

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

Harry & Bob’s Deli,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0199237

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 finding that a six (6) month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program¹ (SNAP) was properly imposed against Harry & Bob’s Deli (hereinafter, “Harry & Bob’s Deli” and/or “Appellant”) and you as its owner of record by the FNS Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a) and (e) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a six (6) month disqualification against Harry & Bob’s Deli in a letter dated September 11, 2017.

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

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

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 Harry & Bob's Deli with Federal SNAP law and regulations which consisted of three (3) visits completed between July 12, 2017 and July 18, 2017.

The *USDA-FNS Report of Positive Investigation* (hereinafter, "Investigative Report") number HO01035 dated August 16, 2017 disclosed that on three (3) separate occasions Harry & Bob's Deli personnel accepted SNAP benefits for merchandise that was ineligible for purchase with such benefits from a USDA Investigator. Identification information ascertained from the Investigative Report indicated that these SNAP violations were handled at Appellant firm by two (2) clerks.

As a result of the evidence compiled during the USDA investigation, in a letter dated August 21, 2017, the Retailer Operations Division, charged Appellant with violating 7 CFR § 278.2(a) of the SNAP regulations. A copy of the redacted Investigative Report was provided for consideration.

The Retailer Operations Division's record documents that a written response was received to the letter of charges which was considered prior to the issuance of a final determination letter dated September 11, 2017, assessing a six (6) month disqualification from participation as an authorized retailer in the SNAP against Harry & Bob's Deli.

Appellant, through its owner, requested an administrative review of this action appealing the Retailer Operations Division's determination via letter dated September 13, 2017 that was received by the Chief of the Administrative Review Branch on September 15, 2017.

The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review in accordance with 7 CFR § 279.4(a).

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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 AND REGULATIONS

The controlling statute in this matter is contained in the *Food and Nutrition Act of 2008*, as amended (the “Act”)², 7 USC 2023 and 278 of Title 7 of the Code of Federal Regulations (CFR).³

7 CFR § 278.2(a) “Use of Coupons”, states, in relevant part, “Coupons may be accepted by an authorized retail food store only from eligible households... only in exchange for eligible food.”

7 CFR § 271.2 defines **Eligible foods**” in relative part as “**Any food and food product** intended for human consumption **except** alcoholic beverages, tobacco and **hot foods and hot food products prepared for immediate consumption...**” (Emphasis Added)

7 CFR § 278.6 establishes the authority upon which a period of disqualification may be imposed against an authorized food store or wholesale food concern in the event that it has failed to comply with the Act.

7 CFR § 278.6(e) provides the following, in relevant part, with respect to penalties that may be assessed against firms determined to have violated the Act or regulations:

“...For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. A civil money penalty and a disqualification shall be considered sanctions for such purposes...”

7 CFR § 278.6(e)(5) applies to the period of disqualification under review, and specifies 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 nonfood items due to carelessness or poor supervision by the firm’s ownership or management.”

7 CFR § 278.6(e)(7), states, that FNS shall,

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment through P.L. 113-79, enacted February 7, 2014.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

“Send the firm a warning letter if violations are too limited to warrant a disqualification.”

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 households because of the unavailability of a comparable participating food store in the area to meet their shopping needs.

7 CFR §278.6(f)(1) 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 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.”

SUMMARY OF THE CHARGES

USDA conducts investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of SNAP violations that may be occurring. In the instant case the Investigative Report dated August 16, 2017, reveals that a USDA Investigator completed three (3) total investigative visits at Harry & Bob’s Deli between July 12, 2017 and July 18, 2017.

The report materials were provided to Appellant as attachments to the charge letter dated August 21, 2017 and included exhibits A through C that provide detail of the investigative results. The report reveals SNAP violations were recorded during each of the three (3) reported visits, included as exhibits A, B, and C of the Investigative Report wherein the exchange of SNAP benefits for hot foods and non-food items was recorded. The record shows that in each of the exhibits SNAP was exchanged for hot sandwiches, prepared on site, together with what is referred to in FNS terms as “common ineligible items” including bathroom tissue; trash bags; paper towels; and a lighter. The Investigative Report further discloses that exchange of cash was refused in exhibit C, by an unidentified female clerk.

