

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

Sunshine Deli & Grocery,

Appellant,

v.

Case Number: C0205736

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 one-year disqualification against Sunshine Deli & Grocery (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(4) in its administration of SNAP when it imposed a one-year period of disqualification against Appellant on July 13, 2018.

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 Appellant’s compliance with federal SNAP law and regulations during the period of April 12, 2018 through April 18, 2018. The investigation reported that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. These items sold during the impermissible transactions are best described in regulatory terms as “common ineligible nonfood items.” In response to an earlier charge letter, the owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), admitted to being the unidentified male clerk involved in the impermissible transactions. As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter

dated June 25, 2018, 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 one year (Section 278.6(e)(4)). Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant replied to the Retailer Operations Division’s charges in writing. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

The Retailer Operations Division notified Appellant in a letter dated July 13, 2018 that the firm was being disqualified for one year from participation as an authorized retailer in SNAP. This determination letter also stated that Appellant’s eligibility for a hardship civil money penalty (CMP) according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated to Appellant that “. . . 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.”

On July 15, 2018, Appellant appealed the Retailer Operations Division’s decision to impose a one-year disqualification, and requested an administrative review of the action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

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 Part 278. In particular, 7 CFR § 278.6(a) and (e)(4) establish the authority upon which a one-year disqualification may be imposed against a retail food store or wholesale food concern.

Section 278.6(e)(4) of the SNAP regulations states, in part, when a firm is to be disqualified for one year:

It is to be the first sanction for the firm and the ownership or management personnel of the firm have committed violations such the sale of common nonfood items in the amounts normally found in a shopping basket.

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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- Appellant has operated since 1998 without any previous issues with SNAP compliance;
- The investigator stated the EBT card was from out of state and could be used for non-food transactions. The owner believed him and allowed the non-food transactions;
- The same investigator should not be making purchases over a three day period;
- Appellant refused trafficking;
- Disqualification would pose a hardship to the firm; and,
- SNAP participants rely upon the firm, and there is no other firm within three blocks that provides the same goods as Appellant.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

First SNAP Violation

Appellant's maintains that this is the first time there has been an issue related to SNAP. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present charges of sale of nonfood items. In addition, the investigation report shows that of the four times that nonfood violations were attempted, store personnel permitted them four times. As the owner was involved in the transactions, the Retailer Operations Division attributed violations to selling common non-food items in amounts normally found in a shopping basket pursuant to 7 CFR § 278.6(e)(4) of the SNAP regulations which provides for a disqualification of one year. This is consistent with Appellant's contention that violations were committed in error. Therefore, a one-year disqualification for the violations committed is the appropriate sanction in this case. Appellant is correct that it refused trafficking, which brings more severe penalties.

No Entrapment

With regards to Appellant's contention that the investigator attempted to entrap the owner into trafficking, the investigative report shows that the investigator asked to purchase ineligible items and the clerk permitted the purchases. (When asked to commit trafficking, the owner said no). Mere solicitation to commit a crime is not inducement which is required to establish entrapment. Nor does the government's use of artifice, stratagem, pretense, deceit (although there is no indication of same in the present case), or the use of the same investigator for multiple purchases establish inducement. Courts have found that inducement is shown only if the investigator's behavior was such that a law-abiding citizen's will to obey the law could have been overborne. There is no support for Appellant's statement that the investigator's tried to convince the owner

that the EBT card could be used for non-food purchases because it was from Tennessee. Further, if the owner was unsure if the card could be used for non-food items because of an out-of-state disaster, the owner could have called the SNAP hotline to clarify this matter at any point prior to permitting the card to be used for non-food purchases on four occasions. If investigators merely provide an opportunity for a suspected violator to continue on a course of improper conduct, such activity does not constitute entrapment. Moreover, even if inducement has been shown, a finding of defendant's predisposition to violate is fatal to an entrapment defense. Predisposition may be said to exist even without prior violations: the ready commission of an offense, such as a person's prompt acceptance of an undercover agent's offer of an opportunity to commit violations, may itself establish predisposition.

No Undue Hardship to Appellant

Appellant maintains that disqualification would pose an extreme hardship to the firm. Economic hardship is a likely consequence whenever a store is disqualified from SNAP participation. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to the firm for economic hardship would forsake fairness and equity to competing stores and other participating retailers who are complying fully with program regulations, and also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that it will incur economic hardship due to an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the imposed penalty.

Investigative Record

Based on a review of the evidence, it appears that the program violations at issue did, in fact, 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 under the supervision of a USDA investigator and all are fully documented. 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.

CIVIL MONEY PENALTY

Appellant contends SNAP participants rely upon the firm, and there is no other firm within three blocks that provides the same goods as Appellant. A CMP as an optional penalty in lieu of a one-year disqualification was considered in this case. Such a finding is appropriate only if: 1) a store sells a substantial variety of staple food items, and; 2) 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.

In this regard, some degree of inconvenience to SNAP benefit users is inherent in the disqualification from the SNAP of any participating food store, since the normal shopping pattern of such SNAP benefit holders may temporarily be altered during that period. In this case, however, the Retailer Operations Division has rendered a finding pursuant to 7 CFR § 278.6(f) that it would not be appropriate to impose a CMP in lieu of a period of disqualification. The Retailer Operations Division has determined that Appellant is not the only authorized retail food store in the area "selling as large a variety of staple food items at comparable prices." In addition, the Retailer Operations Division notes that the subject store is classified in the FNS SNAP retailer database as a small grocery. That database also shows 89 other SNAP authorized stores located within a one-mile radius, including numerous medium grocery stores, supermarkets, and superstores. All of these larger stores are easily accessible to customers and offer a variety and quality 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 other stores. Therefore, the earlier determination that Appellant's disqualification would not create a hardship to customers, as differentiated from potential inconvenience, is sustained, and a CMP in lieu of disqualification is not appropriate in this case.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to impose a disqualification of one year against Sunshine Deli & Grocery from participating as an authorized retailer in SNAP is sustained.

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 one-year 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 Appellant desires a judicial review, 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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

RICH PROULX
Administrative Review Officer

September 4, 2018