

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

New Millennium Deli Grocery Corp,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0232434

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record supports that New Millennium Deli Grocery Corp. (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a six month disqualification of Appellant from the SNAP, as imposed by the Office of Retailer Operations and Compliance (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action in its administration of the SNAP, consistent with 7 CFR § 278.6(a), 7 CFR § 278.6(e), and 7 CFR § 278.6(f)(1), when it imposed a six month period of disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of August 13, 2020 through August 17, 2020. The investigative report dated August 21, 2020, documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible common nonfood items on multiple separate dates. As a result of evidence compiled during the investigation, by letter dated December 11, 2020,

Retailer Operations charged Appellant with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits was noted in Exhibits A, B, and C, that warrants a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain conditions FNS may impose a civil money penalty (CMP) in lieu of a disqualification. The record shows that counsel responded to the Charge letter by letter dated December 17, 2020, which also included a FOIA request.

Retailer Operations informed Appellant by Determination letter dated March 3, 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 also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices. Counsel requested review of the determination by letter dated March 10, 2021. The review was granted by letter dated March 23, 2021.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant, credible evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 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.

7 CFR § 278.2(a) states: “SNAP benefits may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food.”

7 CFR § 278.6(a) states: “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) of the SNAP regulations states that a firm is to be disqualified 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.”

7 CFR § 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause hardship to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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.”

7 CFR § 278.6 Disqualification of retail food stores... and imposition of civil money penalties in lieu of disqualifications states in part: “(p) *Freedom of Information Act (FOIA) requests and appeals.* A FOIA request or appeal for records shall not delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm under paragraphs (c) and (d) of this section, or delay the effective date of a disqualification or penalty listed in paragraph (e) of this section.”

SUMMARY OF THE CHARGES

The investigative report details on the results of each compliance visit, and was provided to the Appellant as Exhibits with the Charge letter. The investigative report documents that SNAP violations were recorded during multiple store visits that warrant a six month disqualification. The SNAP violations of 7 CFR § 278.2(a) involved the sale by store personnel, of ineligible nonfood items for SNAP benefits. The nonfood items sold for benefits included: scrubber sponge, sandwich bags, steel wool pads, and copper scrubbers.

APPELLANT’S CONTENTIONS

Consideration was made of all contentions as presented, whether recapitulated here or not.

- The owner denies that the incidents forming the basis of the complaint as set forth in the letter of charges, and the exhibits annexed thereto, took place. The charges of accepting SNAP benefits in exchange for common ineligible non-food items are vehemently denied.
- It should also be noted at the outset that an FNS Contractor conducted a field inspection at this location on or about the times of these alleged violations. That during that visit to the location by the unnamed FNS Contractor, no violations occurred, the store was fully stocked, yet, the unnamed FNS Investigator claims that the sale of common ineligible non-food items occurred.
- Additionally, prior to the issuance of the letter of charges against this firm, it should also be noted that there had been no prior non-compliance history. Again, proving that this owner has been in compliance with the rules and regulation of the SNAP.
- An FNS Contractor conducted a field inspection at this location on or about the times of these alleged violations. During that visit to the location by the unnamed FNS Contractor, no violations occurred, the store was fully stocked, yet, the unnamed FNS Investigator claims that the sale of common ineligible non-food items occurred.

- My clients vehemently deny that they personally engaged in any type of illegal activity and were unaware, until the receipt of the letter of charges, that anyone else in their store or employed by them in this business is alleged to have engaged in such activities.
- The FNS has failed to make any effort during the investigation of this owner's store to determine the true identity and full name of the one clerk allegedly employed by the owner, and specifically the identity of the clerk during each transaction who allegedly committed the wrongdoing as noted in the Exhibits. During this investigation there is no description of the clerk, no name, no title, no means of identification or his relationship to the owner is set forth, after five undercover visits to the store.
- The owners deny that the numerous descriptions of individuals alleged to be clerks in this store as set forth in the Transaction Reports are employed in this store. These are wholly fabricated as they are not identified by name or any identification. The violations which are alleged to have occurred and which are totally denied by these Owners are the sale of a common ineligible non-food item which in itself are in such insignificant amounts that it raises a question about the appropriateness and credibility of the investigation.
- In each of the alleged transactions, there is no time of entry and departure by anyone to and from the subject premises. Any surveillance cameras in this store are self-erasing and the images taken from August 2020 are no longer available for viewing.
- There no cash receipts or cash register receipt. I am informed that the price of each product is displayed and sold in this store is carefully marked. Each customer receives a cash register receipt or tape when a purchase is made. The owners deny that sales were made without receipts or that there was no price indicated on items that were allegedly purchased.
- There are no prices indicated on most of the items purchased, so that the FNS cannot identify which items were purchased or whether they were merely given to the undercover investigator to assist them as they entrapped the clerk.
- These incompetence, inadequacies, inaccuracies and insufficiencies affect the reliability, veracity and sufficiency of the reports and the meager and questionable sale of ineligible items charge. This charge cannot be sustained as a matter of law or as a matter of fairness and justice to attempt to permanently disqualify this owner from participation in SNAP.
- Should the FNS determine that this firm and owners violated Section 278.2(a) of the SNAP regulations, then and in that event, the FNS should impose a civil money penalty as a sanction in lieu of disqualification, as it would be a violation of due process to prosecute this owner for alleged transactions that occurred without any warning letter to correct and cure any issue with one employee.
- That where the firm and owner are subject to a disqualification it is within the discretion of the FNS to rescind the determination where there is error or impose a minor civil penalty in lieu of a six month disqualification, as the imposition of the sanction in this case would be unjustified, inappropriate, cruel and unusual punishment for no violation.
- That this firm has met the criteria listed in SNAP regulations, the firm has developed an effective compliance policy and program that were in operation at the location where the alleged violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm. The firm had developed and instituted an effective personnel training program and that the owner was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of alleged sale of common non-food ineligible items and as set forth herein in the letter of charges, and it is only the first occasion

