

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

Stuyvesant Deli Grocery Corp,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0229692

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), that the record supports that Stuyvesant 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(f)(1), 7 CFR § 278.6(a), and 7 CFR § 278.6(e), 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 May 6, 2020 through June 23, 2020. The investigative report dated August 11, 2020, documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate dates. The items sold are best described as common nonfood items.

As a result of evidence compiled during the investigation, by letter dated December 10, 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. Counsel requested and was granted an extension to reply.

Counsel responded to the Charge letter in writing January 18, 2021. Retailer Operations informed Appellant by Determination letter dated March 1, 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 administrative review by letter dated March 11, 2021. The review was granted by letter dated April 8, 2021. Counsel provided a brief dated April 29, 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

A report of the investigation was provided to the Appellant as Exhibits with the Charge letter. The investigative report provides details on the results of each compliance visit. 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 nonfood items for benefits. The nonfood items sold in exchange for benefits included: dish liquids and all purpose cleaners.

APPELLANT'S CONTENTIONS

Consideration was made of all contentions whether recapitulated here or not, and submission of the USDA profile of SNAP households in 2018 in New York Congressional District 8.

- My client has had no opportunity to evaluate and respond to all of the information considered by your office to be instrumental in these cases, so this response cannot possibly be considered a “full opportunity.” A decision rendered here is a violation of the regulation.
- The issues of law to be decided herein are: (1) whether the Respondents' alleged violations of the SNAP regulations (i.e. the sale of ineligible items) were the result of the carelessness or poor supervision of the Store's owners; and (2) whether the alleged violations are too limited in nature so as to warrant a disqualification.
- The Appellants deny any wrongdoing on the part of the store. The Appellants' involvement in the transactions is de minimis and should not be grounds for the disqualification.
- As set forth in the investigative reports contained in the Attachments, the only violation to have occurred during these visits was the sale of ineligible SNAP items in exchange for SNAP benefits. Furthermore, the investigator made no mention of the store's

management/ownership, and no evidence exists in the record which would indicate that these transactions were the result of ownership or managerial carelessness or poor supervision – a prerequisite for a six (6) month disqualification under 7 CFR 278.6(e)(5).

- The Department has failed to make any of these showings in general. More specifically: (1) the alleged violation is not corroborated by the submission of pictures of the alleged non-food items purchased transaction(s); (2) or anything else verifying the statement; (3) there can be no reasonable opportunity for Appellate to subpoena or otherwise depose the witness because the Department redacted all of that information prior to sending the Charge Letter and in its' FOIA response, and (4) as a result of Ramon Fernandez's inability to subpoena said witness, it is impossible to determine the witness's veracity or whether or not a statement is biased. As such, the uncorroborated documents should not be relied upon by this Department in determining whether or not the alleged violations have occurred.
- The Store's owners maintain a strict set of rules for the transactions to be run in compliance with SNAP regulations and have reviewed the regulations and have personal knowledge of the rules. There's no past compliance history to indicate that this store had ever been a SNAP violation compliance concern.
- In this case, we have evidence of training (the clerk refused to traffick in SNAP benefits), the purchase of minor ineligible items, and a very large store otherwise. Accordingly, a disqualification under these circumstances would not serve to aid the program any more than a warning letter would.
- Respectfully, the Store would ask that a warning letter be issued in lieu of a six month disqualification. There were minimal ineligible items purchased by the investigator, all of which were reasonably related to food preparation and/or common household products.
- There was a clear misunderstanding on the part of the Store's clerks regarding the difference between eligible verse ineligible items, and nothing in the record to indicate that the sales were intentionally violative. Accordingly, the violations were minor in nature, and while the Department is tasked with maintaining compliance with the regulations, it should be reluctant to resort to draconian sanctions where a lesser sanction would be more appropriate and equally effective.
- In this instance, the ownership had taken reasonable and fiscally practical steps to prevent SNAP violations. Their efforts cannot be reasonably described as careless or as poor supervision, as would be required to support a six month disqualification under the regulation. Rather, it would seem as though the violations are exceptionally minor in nature, and while certainly in need of correction, proper corrective action can be achieved by the issuance of a warning letter.
- The other stores in the area are either priced higher or have less fresh food. Furthermore, in the era of COVID, many SNAP households are having trouble traveling to larger stores, either for their own health and safety, or because they're prohibited from doing so. Accordingly, a six month disqualification would be a hardship on the local SNAP participants.
- The Appellants respectfully request that this Division issue a decision to rescind the Charge Letter issued in this matter, and to issue a Warning Letter. Failing that, the Appellants would request the issuance of Hardship Civil Money Penalty in Lieu of a Disqualification.

ANALYSIS AND FINDINGS

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. The current FOIA regulations are clear that a FOIA request or appeal for records shall not delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm. The administrative review process and the FOIA process are separate. Counsel's contentions regarding the FOIA are not the subject of this review, and the record indicates that as of May 3, 2021, no FOIA request had been made in this matter.

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. Appellant was investigated by the USDA for compliance with the SNAP laws and regulations. The investigative record is specific with regard to the dates of the violations, and it supports that during the course of multiple visits to Appellant, on three occasions, one store personnel exchanged common ineligible nonfood items for SNAP benefits. The record includes photographs of the items acquired during each store visit, signed forms to support that the items were donated to a non-profit organization, and customer copies of EBT SNAP receipts that show the total SNAP benefits transacted, the date, the time, and the name and address of Appellant.

No mention of minimum cost is cited in Section 278.6(e)(5) of the SNAP regulations, which states that FNS shall disqualify a store 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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management. The language "due to carelessness or poor supervision," in the context of the statute and regulations, has been consistently applied by the agency to a specified number of clearly violative sales of ineligible items in which the evidence does not demonstrate firm practice and/or owner/management involvement. Furthermore, entrusting an unsupervised, inexperienced, and/or untrained clerk to handle SNAP benefits is reasonably viewed as careless and/or the exercise of poor supervision. The clerk who transacted the three violative transactions, is not the same clerk who refused ineligibles and the exchange of cash during other store visits. 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 regulations require FNS to consider any prior warnings and evidence of a firm's intent to violate when determining a sanction. It does not require FNS to give such warnings, or to prove a firm's intent to violate. FNS did not consider prior actions to warn Appellant about the possibility that violations were occurring because there were no prior warnings. The evidence considered by Retailer Operations included the information obtained during the USDA onsite store investigation of Appellant's compliance with SNAP law and regulations.

Revisions to parts 278 and 279 of the SNAP regulations eliminated administrative hearings. The revisions became effective September 8, 2003, and the agency no longer holds in-person hearings. Moreover, the statute and regulations do not provide for formal discovery procedures, or adversary cross-examination as part of the review process. If the final agency decision is appealed to the federal district court, a judge is responsible for determining whether case law cited by counsel is on point and applicable to Appellant's case.

The regulations at 7 CFR § 278.6(e)(5) specify 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 period of six months rather than a warning letter. The preponderance of evidence under review supports that Appellant's personnel sold nonfood items on multiple store visits in exchange for SNAP benefits. This program violation warrants a six month disqualification.

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 against Appellant. The record documents that there are many other other authorized stores within a nearby radius of Appellant, that stock as large a variety of staple food items at comparable prices. Therefore, Retailer Operations concluded that the evidence did not support that it would cause hardship for SNAP recipients if Appellant is disqualified.

CONCLUSION

The preponderance of the evidence in the record supports that the program violation charged did occur at Appellant. 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, and 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.

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 owners reside or are 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

May 11, 2021