

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

Sammy's 10-01 Deli Inc,

Appellant,

v.

Case Number: C0200071

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a six month disqualification against Sammy's 10-01 Deli Inc. (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5 and 6), and § 278.6(f)(1) in its administration of the SNAP when it imposed a six month period of disqualification against Appellant on September 27, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, "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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period June 26, 2017, through July 26, 2017. The investigation determined that personnel at the Appellant business accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. All three transactions were deemed clearly violative and warrant a six month disqualification period. The items sold are best described in

regulatory terms as common nonfood items and included items such as kitchen trash bags, laundry detergent, and facial tissues. The investigative report indicates that these violative transactions were handled by two different clerks. The investigative report also noted that the business refused to exchange SNAP benefits for ineligible items on one occasion (Exhibit B) and refused to exchange SNAP benefits for cash on one occasion (Exhibit D).

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated August 8, 2017, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant, through counsel, requested an extension of time to respond and was approved for an extension until September 15, 2017. Appellant responded to the charges in a letter dated September 14, 2017, and sent via fax on September 15, 2017. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated September 27, 2017, that it determined that violations had occurred at the establishment, and that a six month period of disqualification from participating as an authorized firm in SNAP was warranted. This determination letter also states that Appellant’s eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

By letter dated October 3, 2017, Appellant appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. Subsequent correspondence dated November 10, 2017, was also received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, 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 § 271.2 states, in part, that, “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.”

7 CFR § 278.2(a) states, in part, “Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food.” Further, the citation specifies that “Coupons may not be accepted in exchange for cash . . . or for any other nonfood use.”

7 CFR § 278.6(a) states, in part, “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. . . .”

7 CFR § 278.6(e)(5) of the SNAP regulations states, in part, 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) 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.”

APPELLANT’S CONTENTIONS

In the response to the letter of charges, in the request for administrative review, and in the subsequent correspondence, Appellant has stated as its position in the matter the following:

- Store ownership has not violated any rule or regulation of SNAP and has not intentionally accepted coupons in exchange for anything other than eligible foods;
- The clerk who was present on two of the four occasions rejected two ineligible items and the clerk on the fourth transaction rejected the request for cash from the EBT card. Although ineligible items were allegedly accepted using EBT payment, clearly these items were mistakenly accepted and appear to be an oversight as they were purchased among several eligible items. The store sells many products both food and non-food to many different EBT customers and is a very busy store with a high frequency of transactions every day. Any alleged failure to refuse ineligible items was nothing more than a mere oversight at best;
- The imposition of any disqualification would be excessive under the circumstances. The business meets the criteria for a CMP for hardship pursuant to CFR 278.6(f)(1). The store provides a different service from the supermarket located adjacent to it. The store is open 24/7 and is located adjacent to the Queensbridge Housing Projects. This project contains 96 buildings and is the largest housing project in New York City. Upon information and belief, the residents, many of whom rely solely on EBT, make up about

80 percent of the customer base for the store. Disqualifying the business would cause great hardship to these SNAP households as it is one of the closest and at late hours, the only retail food grocery store in the area selling the variety of staple food items at comparable prices. As demonstrated by Exhibits A through D, the store sells a wide variety of staple food items such as milk, bread, eggs, cereal, canned goods, etc.;

- The business is located in a housing project that is often crime ridden so even having to travel a slightly further distance for staple food items can be a great impediment and even dangerous especially at late hours and considering that most residents are walking. The only other authorized retail food stores are not in close enough proximity to the business as to alleviate any risk therefore the disqualification decision should be reversed and the business remain in SNAP because it qualifies for a hardship CMP;
- Pursuant to CFR 278.6(d), in determining whether to disqualify a business, FNS should consider three criteria. Here, a determination of disqualification is not merited based on these criteria. In this instance, employees rejected ineligible items and a request for cash. The ineligible items were single products among several eligible food purchases;
- The store owner has participated in SNAP for a significant period of time without any warnings or charges of violations until what appears to be this accidental oversight. There is no regular pattern of ineligible items being accepted. To disqualify the store based on only these allegations is overly harsh and would deprive the neighborhood of a valuable source of 24 hour access to staple foods that may be purchased using SNAP. It is requested that the business not be disqualified from SNAP and if any penalty be ordered, that it be a minimal fine in lieu of disqualification;
- Based upon the nature and scope of the alleged violations, the owner's clear history, and the reasonable explanations of any slight irregularities, the case does not warrant disqualification and is eligible for a hardship CMP; and,
- Appellant reiterates that there are no other authorized retail stores in the general area selling as large a variety of staple foods at the same prices and services as does this business. The store at **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is closed and in pictures provided by Appellant there are no stores within sight on 40th Avenue. There is only a **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** store on 11th Street. The business is the only grocery store on that part of 40th Avenue directly across from the housing project. In the other direction on 40th Avenue is another grocery at a significant distance, but it is not open 24/7 and does not have a deli offering cold cuts and sandwiches. The business is directly connected to the housing project which is a labyrinth large building secluded and often crime ridden. A disqualification would cause tremendous hardship to households in the project, many who rely solely on EBT. Disqualifying the business would mean no 24 hour grocery store and deli for at least five blocks in either direction. That is a long distance for households without a car to walk especially at night and in the winter. Crime statistics for the area in October-November 2017 shows 205 thefts and 89 assaults among robberies and burglaries.