The violations are documented to have involved two (2) clerks initially recorded as an unidentified male [Exhibit B] and an unidentified female [Exhibits A and C]. During the course of the investigation it is recorded that the unidentified female clerk from exhibits A and C, who is noted to have been present during each of the violations, identified the previously unidentified male as an owner⁴. The individual identified as the owner was documented to

⁴ The request for review materials signed by the owner of record indicates that her son is running the deli since her husband’s demise. He is not identified as an owner of record.

have approved each of the three (3) violative sales; and to have acted as the cook in each of the transactions described in exhibits A, B and C.

The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf.

APPELLANT'S CONTENTIONS

The request for appeal dated September 13, 2017 conveys that:

- A training program has been instituted to avert further violations;
- Appellant, in operation and authorized as a SNAP retailer for over 40 years, has never had an incidence of SNAP violations previously;
- A 5 U.S.C. § 552 (b)(6) & (b)(7)(C) mistake for which a six (6) month penalty will be imposed is likely to force Appellant to close its doors; and,
- A request is made for the allowance of the imposition of a civil money penalty in lieu of a six month disqualification; or, in the alternative a reduction in penalty to one (1) month.

In additional materials dated September 28, 2017 and received by the Administrative Review Officer on October 4, 2017, Appellant through its owner, expressed disagreement with the Retailer Operations Division assessment that there were other nearby SNAP authorized firms to fulfill the needs of its SNAP customers.

Appellant's owner indicates that Appellant is a cornerstone of the neighborhood; that it uses the best products available in preparation of its sandwiches; and, that it is a sole source in a food desert for neighborhood customers to obtain basic staple foods such as milk, bread and eggs. Also provided for consideration were:

- a copy of the obituary for the owner's husband who is explained to have run Appellant, until his untimely death in 2013, without SNAP violations;
- a petition signed by 211 "concerned citizens" urging USDA to reverse its decision to disqualify Appellant for six (6) months, citing that absence of the ability of Appellant to accept SNAP will pose a hardship to the neighborhood;
- a photograph of a donation jar set up to accept donations for the victims of the Puerto Rico hurricane;
- a three (3) day prayer to Our Lady of Mount Carmel; and
- a copy of the previous response to the letter of charges provided to the Retailer Operations Division.

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

ANALYSIS AND FINDINGS

That SNAP benefits are not for the purchase of hot foods and non-food items is clear in the “Act” and in the SNAP regulations, with noted exceptions, such as seeds used to grow food, and hunting equipment in remote areas of Alaska. This and other rules governing SNAP were provided to Appellant upon initial SNAP authorization in June of 1973 and have been repeatedly provided through the years upon periodic reauthorization.

7 CFR § 278.6(e)(5) of the SNAP regulations states that FNS shall disqualify a store for six (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 the sale of hot foods or common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management.

Corrective Action:

In response to the initial letter of charges Appellant indicates that the sale of hot foods was made under the mistaken impression that the investigator was qualified to receive hot foods under SNAP regulations; that the sale of non-food items was not authorized by the owner; and that a training program together with improved signage have been established to avert future violations.

Addressing the contentions as expressed:

- The Investigative Report includes no evidence that the USDA Investigator was authorized to purchase hot foods using SNAP. The SNAP regulations do not permit the sale of hot foods except under special conditions such as the participation of restaurants operating under a contract with a State or local agency to prepare and serve low-cost meals to homeless persons, elderly persons, disabled or handicapped persons; participants in authorized drug addict or alcoholic treatment programs; residents of licensed group homes; and residents of shelters for battered women and children.
- Although Appellant indicates that the sale of ineligible items was not authorized by ownership, this contention cannot be accepted as a valid

basis for dismissing any of the charges, or for mitigating the impact of those charges. 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 and Nutrition Act of 2008 and the enforcement efforts of the USDA.

- Appellant has indicated both in the initial response to the letter of charges provided to the Retailer Operations Division, and on appeal, that corrective actions have been implemented to avert future SNAP violations. These corrective actions include signage in English and Spanish reminding customers that hot foods are not eligible for purchase with SNAP benefits; and the implementation of a training program. Although both of those actions could potentially impact the reoccurrence of SNAP violations the corrective actions cannot be considered as a basis to mitigate or reverse the current SNAP violations as cited.

First Time Violation:

Appellant, through its owner, contends that the violations identified in the Investigative Report reflect a first time offense in over 40 years of SNAP authorization. On review it is affirmed that the record does not evidence any previous chargeable SNAP violations. However, the lack of previous violation is not a basis for mitigating or reversing the penalty being assessed. 7 CFR § 278.6(e)(5) clearly requires that FNS impose a penalty of six (6) months for violations found to represent a “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.”

