

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

Lo Maximo Deli Grocery LLC,

Appellant,

v.

Case Number: C0201341

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 there is sufficient evidence to support a six-month disqualification of Lo Maximo Deli Grocery LLC (hereinafter Appellant), from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as initially imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a six-month disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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 Lo Maximo Deli Grocery LLC, with Federal SNAP law and regulations from July 17, 2018 through July 25, 2018. In a letter dated August 14, 2018, Retailer Operations Division charged the Appellant firm with accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three (3) out of four (4) compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

In a facsimile dated August 27, 2018, Appellant replied to the charge letter and generally stated that it never authorized or approved any of the alleged violations. Appellant stated that all of its employees are obligated to attend a SNAP training twice a year. As a result, they are well versed in the rules and regulations of the program. Appellant provided training sheets signed by the employees after every training session. Appellant also stated that the description of the employee in the “Clerk Information” section of the report does not fit the description nor does it even slightly resemble any of my employees. In addition, the merchandise received section of the report claims to have purchased a “wrapped hand & cheese sandwich” however my business only sells sandwiches made-to-order.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated September 13, 2018. The determination letter informed the Appellant it was disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that Retailer Operations Division considered Appellant’s eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter dated September 21, 2018, the Appellant requested an administrative review of the Retailer Operations Division’s determination. The appeal was accepted and the implementation of the six-month disqualification was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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

The controlling statute in this matter is contained in the Food & 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) establish the authority upon which a period of disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, inter alia: “Coupons 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 food 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 1977, 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...”

7 CFR § 278.6(e)(5) states, inter alia: “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 when... the firm’s disqualification would cause hardship to Food Stamp [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.”

APPELLANT’S CONTENTIONS

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

1. We provide our employees with a SNAP training session twice a year. Copies of the signed documents given after every session were sent previously.
2. The description of the employee in the “Clerk Information” section does not fit the description nor does it even slightly resemble any of my employees and we do not have any already prepared sandwiches available for sale at this business.
3. The refusal of the clerk when asked for cash in exchange for SNAP benefits is an indication that the clerk is well aware of the rules of the program.
4. Without the ability to process, EBT our business will lose a substantial amount of income and will be forced to close.
5. Please consider the imposition of a CMP in lieu of the disqualification period.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

FNS initially authorized Lo Maximo Deli Grocery LLC as a small grocery store on July 25, 2016. During an investigation from July 17, 2018 through July 25, 2018, the USDA conducted four (4) compliance visits at Appellant’s store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated August 14, 2018. 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 committed during three (3) of the four (4) compliance visits. They involved the sale of one 16 count package of Caribe 16 ounce durable plastic cups; one 51 count pack of Quality Home plastic

spoons; one 40 count box of Bounce dryer sheets 6.4in x 9in; one 450 mil bottle of Suavitel Fresca Primavera liquid fabric softener; one 25 count of 9 inch Sunny pack foam plates; one 30 count pack of 12 ounce Apollo Power Bowls extra strength soak-proof and one 51 count pack of House Dishware forks. The clerk refused the exchange of an undisclosed amount of SNAP benefits for cash in exhibit D.

Appellant contends that it provides employees with a SNAP training session twice a year and had previously provided signed copies. With regard to this contention, there is no dispute that ownership trained employees according to the requirements of SNAP regulations. Appellant was not charged with trafficking in this case therefore training documentation required for a trafficking civil money penalty, does not apply during this review. As owner of the store, Appellant is liable for all violative transactions handled by either paid or unpaid store personnel. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper 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 Stamp Act and the enforcement efforts of the USDA.

Appellant contends that the description of the employee in the clerk information section does not fit the description of any of its employees and the store does not sell already prepared sandwiches. With regard to these contentions, the charges of violations are based on the findings of a USDA investigation, conducted by a trained USDA official. The investigative report has been carefully reviewed and does not include any evidence of inconsistencies or errors. The report clearly recounts activities wherein personnel at Appellants store exchanged SNAP benefits for ineligible items. These transactions are clearly violative of the SNAP regulations. Furthermore, the descriptions of the two store personnel are as perceived by the investigator.

Appellant contends that without the ability to process EBT the business will lose a substantial amount of income and will be forced to close. With regard to this contention, it is recognized that some degree of 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 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 allow store ownership from being excused 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, as amended, 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 may be forced to close, based on the assessment of an administrative penalty, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Furthermore, it is important to clarify for the record that the purpose of this review is to determine if the earlier decision of the Retailer Operations Division, to disqualify Appellant from participation in the SNAP for a period of six months, was in fact a correct one. It is not within the scope of this review to consider what subsequent actions Appellant may have taken so that its store may begin to comply with program requirements.

Based on a review of the evidence in this case, there is no question that program violations did occur. Clerks working at Appellant sold common ineligible items to an FNS investigator on three (3) separate investigative visits. The investigative record is specific and accurate with regard to the dates of the violations, the exchange of SNAP benefits for ineligible items, and in all other critically pertinent detail. As such, the contentions presented do not constitute valid grounds for dismissal of the current charges of violations, or for mitigating the impact of those charges. Based on a review of the evidence in this case, it appears that the SNAP violations at issue did, occur as charged.

CIVIL MONEY PENALTY

Appellant requested consideration of a civil money penalty. Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR §278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification because there were at least 162 authorized retailers within a one-mile radius of Appellant. These retailers included 36 additional small grocery stores, 17 medium grocery stores, six (6) large grocery stores, 15 supermarkets and four (4) superstores. These authorized retailers are selling as large a variety of staple foods at comparable prices.

CONCLUSION

The documentation presented by 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) specifies that FNS shall "disqualify the 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 or poor supervision by the firm's ownership or management.

The violations were determined by Retailer Operations Division to represent the first sanction for the firm and evidence carelessness and poor supervision. Therefore, the imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

It is therefore established that the violations as described in the letter of charges did in fact occur at the Appellant firm warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). Based on the discussion herein, the decision to impose a six-month disqualification against Lo Maximo Deli Grocery LLC is appropriate and the action is sustained.

In accordance with the Act and regulations, the six-month period of disqualification shall become effective thirty (30) days after receipt of this letter. The Appellant may submit a new

application for SNAP participation ten (10) days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you reside or are 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 (30) days of receipt of this Decision.

Under the Freedom of Information Act (FOIA), 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.

Monique Brooks
Administrative Review Officer

April 15, 2019