Appellant submitted four Google maps street views of the area immediately surrounding the Appellant business and a spotcrime.com printout showing recent crime in Astoria-Long Island City in support of these contentions.

The preceding may represent only a brief summary of Appellant's contentions 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 herein.

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 earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. While store ownership may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. Ownership is also responsible for all SNAP transactions at the firm regardless of the amount of time the owner is present at the subject firm.

The Report of Investigation shows that two clerks working at the Appellant business during the period under review transacted SNAP benefits for ineligible items on three separate occasions indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The acceptance of SNAP benefits for ineligible items is a violation of the SNAP rules and regulations. The regulations state that FNS shall disqualify a store for a six month period 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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management. There was no indication of involvement by the firm's management or ownership.

Contrary to Appellant's contention, the three criteria from SNAP regulations at section 278.6(d) listed below are not bases to be met in order for a firm to be disqualified, but are those areas that FNS considers in determining the appropriate level of sanction for firms that have violated SNAP regulations. The level of sanction could include temporary or permanent disqualification.

- 1) The nature and scope of the violations committed by personnel of the firm,
- 2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and
- 3) Any other evidence that shows the firm's intent to violate the regulations.

The Report of Positive Investigation shows that the nature and scope of the violations under review do violate SNAP regulations, and the transaction amounts cited in the Report also match FNS transaction records for the dates in question. Additionally, a review of the Report shows no errors or discrepancies. While a firm that has previously received warnings of possible

violations or that has been sanctioned before could receive a more severe penalty, SNAP regulations do not provide any grounds for dismissing or reducing penalties for those firms that have not received warnings or previously been sanctioned. The record shows no evidence that the Appellant firm received any prior warnings or has been sanctioned and there is no evidence that the firm's ownership or management intentionally violated SNAP regulations. Based on this discussion, the decision by the Retailer Operations Division to disqualify the firm for a six month period was the appropriate penalty.

It is highly improbable, based on the readiness of the two store employees to exchange SNAP benefits for ineligible items, that the only instances of SNAP violations were those identified as part of the FNS undercover investigation and more likely than not that this represented an ongoing pattern of SNAP violations at the Appellant business. As previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight on the part of ownership to ensure employees are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store owners to not be monitoring all transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the business or conducting other activities that would jeopardize the licenses and income that the business is dependent upon.

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications therefore any contentions related to Section 278.6(i) are of no consequence.

A hardship CMP as an optional penalty in lieu of a six month disqualification was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and its disqualification would create a 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. FNS records show there are 60 other SNAP retail stores located within a one mile radius of the Appellant business that includes five super stores, five supermarkets, one large grocery store, and five medium grocery stores in addition to many smaller stores. One supermarket, one medium grocery store, three small grocery stores, and a convenience store are all located within 0.25 miles or 440 yards of the Appellant business. Two of the small grocery stores are located on 40th Avenue while the medium grocery store and the supermarket are both located near the center of the housing project that occupies several square blocks making them readily accessible by project residents. All of these stores stock adequate varieties of food in all four food categories and in perishables as required by FNS. While none of these stores are open 24 hours per day seven days per week, this does not constitute a hardship as their hours of operation are sufficient to accommodate shopping by SNAP recipients. Additionally, there is scheduled bus service on both 40th and 41st Avenues and there is a NYC Metro station located just over two blocks from the Appellant business. It is also noteworthy that there are two national chain hotels located approximately two blocks from Appellant's location.

A review of the 4,721 SNAP transactions at the Appellant business during the months of June 2017-July 2017 shows that the vast majority of transactions (4,187) were less than 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with most (3,279) being less than 5 U.S.C. § 552 (b)(6) & (b)(7)(C) indicating that SNAP households in the area of the Appellant business do not consider the Appellant business to be a primary source for groceries. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The many nearby stores appear readily accessible to SNAP recipients and they offer a variety of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at these stores. Based on the close proximity of the larger stores, it is unlikely that any SNAP households would consider the Appellant business as their primary source of food, beverages, and essential supplies. It is recognized that some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience, however, does not rise to the level of hardship required by the regulations.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA special agent and signed under penalty of perjury. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate 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. Accordingly, the determination by the Retailer Operations Division to impose a disqualification of six months against the Appellant business from participating as an authorized retailer in SNAP is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations as there are other authorized retail stores in the area selling as large a variety of staple foods, including ethnic foods, at comparable prices.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. A new application for participation in SNAP may be submitted ten (10) days prior to the expiration of the six month disqualification period. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS web site at www.fns.usda.gov/snap/retailer-apply.

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 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.

ROBERT T. DEEGAN
Administrative Review Officer

January 24, 2018