

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

**N and M Express Deli Inc,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0221015**

**FINAL AGENCY DECISION**

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the six-month disqualification of N and M Express Deli Inc. (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), 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 November 1, 2021, through November 8, 2021. 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 9, 2020, 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.

On October 12, 2020, Appellant replied to the charge letter by e-mail. Appellant explained that it was fully compliant and will continue to adhere to all rules and regulations. After considering the retailer's original reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated February 9, 2021, 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 February 18, 2021, Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The appeal was granted and implementation of the six-month disqualification 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 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 § 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.

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.

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**

N and M Express Deli Inc. is a convenience store originally authorized by FNS on May 30, 2018. During an investigation conducted between November 1, 2021, and November 8, 2021, a USDA investigator conducted three compliance visits at Appellant. A report of the investigation dated May 14, 2020, was provided to Appellant as an attachment to the charge letter. The investigation report included Exhibits A through C which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during each of the compliance visits and involved the sale of common ineligible items including sandwich bags, plastic spoons, steel wool soap pads, dishwashing liquid, 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, and C furnished with the charge letter.

### **APPELLANT’S CONTENTIONS**

Appellant, through counsel, made the following summarized contentions in its February 18, 2021, administrative review request, in relevant part:

- Appellant is a vital part of the community.
- Counselor has seen the owner not accept payment when the customer does not have money.
- It would be a tremendous hardship to the community and the store if the firm is

disqualified for six months.

- During one of the visits, the ineligible items were not charged and were given to the investigator.
- Appellant requests a warning or 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**

Appellant explains that during the first visit, two of the items were given to the investigator and were not charged to the SNAP account. Appellant wrote in the prices for the items that had no price indicated to show that the ineligible items were not included in the total cost of the transaction. There is insufficient evidence to support this statement.

The charges of violations are based on the findings of a formal USDA investigation. 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 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.

### **Warning Letter**

Counsel requests a warning in lieu of a six-month disqualification. It should be noted that a warning letter is not a prerequisite to a disqualification. However, the SNAP regulations do provide for a warning letter in some cases. Specifically, 7 CFR 278.6(e)(7) states the following: "Send the firm a warning letter if violations are too limited to warrant a disqualification." As previously stated, the investigative report documented that a total of seven common ineligible items were exchanged for SNAP benefits on three separate occasions. These violations are not considered "violations that are too limited to warrant a disqualification." Therefore, Appellant's contention does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

### **Appellant Hardship**

Counsel reports that it would be a hardship for the store if it disqualified for six months. 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.

### **Civil Money Penalty**

Appellant also contends that a six-month disqualification will be a hardship on SNAP households. 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 14 larger authorized stores located within a one-mile radius of Appellant. Thus, in its letter dated February 9, 2021, 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 N and M Express Deli Inc. from participating as an authorized retailer in SNAP is sustained. In accordance with the Food and Nutrition Act, and the regulations, 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

April 27, 2021