corp., classified as 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 dozens of similar or larger SNAP-authorized retail stores located within a one-mile radius of Lia Deli Grocery Corp., including several superstores and supermarkets.

It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified and the 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. Therefore, pursuant to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be granted in this case.

CONCLUSION

Based on a review of the evidence in this case, there is no question that program violations of 7 CFR § 278.2(a) did occur 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 is specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood items, 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, Lia Deli Grocery Corp., is sustained.

Further, the decision by the Retailer Operations Division to not impose a civil money penalty in lieu of disqualification is also sustained. Pursuant to 7 CFR § 278.6(f)(1) it is the determination of this review that SNAP households will not incur hardship as a result of the Appellant's disqualification because there are other authorized stores in the area selling as large a variety of staple foods at comparable prices.

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

October 31, 2017