

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

**New Latin Deli and Grocery,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0210846**

**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 from the Supplemental Nutrition Assistance Program (SNAP) as 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, when it imposed a six-month disqualification against New Latin Deli and Grocery.

**AUTHORITY**

7 U.S.C. § 2023 and its implementing regulation 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 New Latin Deli and Grocery with Federal SNAP law and regulations from April 2019 to June 2019. In a letter dated July 24, 2019, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for merchandise which included ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on four (4) out of five (5) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a disqualification period of six (6) months as provided in 7 CFR § 278.6(e)(5). The Appellant was informed it could respond to the charges within ten (10) calendar days following delivery

of the charge letter. The charge letter was delivered to the store via UPS on July 25, 2019. The Appellant did not respond to the charge letter.

After considering the evidence in the case and the Appellant's lack of response, the Retailer Operations Division issued a determination letter dated August 13, 2019. The determination letter informed the Appellant it was disqualified from the SNAP for a period of six (6) months in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that the Retailer Operations Division considered the 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 other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked August 21, 2019, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request for review was granted. Upon acceptance of the administrative review request, 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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

### **CONTROLLING LAW AND REGULATIONS**

The controlling law in this matter is covered 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 disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

Coupons may be accepted by an authorized retail food store only from eligible households ... and only in exchange for eligible food.

7 CFR § 271.2 states that the definition of "coupon" includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the "Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 271.2 states, in part:

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 § 278.6(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) states, in part:

FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ... (5) **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 non-food items** due to carelessness or poor supervision by the firm's ownership or management. [Emphasis added.]

7 CFR § 278.6(f)(1) states, 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.

### SUMMARY OF THE CHARGES

During an investigation conducted from April 2019 to June 2019, the USDA conducted five (5) compliance visits at New Latin Deli and Grocery. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated July 24, 2019. 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 recorded during four (4) of the five (5) compliance visits as documented by Exhibits B, C, D and E. The chargeable violations in Exhibits B, C, D and E involved the sale of five (5) rolls of Scott toilet paper; a bag of Tide detergent; and a bottle of fabric softener in exchange for SNAP benefits in violation of 7 CFR § 278.2(a). The chargeable violations were committed by two (2) different clerks. One of these clerks refused to exchange SNAP benefits for cash as documented in Exhibit E.

### APPELLANT'S CONTENTIONS

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

- The firm failed to respond to the charge letter as it was misplaced.
- The firm has been accepting SNAP since 2011 and has not had any prior violations.

- The firm's revenue is heavily reliant on SNAP transactions and a six-month disqualification will substantially harm the business and may cause it to close.
- The firm has established new procedures to prevent such violations in the future.
- The firm requests that it be excused for this first violation.

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

### Investigation Report

The investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The investigation report documents by a preponderance of the evidence that personnel at the store exchanged ineligible items for SNAP benefits.

### Violations Warrant a Six-Month Disqualification

The Appellant states that this is its first violation and requests that it be excused on this occasion. However, the SNAP regulation at 7 CFR § 278.6(e)(5) states, in part, that “FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ... **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 non-food items due to carelessness or poor supervision** by the firm's ownership or management.” [Emphasis added.] The investigation report documents that the number of chargeable violations over multiple transactions in this case equate to carelessness or poor supervision by ownership under agency standards.

Although a clerk refused to exchange cash for SNAP benefits in Exhibit E, this does not ameliorate or mitigate the penalty for the clerk exchanging SNAP benefits for non-food items as documented by Exhibits B, C, D and E. Therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification, the least severe penalty allowed by regulation under these circumstances.

### Owner Responsibility

A store owner signed the SNAP authorization application for New Latin Deli and Grocery on September 19, 2011. That application included a signed certification that the owner(s) 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.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations including accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible non-food items.

### **Corrective Action**

The Appellant states the store has taken some unspecified corrective action to insure that there are no further violations. Regarding this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is **limited** to what circumstances existed at the time of the violations that was the basis of the Retailer Operations Division’s action. It is not the authority of this review to consider what subsequent remedial actions may be planned or taken so that a store may begin to comply with program requirements.

In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations. Therefore, the Appellant’s contention that corrective action will take place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Hardship to the Business**

The Appellant contends that a six-month disqualification from the SNAP will create a hardship for the store as it relies upon the SNAP for a significant portion of its business. 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 the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the owner(s), employees or the firm resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

### **HARDSHIP CIVIL MONEY PENALTY**

The Retailer Operations Division determined that the Appellant was not eligible for a hardship CMP under 7 CFR § 278.6(f)(1). That regulation 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.” [Emphasis added.]

The case record documents that the Retailer Operations Division determined that a six-month disqualification of New Latin Deli and Grocery, a small grocery store, would not cause a

hardship to SNAP households as there are other comparable or larger SNAP authorized stores in the area.

The Retailer Operations Division determined through agency mapping systems that there are 18 comparable or larger SNAP authorized stores located within a one-mile radius of New Latin Deli and Grocery. These SNAP authorized stores include a supermarket, a large grocery store, eight (8) medium grocery stores, and eight (8) small grocery stores.

In addition, there is no evidence that New Latin Deli and Grocery carries any specialty or international foods that cannot be obtained at these other stores. Based on this evidence, a six-month disqualification of New Latin Deli and Grocery would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division decision not to assess a hardship CMP in lieu of a six-month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

### CONCLUSION

It is established that the violations as described in the letter of charges did in fact occur at New Latin Deli and Grocery warranting a disqualification of six (6) months in accordance with 7 CFR § 278.6(e)(5). That regulation states that FNS **shall** “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 non-food items due to carelessness or poor supervision by the firm’s ownership or management.” Therefore, the decision to impose a six-month disqualification, **the least severe penalty** allowed by regulation, against New Latin Deli and Grocery, Appellant, 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 authorization ten (10) days prior to the expiration of the six-month disqualification period.

### RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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, FNS is 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.

RONALD C. GWINN  
Administrative Review Officer

November 6, 2019