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

Lin's Deli & Grocery Inc.,	)	
Appellant,	)	
	)	
v.	)	
	)	**Case Number: C0182456**
	)	
Retailer Operations Division,	)	
Respondent.	)	
	)	

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Lin's Deli & Grocery Inc. (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP), and that there is sufficient evidence to support a six month disqualification from the SNAP as initially 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 March 7, 2015 through April 27, 2016. 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 non-food items.

As a result of evidence compiled during this investigation, by letter dated June 7, 2016, Retailer Operations charged ownership with violating the terms and conditions of the SNAP regulations

at 7 CFR § 278.2(a) and noted misuse of SNAP benefits noted in Exhibits A, D, E, and F violates Section 278.2(a) of the SNAP regulations. Further, the violations in Exhibits D, E, and F warrant a disqualification 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.

Ownership replied to the Charge letter by letter dated June 12, 2016. Retailer Operations informed ownership by Determination letter dated July 15, 2016, 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 were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

By letter dated July 22, 2016, ownership appealed Retailer Operations' determination and requested administrative review of this action. The appeal was granted by letter dated September 7, 2016.

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.

Section 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."

Section 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(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 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…" (*emphasis added)*

In addition, 7 CFR § 278.6(f)(1) provides for civil money penalty (CMP) 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, 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 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 USC 2018 (b)(7)(e).

SUMMARY OF THE CHARGES

During an investigation, the USDA conducted six compliance visits at Appellant. A report of the investigation was provided to the Appellant as an attachment to the Charge letter. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during four store visits, and on three visits the violations warrant a six month disqualification. The violations involved the sale of the following non-food items: paper towels, chop sticks, wine glasses, shampoo, wash cloths, dish liquid and bleach powder in exchange for SNAP benefits in violation of 7 CFR § 278.2(a).

APPELLANT'S CONTENTIONS

Consideration of all contentions was made whether these are recapitulated here or not. The owner advanced the following contentions:

- I do understand that we made some mistakes.
- I have tried to improve and re-educate my workers and even myself.
- That is the first time this happened at our store.
- We have a large number of EBT customers; it will affect them and give them a lot of inconvenience.
- A big money loss for us for sure.

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 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 non-food items as defined by Section 271.2 of the regulations, on multiple occasions as noted in the

Exhibits furnished with the Charge letter which warrant a disqualification period of six months. 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." (emphasis added) 7 USC 2018 (b)(7)(e)

The investigation report documented the exchange of SNAP benefits for inexpensive nonfood items during four separate compliance visits, three of which warrant a six month disqualification. 7 USC 2018 (b)(7)(e). A six month disqualification under 7 CFR § 278.6(e)(5) is the appropriate penalty for a first time sanction involving the sale of nonfood items due to carelessness or poor supervision by the store's ownership or management. Therefore, the violations in this case are not violations that are too limited to warrant a disqualification.

Ownership signed the FNS retailer application to become a SNAP authorized retailer, which included a certification and confirmation that the owner 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 ownership 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." The violations listed on this certification include accepting SNAP benefits as payment for ineligible items, a violation of the SNAP rules and regulations.

A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act, regulations, or agency policy that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

Appellant contends that training has been provided to employees. With regard to this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the determination of the Retailer Operations. This review is limited to what circumstances were at the basis of Retailer Operations' action at the time such action occurred. It is not the authority of this review to consider what subsequent remedial actions may be undertaken so that a store might begin to comply with program requirements. There are no provisions in the SNAP regulations or internal agency policy directives 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. Therefore, Appellant's contention

that corrective action such as training has occurred, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Ownership contends that a SNAP disqualification will have a negative financial impact on the business. 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 or internal agency policy directives 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 ownership 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 store 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 retail food stores that have been disqualified from the program in the past for similar violations. Therefore, the owner's contention that Appellant may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that it was not appropriate to impose a civil money penalty in lieu of a six month period of disqualification because there are many other authorized stores within a one mile radius of Appellant that stock a variety of comparable staple foods and have comparable prices. Thus, while it may be inconvenient for some SNAP recipients to transact benefits at other nearby authorized stores, the evidence does not support that it will cause hardship for SNAP recipients if Appellant, a convenience store, is disqualified. Therefore, pursuant to 7 CFR § 278.6(f) it is determined that the disqualification of Appellant would not create a hardship to SNAP households, and that a civil money penalty in lieu of disqualification is not appropriate in this case.

CONCLUSION

Based on a review of the evidence, the record indicates that the program violations at issue did occur at Appellant. The charges of violations are based on the findings of a formal USDA investigation. 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.

A review of the evidence in this case confirms that Retailer Operations' initial determination to impose a six month disqualification in lieu of a CMP was proper. The record documents that Retailer Operations properly considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations. Appellant is located in an area where there are other authorized SNAP retailers, including larger stores, selling as large a variety of staple food items at comparable prices. Given the evidence under review, the CMP was

appropriately denied. Therefore, the six month disqualification of Appellant from participating as an authorized retailer in the SNAP is sustained.

RIGHTS AND REMEDIES

In accordance with the Food and Nutrition Act of 2008, and the regulations there under, this penalty shall become effective thirty (30) days after receipt of this letter. 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.

Your 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. 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 the owner resides or is 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), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

/S/

_____	October 5, 2016
MADELINE VIENS	DATE
ADMINISTRATIVE REVIEW OFFICER	