

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

NYC Deli Market Corp I,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0188836

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the six-month disqualification imposed upon NYC Deli Market Corp I (hereinafter “Appellant”) by the Retailer Operations Division, Investigations and Analysis Branch, hereinafter “ROD Office,” is hereby sustained.

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6 (e) and 7 CFR § 278.6 (f) in its administration of the SNAP when it imposed a disqualification upon Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 C.F.R. § 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

In a letter dated March 3, 2017, the ROD Office informed Appellant that it was charged with violating the terms and conditions of the SNAP regulations, 7

CFR § 271 – 282. The record reflects that the ROD Office received and considered Appellant’s replies to the Charge Letter. By a letter dated April 21, 2017, Appellant was informed that it was disqualified for a period of six-months from participation as a retail store in the SNAP and was instructed to cease accepting SNAP benefits or, alternatively, request an administrative review of the decision. On April 29, 2017, Appellant requested an administrative review of the ROD Office’s decision. The request was granted and the disqualification action held in abeyance pending the results of the 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, at 7 U.S.C. § 2021 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6 (e) of the Regulations establish the authority upon which a disqualification, or a civil money penalty in lieu thereof, may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to disqualify retail stores from the SNAP.

7 U.S.C. § 2021 states, *inter alia*:

- (1) IN GENERAL.—An approved retail food store or wholesale food concern that violates a provision of this Act or a regulation under this Act may be—
 - (A) disqualified for a specified period of time from further participation in the supplemental nutrition assistance program;
 - (B) assessed a civil penalty of up to \$100,000 for each violation; or
 - (C) both.

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 & 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) states:

FNS shall 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(e)(6) states:

Double the appropriate period of disqualification prescribed in paragraphs (e)(2) through (5) of this section as warranted by the evidence of violations *if the same firm has once before been assigned a sanction.* (Emphasis added.)

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...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 store in the area selling as large a variety of staple food items... *FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction.* (Emphasis added.)

7 CFR §278.6(f)(2) states, *inter alia*:

In the event any retail food store...which has been disqualified is sold or the ownership thereof is otherwise transferred...the person or other legal entity who sells or otherwise transfers ownership...shall be subjected to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at 278.6(g).

7 CFR §278.1(b)(4) states, *inter alia*:

If the applicant firm has been sanctioned for violations of this part, by withdrawal or disqualification, for a period of more than six months, or by a civil money penalty in lieu of a disqualification period of more than six months, or if the applicant firm has been previously sanctioned for violations and incurs a subsequent sanction, regardless of the

disqualification period, FNS shall, as a condition of future authorization, require the applicant to present a collateral bond or irrevocable letter of credit...

7 CFR §278.6(h)(1),(2) and (3) state, *inter alia*:

1. Disqualify the firm for the period determined to be appropriate under paragraph (e) of this section if the firm refuses to pay any of the civil money penalty.
2. Disqualify the firm for a period corresponding to the unpaid part of the civil money penalty if the firm does not pay the civil money penalty in full or in installments as specified by the regional office.
3. Disqualify the firm for the prescribed period if the firm does not present a collateral bond or irrevocable letter of credit within the required 15 days. If the firm presents the required bond during the disqualification period, the civil money penalty may be reinstated for the duration of the disqualification period.

SUMMARY OF THE CHARGES

Among other documents, the record contains a Report of Positive Investigation, #ME40433, which indicates that investigative work was undertaken at Appellant's firm from June 5 through August 6, 2016 and reflects that six investigative visits were made to Appellant's firm during which a store clerk sold common ineligible items (those normally seen in shopping baskets) in exchange for SNAP benefits in combination with eligible food items at a substantive ratio on three separate occasions, indicative of clearly violative activity. When the extent of violative activity was determined, the investigation was halted and a report issued and assigned to the ROD Office for consideration of administrative action.