Economic Impact:

To Appellant’s contention that a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) mistake for which a six (6) month penalty will be imposed is likely to force Appellant to close its doors; it is noted that an economic impact is expected to result from the disqualification of any SNAP authorized retailer.

The economic impact is likely to be evident to not only Appellant’s operation but to that of competitor firms. Similarly, the shopping patterns of frequent customers may be subject to impact; and, the income of families dependent on Appellant revenue will likely be impacted.

Notwithstanding the recognized economic impact consideration must be given to the interests of the program and the fairness and equity, not only to competing stores but also to those other participating retailers who are complying fully with program regulations. In addition, fairness must be afforded to those other retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contentions do not provide a basis for mitigating or reversing the current penalty as assessed by the Retailer Operations Division.

Petition by Customers

Appellant has provided a petition, reported to be signed by 211 "concerned citizens" urging the USDA to allow Appellant to continue excepting SNAP benefits; requesting the decision to "close down the SNAP Program for 6 mos" be reversed; and stating that disqualification of Appellant would pose a hardship to the neighborhood. The petition provided included comments by several of the signatories indicating that Appellant is a family store, known in the community for many years, run by honest, respectful, responsible, helpful people that do not deserve the penalty being imposed.

On review it is noted that the provision of the petition as described cannot be considered as a basis to mitigate or reverse the penalty in review. That Appellant enjoys popularity and support in the neighborhood is admirable, however, the SNAP regulations are specific with regard to the type of penalty to be imposed for the violations as evidenced to have occurred at Appellant firm.

Civil Money Penalty:

Appellant has requested that payment of a CMP be allowed in lieu of disqualification; or in the alternative, the penalty be reduced to one (1) month. The previously cited petition cites that disqualification of Appellant will pose a hardship to the neighborhood.

7 CFR § 278.6(f)(1) 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 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." The record reflects that the Retailer Operations Division has rendered a finding that pursuant to 7 CFR § 278.6(f)(1), it would not be appropriate to impose a civil money penalty in lieu of a period of disqualification on Appellant firm.

The Retailer Operations Division record reflects that Harry & Bob's Deli is classified within FNS definitions as a small grocery store; and, that there are at least 115 SNAP authorized firms within a one (1) mile radius of Appellant

including a superstore and two (2) supermarkets located approximately one-quarter mile from Appellant.

Retailer Operations Division documented having reviewed the surrounding area and finding no indication that the alternative SNAP authorized firms would not provide a variety of staple foods at comparable prices to those of Appellant.

Based on the availability of the alternative SNAP authorized retailers the Retailer Operations Division has determined that the temporary disqualification of Appellant would not create a hardship to customers.

It is recognized that some degree of inconvenience to SNAP customers is inherent from the temporary disqualification of any participating food store. Although the normal shopping pattern of such SNAP customers may be temporarily altered during the period of disqualification, the determination that the disqualification of Harry & Bob's Deli would not create a hardship to customers, as differentiated from potential inconvenience is sustained and a civil money penalty in lieu of disqualification is found not to be appropriate in this case.

CONCLUSION

The charges of violations are based on the findings of a formal USDA investigation in which all transactions cited in the letter of charges were fully documented. A complete review of this documentation has yielded no swaying error or discrepancy. The Investigative Report is specific and thorough with regard to the dates of the violations and the specific related facts.

The documentation presented by the Retailer Operations Division clearly provides a preponderance of the evidence that the violations as reported occurred at Appellant firm and, 7 CFR §278.6(e)(5) specifies 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 nonfood items due to carelessness or poor supervision by the firm's ownership or management." It is established that the violations as described in the letter of charges dated August 21, 2017, did in fact occur at Appellant's firm, warranting a disqualification of six (6) months in accordance with 7 CFR §278.6(e)(5).

Based on the discussion above, the decision to impose a six (6) month disqualification against Harry & Bob's Deli is proper and the action is sustained.

In accordance with the Act and regulations, **the six (6) month period of disqualification shall become effective thirty (30) days after receipt of this letter.** Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six (6) month 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 a judicial review is desired, 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, 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.

NANCY BACA-STEPAN
Administrative Review Officer

October 31, 2017