

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

**Chez Rafiki African Market,
Appellant,
v.
Retailer Operations Division,
Respondent.**

Case Number: C0240570

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 one-year disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Chez Rafiki African Market (hereinafter “Chez Rafiki African Market” or “Appellant”) by the Retailer Operations Division of FNS.

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 one-year period of disqualification against Chez Rafiki African Market.

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 Department of Agriculture investigated of the compliance of Chez Rafiki African Market with Federal SNAP law and regulations during the period March 2, 2021, through March 8, 2021. In a letter dated March 29, 2021, the Retailer Operations Division charged the Appellant with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three out of four compliance visits and warranted a disqualification period of one year as provided in 7 CFR § 278.6(e)(6). The letter also stated that under certain conditions, FNS may impose a hardship civil money penalty (CMP) in lieu of a disqualification as provided in 7 CFR § 278.6(f)(1).

The charge letter noted that per SNAP regulations Section 278.6(b), the Appellant has the right to present any information, explanation or evidence regarding the charges and must reply within 10 calendar days of the date of receipt of the charge letter. Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on April 13, 2021.

In a response to the Retailer Operations Division of April 20, 2021, the Appellant replied to the charges therein stating that the owner is sorry that the firm violated the SNAP regulations by selling ineligible nonfood items with SNAP benefits. The owner requests a second chance to serve the community. The owner promises that these violations will not occur in the future and the Appellant will sell items according to the SNAP rules. The owner will have the store clerk watch the video on the SNAP rules once a month.

After considering the Appellant's response and the evidence of this case, the Retailer Operations Division issued a determination letter dated May 6, 2021. The determination letter informed the Appellant that the firm was disqualified from the SNAP for a period of one year in accordance with 7 CFR § 278.6(a) and 7 CFR § 278.6(e)(6). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a hardship civil money penalty 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 one-year 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 May 15, 2021, the Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated June 9, 2021. Upon acceptance of the administrative review request, implementation of the one-year disqualification was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record, 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulations under Title 7 CFR Part 278. 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, 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 foods mean: 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 2008, as amended, or this part. Such disqualification shall result from a finding of a violation based on 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(e)(6) states, inter alia:

Double the appropriate period of disqualification prescribed in paragraphs (e)(2) through (5) of this section as warranted by the evidence of violations if the same firm has once before been assigned a sanction.

7 CFR § 278.6(f)(1) states, inter alia:

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

During an investigation conducted from March 2, 2021, through March 8, 2021, USDA conducted four compliance visits at Chez Rafiki African Market. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated March 29, 2021. The investigation report included Exhibits A through D which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during three of the four compliance visits and involved the sale of a variety of items best described in regulatory terms as "common nonfood items". The misuse of SNAP benefits noted in Exhibits A, B, and C warrant a disqualification period of one year as provided in 7 CFR § 278.6(e)(6). The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

APPELLANT'S CONTENTIONS

The following represents a summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the reply to the charge letter and in administrative review request, the Appellant stated the following summarized contentions, in relevant part:

- The owner is sorry that the firm violated the SNAP regulations by selling ineligible nonfood items with SNAP benefits.
- A clerk and the owner were involved in the violations.
- The owner requests a second chance to serve the community.
- The owner promises that these violations will not occur in the future and the Appellant will sell items according to the SNAP rules.
- The owner will have the store clerk watch the video on the SNAP rules once a month.
- The trafficking civil money penalty (TCMP) imposed upon the owner in 2020 totaled \$67,000.00 between the TCMP, lawyer fees and security bond.
- The owner had to borrow this amount from twelve different persons and needs to pay them back.
- The owner will not be able to pay back the money borrowed if the firm is disqualified from the SNAP for one year.
- A SNAP disqualification will impose a financial hardship on the Appellant.
- The owner requests a civil money penalty in lieu of a SNAP disqualification.

In support of these contentions, the Appellant submitted a Bill of Collection for a trafficking civil money penalty of \$59,000.00 dated September 10, 2020, and a Security Bond dated November 3, 2020, for \$1,458.00.

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by the Retailer Operations Division; it is limited to the facts at the basis of the Retailer Operations Division's determination at the time it was made.

The owner contends that she apologizes for the SNAP violations and requests a second chance to serve the community. A clerk and the owner were involved in the violations. However, when store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP.