APPELLANT'S CONTENTIONS

In its reply to the Charge Letter, in its written request for review dated April 27, 2017, and in subsequent correspondence, Appellant provided information in which it was argued that:

1. There is no evidence to support the charges; the government must show by admissible evidence that food stamp coupons were accepted by plaintiff as payment for ineligible items. The Government fails to meet its burden. The agency action was arbitrary and capricious, as it was unwarranted in law or without justification in fact.
2. Appellant has participated in the SNAP for almost two and one-half years

- and has no prior violations.
3. On three of the six visits to the store, no violations occurred; on two of those visits, cash was requested but refused.
 4. The Owner continually instructed employees on eligible items permitted in the SNAP; employees are instructed daily to follow all SNAP regulations.
 5. The description of the clerk during the June 8, 2016 visit differs from that of the clerk during the June 10 and 19 visits, though they are the same person on all three occasions. That person has been fired for violating the Owner's instructions.
 6. The Owner was not present when the violations occurred; therefore he is not in a position to contest same other than to state his usual method is to constantly instruct employees on the SNAP regulations and order them not to commit violations.
 7. There was no intent to benefit from any violations of the SNAP. It is requested that the six month disqualification be waived and a warning letter or civil money penalty be imposed instead.
 8. The store is located in a low-income area and many customers are SNAP and WIC recipients; the business and customers will suffer in the event of a disqualification.

ANALYSIS AND FINDINGS

In regard to contention 1 above, the charges of violations are based on the findings of a formal Department of Agriculture investigation; all transactions cited were conducted under the direct supervision of a Department Investigator. All such transactions are fully documented and a review of this documentation has yielded no indication of substantial error or discrepancy in the reported findings; the investigative record is specific and thorough with regard to the dates, amounts, merchandise obtained and other facts concerning the violations and in all other critically pertinent detail. Additionally, investigative results are routinely supported by documentation in the record that confirms items purchased at a retail firm in the course of an investigation are donated to and signed for by a charitable organization following the transactions. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made and the official's initials next to the items donated. The purchase costs of each of the three violative transactions noted in the investigation are documented on SNAP terminal receipts obtained during each transaction. Moreover, transaction data generated by each investigative purchase at Appellant's firm confirms the store's SNAP authorization number, the date, and the amount, among numerous other details such as the card number, household number, time of the transaction and transaction method (not reprinted below pursuant to 5 U.S.C. Section 552(b)(6) and 552(b)(7)(C) and/or 7 U.S.C. Section 2018(b)(6) & (b)(7)(c)):

5 U.S.C. § 552 (b)(7)(E)

Appellant offers no compelling information or supporting documentation which would constitute evidence that any relevant detail is incorrect in any substantial respect. As such, the contention exerts little force in the context of the considerable information and documentation presented by the SNAP Office, as referenced above, which indicate that the merchandise was in fact obtained as described at the Appellant firm on the dates noted, that the manner in which it was obtained is accurately described and that the clerks in attendance throughout were likewise accurately described.

Regarding contention 2 above, Appellant may imply that a record of no prior SNAP violations at the store at issue, or at other firms now or previously owned, should be taken into consideration. However, such a record does not constitute valid grounds for dismissing the present serious charges or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that precludes, reverses or reduces a sanction based upon a lack of prior SNAP violations by a firm and its owners, managers and/or employees. While the regulations provide for increased sanctions upon firms with prior violations, no provision exists for reducing a sanction in the absence of same. Further, as noted above, the regulations stipulate “FNS *shall* (emphasis added) 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 and poor supervision by the firm’s ownership or management.” Such accurately describes the nature and extent of violations in the present case. It should be added that a six-month disqualification is the least severe disqualification period allowed by regulation.

With regard to contention 3 above, Appellant’s refusals to commit violations on two occasions, as noted in the investigative report, are duly acknowledged; such refusals tend to indicate that the firm did not engage in SNAP benefit trafficking. A finding that the firm did not engage in trafficking does not negate a finding that the firm sold ineligible items in exchange for SNAP benefits or prevent a sanction on the basis thereof. It should be reiterated that a six-month disqualification is the least severe sanction allowed by regulation given the violations in this case.

In regard to contention 4 above, while such efforts to train employees are commendable, there is no provision in the statute, regulations or agency policy to consider employee training alone as a mitigating factor or as a basis for reversal of the disqualification. (It is noted for the record that Appellant provided no corroborating evidence or documentation in support of its training efforts.) While significant effort may be required to develop and maintain a compliance policy

and program, if such fails to prevent violations, that level of effort, even if substantial, does not nullify the insufficiency.

