

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

**Zig Zagz 24/7 Deli and Convenience #1,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0207729**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a six-month disqualification of Zig Zagz 24/7 Deli and Convenience #1 (hereinafter Appellant), from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as initially imposed by the Retailer Operations Division.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a six-month disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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 Zig Zagz 24/7 Deli and Convenience #1, with Federal SNAP law and regulations from October 23, 2018 through October 31, 2018. In a letter dated December 18, 2018, Retailer Operations Division charged the Appellant firm with accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on five (5) out of five (5) compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

Appellant replied to the charge letter and stated that it does its due diligence in the training process and explain to new employees which items are food stamp eligible, but unfortunately some employees are negligent at times. Appellant stated that it had implemented a new measure to ensure that the mistake will not happen again. Not all ineligible food items are stated in the product description in the PO system when the QR code is scanned to ensure a second screening before products are delivered to the customer. Appellant also stated that it does not sell any articles of clothing and that the clerk in the report ranged from 35-40 and the oldest cashier in the store is 21 years old. Appellant stated that it believes the investigator entered a neighboring store by mistake and apologized for failure to follow protocol.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated February 19, 2019. The determination letter informed the Appellant it was disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked March 1, 2019, the Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal was accepted and the implementation of the six-month disqualification was held in abeyance pending completion of this 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, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e) establish the authority upon which a period of disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, inter alia: "Coupons may be accepted by an authorized retail food store only from eligible households.... Only in exchange for eligible food"

7 CFR § 271.2 states, inter alia: "Eligible food 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 § 278.6(a) states, inter alia: “FNS may disqualify any authorized retail food store... if the firm fails to comply with the Food and Nutrition Act of 1977, 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) states, inter alia: “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(f)(1) states, inter alia: “FNS may impose a civil money penalty as a sanction in lieu of when... the firm’s disqualification would cause hardship to Food Stamp [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**

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

1. I believe the penalty in the form of a 6 month suspension is severe and could be crippling to our business.
2. We understand a mistake was made and we should have prevented this error.
3. We plead for a lesser penalty, mistakes happen and I wish we could have prevented it.
4. We interviewed all employees and all have denied disposing of goods improperly and claim to have followed protocol.
5. In response to the situation additional screening measures prior to delivery of the good have been deployed at our establishment to insure this will never happen again.
6. Some of the items in the investigative report we do not carry or stock.
7. The report mentioned that the clerk was 35-40 years old and the oldest clerk we employ is 23 years old.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

### **ANALYSIS AND FINDINGS**

FNS initially authorized Zig Zagz 24/7 Deli and Convenience #1 as a convenience store on September 19, 2016. During an investigation from October 23, 2018 through October 31, 2018, the USDA conducted five (5) compliance visits at Appellant’s store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated December 18, 2018. The investigation report included Exhibits A through E, which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during five (5) of the five (5) compliance visits. They involved the

sale of four rolls of Scott toilet paper, two 24 count boxes of Parade plastic spoons, three 3.9 lb. bags of parade charcoal briquettes and three rolls of Scott paper towels. A clerk refused the purchase of one ineligible item in Exhibit D and one ineligible item in Exhibit E and the exchange of an undisclosed amount of SNAP benefits for cash in Exhibits D and E.

Appellant did not deny that the violations took place during the investigation and contends that it understands that a mistake was made and it should have prevented the error however, it interviewed all employees and all have denied disposing of goods improperly and claim to have followed protocol. With regard to Appellant's contentions it is important to note that as owner of the store, Appellant is liable for all volatile transactions handled by either paid or unpaid store personnel. 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. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food Stamp Act and the enforcement efforts of the USDA.

Appellant contends that the report mentioned that the clerk was 35-40 years old and the oldest clerk employed is 23 years old. With regard to this contention, it is important to note that the charges of violations are based on the findings of a USDA investigation, conducted by a trained USDA official. The investigative report has been carefully reviewed and does not include any evidence of inconsistencies or errors. The report clearly recounts activities wherein personnel at Zig Zagz 24/7 Deli and Convenience #1 exchanged SNAP benefits for ineligible items. Furthermore, the descriptions of the clerks involved in the transactions are based on the Investigator's perception and may not perfectly match the clerk's actual height, weight or age.

Appellant contends that they do not carry or stock some of the items in the investigative report. With regard to this contention, a review of the investigative report to include the EBT receipts and photographs of items purchased, indicate that the Investigator made all purchases at Appellant's store. Appellant also contends that additional screening measures prior to delivery of the goods has been deployed to insure this will never happen again. With regard to this contention, it is important to clarify, for the record that the purpose of this review is to determine if the earlier decision of the Retailer Operations Division, to disqualify Appellant from participation in the SNAP for a period of six months, was in fact a correct one. It is not within the scope of this review to consider what subsequent actions Appellant may have taken so that its store may begin to comply with program requirements.

Appellant contends that the penalty in the form of a six-month suspension is sever and could be crippling to the business and requested a lesser penalty. With regard to this contention, 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 store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA.

Moreover, 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, Appellant's contention that the assessment of an administrative penalty will cripple the business does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Based on a review of the evidence in this case, there is no question that program violations did occur. Clerks working at Appellant sold common ineligible items to an FNS investigator on five (5) separate investigative visits. The investigative record is specific and accurate with regard to the dates of the violations, the exchange of SNAP benefits for ineligible items, and in all other critically pertinent detail. As such, the contentions presented do not constitute valid grounds for dismissal of the current charges of violations, or for mitigating the impact of those charges. Based on a review of the evidence in this case, it appears that the SNAP violations at issue did, occur as charged.

### **CIVIL MONEY PENALTY**

Appellant requested consideration of a civil money penalty. Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR §278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification because there were at least 113 authorized retailers within a one-mile radius of Appellant. These retailers included small, medium and large grocery stores, superstores, supermarkets and other convenience stores all selling as large a variety of staple foods at comparable prices.

### **CONCLUSION**

The documentation presented by Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm. 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 common nonfood items due to carelessness or poor supervision by the firm's ownership or management.

The violations were determined by Retailer Operations Division to represent the first sanction for the firm and evidence carelessness and poor supervision. Therefore, the imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

It is therefore established that the violations as described in the letter of charges did in fact occur at the Appellant firm warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). Based on the discussion herein, the decision to impose a six-month disqualification against Zig Zagz 24/7 Deli and Convenience #1 is appropriate and the action is sustained.

In accordance with the Act and regulations, the six-month period of disqualification shall become effective thirty (30) days after receipt of this letter. The Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six-month disqualification period.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you 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 receipt of this Decision.

Under the Freedom of Information Act (FOIA), 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.

Monique Brooks  
ADMINISTRATIVE REVIEW OFFICER

July 31, 2019