The FNS investigative report shows that two employees working at the Appellant firm accepted SNAP benefits for ineligible nonfood items on three separate occasions during the investigative period indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The report shows that the nature and scope of the violations under review do violate SNAP regulations, and the transaction amounts cited in the report also match FNS transaction records for the dates in question. Additionally, a review of the report shows no errors or discrepancies.

There is no regulatory threshold for the dollar value of the ineligible items purchased or for the timeframe in which they were purchased. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items.

The SNAP regulations explicitly state that FNS shall disqualify a store for a six-month period 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 common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management. However, the SNAP regulations state that this sanction shall be doubled as warranted by the evidence of violations if the same firm has once before been assigned a sanction. 7 CFR § 278.6(e)(6) of the SNAP regulations states, "Double the appropriate period of disqualification prescribed in § 278.6(e)(5) as warranted by the evidence of violations if the same firm has once before been assigned a sanction". FNS' records indicate that the Appellant was sanctioned a trafficking civil money penalty of \$59,000.00 on September 11, 2020, and that the trafficking civil money penalty was paid in full by the Appellant on October 15, 2020.

Had an effective compliance policy and program been in effect at the firm, it is unlikely that the employees would have made such obvious mistakes. The more likely explanation is that store ownership and/or management failed to properly train and subsequently supervise the employees. Additionally, had store ownership and/or management been supervising the employees through occasionally monitoring them using videotape, if available, or in person, it would have readily noticed that they were allowing the sale of ineligible nonfood items in exchange for SNAP benefits.

It also would have been immediately evident to store ownership and/or management that the employees were deficient in their knowledge of SNAP rules and regulations had it periodically spot checked the employees' knowledge and abilities by asking questions about SNAP eligible/ineligible items. Either of these basic supervisory techniques would have provided a no cost method for store ownership and/or management to ensure that store employees were not putting the firm's SNAP authorization at risk.

These are clear signs of poor or no supervision by store ownership and/or management. It is highly improbable, based on the willingness of the employees to exchange SNAP benefits for ineligible nonfood items, that the only instances of SNAP violations were those transactions identified as part of the FNS undercover investigation. These actions more likely than not represent an ongoing pattern of SNAP violations at the Appellant firm. Under SNAP regulations, the penalty for allowing the purchase of ineligible nonfood items using SNAP benefits as the result of poor supervision by ownership or management is a six-month disqualification. However, the SNAP regulations at 7 CFR § 278.6(e)(6) state that this sanction shall be doubled as warranted by the evidence of violations if the same firm has once before been assigned a sanction.

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur.

Based on this discussion, the decision by the Retailer Operations Division to disqualify the firm for a one-year period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

Corrective Action

The owner contends that she promises that these violations will not occur in the future and the Appellant will sell items according to the SNAP rules. The owner will have the store clerk watch the video on the SNAP rules once a month.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment based on after-the-fact corrective action implemented after investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Financial Hardship

With regards to the Appellant's contentions that a SNAP disqualification will impose a financial hardship on the firm, 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 based on possible economic hardship to the firm or to ownership 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, as amended, and the enforcement efforts of the USDA.

Furthermore, 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, the Appellant's contention that the firm 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

The Appellant requests the imposition of a civil money penalty in lieu of SNAP disqualification.

The Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty (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]. 5 U.S.C. § 552 (b)(7)(E).

Therefore, based on the evidence, the disqualification of Chez Rafiki African Market would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division’s decision not to assess a hardship CMP in lieu of a one-year disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is therefore established that the violations as described in the letter of charges did in fact occur at Chez Rafiki African Market warranting a disqualification of one year in accordance with 7 CFR § 278.6(e)(5) and 7 CFR § 278.6(e)(6). 7 CFR § 278.6(e)(5) 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 nonfood items due to carelessness or poor supervision by the firm’s ownership or management”. 7 CFR § 278.6(e)(6) of the SNAP regulations states that this sanction shall be doubled as warranted by the evidence of violations if the same firm has once before been assigned a sanction. The Appellant was sanctioned a trafficking civil money penalty of \$59,000.00 on September 11, 2020, and the record indicates that the trafficking civil money penalty was paid in full by the Appellant on October 15, 2020. Therefore, the decision to impose a one-year disqualification against Chez Rafiki African Market, the Appellant firm, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the one-year period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this one-year period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (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 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

July 21, 2021