in which a member of firm management has become aware that the FNS has alleged conduct of supposed violations by the firm.

- The owner would not knowingly or intentionally jeopardize this source of business and his livelihood and his reputation in the community by engaging in the illegal activity charged herein. He has invested large sums of his personal savings to renovate this store in the effort to provide financial support to his family.
- During the time the owner has been in the Program, since 2012, he have maintained an exemplary record and that the allegations contained in the letter of charges is the first occasion in which a member of this firm or its management has been made aware of conduct of any violations by the firm. Such an unblemished record is evidence of his continued compliance with the law and his training and supervision of his employees, up and including the present time.
- The training program consists of two weeks of intensive, hands on classes, overseen by the owner of this store. He works with each employee during this period, teaching them the rules and regulations of the SNAP.

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by Retailer Operations, and it is limited to the facts at the basis of Retailer Operations' determination at the time it was made. The documentation under review supports that the violative transactions were conducted at Appellant by store personnel, on different dates as indicated on the Exhibits. While the owner denies the charges, he submitted no evidence to support that the transactions did not occur at Appellant. The record under review includes the EBT receipts for the total SNAP benefit amounts recorded in the Exhibits. The record also included photographs of the items exchanged at Appellant, and documentation that confirms that the items as noted in the Exhibits, were donated to local community organizations by the USDA contract investigator. Notwithstanding potential discrepancies between the contractor's description of store personnel and the owner's description of his personnel, the evidence supports that Appellant was the offending store, and the nonfood items identified were exchanged for SNAP benefits as charged.

Regardless of cost, Appellant established a record of selling nonfood items on multiple store visits. The SNAP regulations make no mention of minimum cost for a common ineligible nonfood item, exchanged for SNAP benefits, to be considered a violative exchange. The regulations are clear that benefits can only be exchanged for eligible foods. Therefore, the contention that transactions involved a small dollar amount is not relevant. The regulations allow that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through onsite investigations.

The owner contends that a SNAP disqualification will have a negative financial impact on Appellant's business. 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 the owner to be excused from an assessed administrative penalty 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. Furthermore, 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, that the firm may incur economic hardship based on the assessment of an administrative penalty is not a valid basis for dismissing the charges or the resultant regulatory penalty.

Retailers are informed that it is their responsibility to ensure that store personnel are properly trained regarding the SNAP rules. Regardless of whom the owner of a store may utilize to handle store business, the firm's ownership is accountable for the proper training of personnel, and the effective monitoring and handling of SNAP benefit transactions. The preponderance of evidence under review supports that Appellant's personnel sold nonfood items on multiple store visits, in exchange for SNAP benefits. Such repetitive violations are considered evidence of carelessness. The regulations at 7 CFR § 278.6(e)(5) state that a firm is to be disqualified 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.

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six month period of disqualification from SNAP. The record documents that there are other authorized stores within a nearby radius of Appellant that stock a variety of comparable staple foods at comparable prices. Retailer Operations concluded that the evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified. Therefore, Appellant was deemed not eligible for a hardship CMP.

CONCLUSION

The preponderance of the evidence in the record supports that Appellant violated the SNAP regulations as charged. The record documents that Retailer Operations properly evaluated Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations. On review, it is decided that Retailer Operations properly denied a CMP. Therefore, the six month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained. This penalty shall become effective thirty (30) days after delivery of this decision.

A new application for participation in the SNAP may be submitted ten days prior to the expiration of the six month period of disqualification. Please contact the Retailer Center at 877-

823-4369 with general questions regarding the SNAP application process.
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023), and to the regulations at 7 CFR § 279.7 with respect to the owner's right to judicial review of this decision. 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 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 (30) days of delivery 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

April 21, 2021