Regarding contention 5 above, Appellant's point regarding the descriptions of the clerk(s) in Exhibits B, C and D is duly noted; the descriptions in the report do in fact overlap – that is, the descriptions allow for the possibility that one person could have been the clerk in all three store visits. With regard to Appellant's assertion that the employee is no longer with the firm, it is important to clarify for the record that there is no provision in the statute or regulations for waiver or reduction of an administrative penalty on the basis of corrective action implemented subsequent to findings of program violations. The purpose of this review is to determine if the earlier decision of the SNAP Office was proper and in compliance with pertinent laws and regulations. Accordingly, this review is limited to considerations relevant at the time such decision was made. It is beyond the scope of this review to consider what subsequent remedial actions, such as changes in store management, procedures, internal controls, employee discipline/training or facility and/or inventory changes and improvements Appellant may propose to take or may have taken in order to comply with program requirements. Therefore, to the extent Appellant implies that it will, or has, implement(ed) corrective and/or remedial actions, though this would likely have been valuable in preventing program violations at an earlier time, such cannot now apply retroactively and does not provide a valid basis for dismissing the charges or for mitigating the serious impact of the violations upon which they are based. It is further added for the record that, although Appellant claims corrective action has been taken, it offers no documentary evidence of same. As such, the claim carries little weight, and as noted above, corrective action following findings of violations is not a relevant consideration in ROD Office sanction decisions.

With regard to contention 6 above, Appellant may imply that the Owner did not personally commit violations of the SNAP Regulations and notes that an employee committed the violations. This contention cannot be accepted as a valid basis for dismissing any of the charges or for mitigating the impact of the violations upon which they are based. Appellant is liable for all violative transactions handled by full or part- time, paid or unpaid store personnel, whether or not ownership is aware of such transactions. 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. Additionally, ownership of the Appellant firm signed an FNS-252, SNAP Application for Stores, on June 24, 2014, by means of which Appellant acknowledged and agreed to accept responsibility to prevent violations of the program by any and all employees of the firm. Again, to allow store ownership to disclaim accountability for the acts of persons to whom the responsibility to handle store business has been assigned would render inert the enforcement provisions of the Food and Nutrition Act of 2008 and corresponding provisions of the regulations.

In regard to contention 7 above, Appellant implies that mistakes made in handling transactions, as opposed to violations intentionally committed, may provide a compelling rationale to reduce or reverse the sanction imposed in the present case. Lack of intent to violate is contemplated by the regulations and reprinted above on page 2; as noted above, violations due to carelessness or poor supervision warrant a six-month disqualification or a hardship civil money penalty in lieu thereof, provided the firm is qualified for such alternate sanction. Moreover, it is acknowledged that the agency issues warning letters for some cases involving violations; however, this is done in accordance with 7 CFR 278.6(e)(7), which states, "Send the firm a warning letter if violations are too limited to warrant a disqualification." As the violations in the present case (three clearly violative sales of ineligible items) exceeded the standard for warranting a warning letter only, the SNAP Office was afforded no latitude to issue a warning letter and, therefore, properly assigned a six-month disqualification.

With regard to contention 8 above, the record reflects that the SNAP Office duly considered the firm's eligibility for a hardship civil money penalty and correctly found the firm ineligible. The ROD Office noted that, at the time of the sanction decision, there were 148 similarly or better-stocked stores within a one-mile radius, including 10 super stores, eight supermarkets, two large grocery stores, 16 medium grocery stores, 34 small grocery stores, 38 combination grocery/other stores and 40 other convenience stores. The regulations stipulate the conditions upon which this alternative penalty may be imposed in lieu of a disqualification: if a store 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 store in the area selling as large a variety of staple food items, a hardship civil money penalty is to be assessed. In the present case there is no indication that the disqualification would work a hardship upon SNAP customers due to the impending closure of a nearby comparable firm, due to loss of access to ethnic foods or due to physical barriers or conditions that would make travel difficult or would restrict normal travel to comparable firms. It should be reiterated that hardship worked upon retailers is not a consideration in decisions to disqualify firms due to SNAP violations or in decisions to impose civil money penalties in the event disqualified firms are subsequently sold or the ownership thereof otherwise transferred; there are no provisions in the Act or the regulations allowing for hardship worked upon a firm, due to a disqualification, to warrant a civil money penalty. In accordance with the regulatory and policy guidance referenced in the foregoing, therefore, the ROD Office's decision to withhold a civil money penalty in lieu of a six-month disqualification was correct and appropriate.

CONCLUSION

In view of the above, the decision of the ROD Office to disqualify NYC Deli Market Corp I for a period of six months from participation in the SNAP is

hereby sustained and will become effective upon the 30th day following your firm's receipt of this document. Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the six-month disqualification period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the provisions of the Freedom of Information Act (FOIA), FNS is 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.

DANIEL S. LAY
Administrative Review Officer

December 4, 2017