

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

Old Bayview Deli & Grocery Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0199399

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record indicates that Old Bayview Deli & Grocery Inc. (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a six month disqualification from the SNAP as imposed by the Retailer Operations Division (Retailer Operations).

ISSUE

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

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

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of August 22, 2017 through August 30, 2017. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate occasions that warrant a six month

disqualification period. The items sold are best described in regulatory terms as common nonfood items.

As a result of evidence compiled during this investigation, by letter dated November 2, 2017, Retailer Operations charged the owner with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). Misuse of SNAP benefits was noted in Exhibits A, B, C and D. The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

The owner replied to the Charge letter November 6 and 7, 2017. By Determination letter dated November 16, 2017, Retailer Operations informed the owner 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.

Appellant, appealed Retailer Operations' determination and requested administrative review of this action by letter dated November 20, 2017. The appeal was granted by letter dated November 27, 2017. The owner provided additional information by letter dated December 7, 2017.

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 evidence which 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 or wholesale food concern.

7 CFR § 278.2(a) states: "Coupons 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(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(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...”

In addition, 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 reads: “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.”

SUMMARY OF THE CHARGES

The USDA conducted four compliance visits at Appellant. A report of the investigation was provided to Appellant with the Charge letter. The investigation report documents that SNAP violations were recorded during four store visits, which warrant a six month disqualification. The violations involved the sale of nonfood items including: laundry soap, scrub sponges, plastic forks, and a mesh scrubber for SNAP benefits in violation of 7 CFR § 278.2(a).

APPELLANT’S CONTENTIONS

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

- Our employees are well trained about SNAP regulations.
- There may have been an unintentional violation.
- I will take necessary steps so this does not happen again.
- This is our first offense.
- I am a small business owner. This is my bread and butter. Suspension will lead to severe damage to the business and hardships for me and the staff.
- The cash exchange was rejected, however there was human error. The clerk has been put on notice.
- I request to impose a minimum penalty but allow me to continue SNAP in my store.
- The employees have been trained again to follow the SNAP rules.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the determination made by Retailer Operations. This review is limited to what circumstances were at the basis of Retailer Operations’ determination at the time such action was taken. Upon review the evidence supports that Appellant established a record of selling nonfood items as defined by Section 271.2 of the regulations, on multiple occasions as noted in Exhibits

A, B, C, and D furnished with the Charge letter. 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 nonfood items due to carelessness or poor supervision by the firm’s ownership or management.” Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification.

The owner signed the FNS retailer application to become a SNAP authorized retailer, which included a certification and confirmation that ownership would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” By signing this document the owner confirmed that “I am aware that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal or disqualification from Supplemental Nutrition Assistance Program; “It is my responsibility to ensure that the training materials are reviewed by all firm owners and all employees....;” “I accept responsibility on behalf of the firm for violations of the Supplemental Nutrition Assistance Program regulations, including those committed by any of the firm employees.”

Regardless of whom the owner of a store may utilize to handle store business, the owner is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in SNAP when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. To allow the store owner to disclaim accountability for the acts of persons whom the owner chooses to utilize to handle Appellant’s business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA.

Appellant contends that he will take necessary steps to prevent future violations. It is not the authority of this review to consider what subsequent remedial actions may be undertaken so that Appellant might begin to comply with Program requirements. There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective actions implemented subsequent to findings of Program violations.

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, the owner’s contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or mitigate the penalty imposed.

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 in this matter. The record supports that authorized stores within a nearby radius of Appellant stock a variety of comparable staple foods at comparable prices. Thus, the evidence does not support that it will cause SNAP recipients hardship if Appellant is disqualified.

CONCLUSION

Based on a review of the evidence, the record indicates that the Program violations did occur at Appellant. The investigative record is specific, thorough, and fully documented with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits and in all other critically pertinent detail.

The record documents that Retailer Operations considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) and properly denied it. Therefore, the six month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained.

RIGHTS AND REMEDIES

This penalty shall become effective thirty (30) days after receipt of this decision. A new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the six month period of disqualification. Please contact the Retailer Center at 877-823-4369 with any questions regarding the SNAP application process.

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to Section 279.7 of the regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. 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.

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

January 10, 2018