

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

Chayo Market,

Appellant,

Case Number: C0245060

v.

Office of Retailer Operations and Compliance,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a three year disqualification against Chayo Market (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(3), and § 278.6(f)(1) in its administration of the SNAP when it assessed a three year period of disqualification against Appellant.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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

A USDA investigator conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period August 24, 2021, through August 31, 2021. The investigation determined that personnel at the Appellant firm accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. All four transactions were deemed clearly violative and warrant a three year disqualification period as the firm had received a warning letter in 2019 advising it that violations were occurring and of the possible consequences of violating SNAP regulations. The items sold are best described in regulatory terms as common nonfood items such as foam plates, foam cups, and plastic utensils. The investigative report indicates that these violative transactions were handled by three different clerks. The report shows that these clerks all readily allowed the exchange of SNAP benefits for ineligible items in Exhibits A, B, C, and D. The clerk in Exhibit D did refuse the exchange of SNAP benefits for cash, but allowed the exchange of SNAP benefits for ineligible items in both Exhibits A and D.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated October 4, 2021, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of three years. The letter also states that under certain conditions, FNS may impose a CMP in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant responded to the charges in a letter dated October 5, 2021, that did not request a CMP. After giving consideration to the evidence, the Office of Retailer Operations and Compliance notified Appellant in a letter dated October 26, 2021, that it determined that violations had occurred at the firm, and that a three year period of disqualification from participating as an authorized firm in SNAP was warranted. This determination letter also states that Appellant’s eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

By an email dated November 4, 2021, Appellant appealed the Office of Retailer Operations and Compliance’s decision and requested an administrative review of this action. The appeal was granted

and implementation of the sanction has been held in abeyance pending completion of this review. Subsequent correspondence was received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, Sections 278.6(a) and (e)(3) establish the authority upon which a three year disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 271.2 states that: 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 § 278.2(a) states that: Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. Further, the citation specifies that coupons may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states that: 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)(3)(i) states that: Disqualify the firm for 3 years if it is to be the first sanction for the firm and the evidence shows that: It is the firm's practice to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket and the firm was previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations;

7 CFR § 278.6(f)(1) states that, 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. FNS may disqualify a store which meets the criteria for a CMP if the store had previously been assigned a sanction. A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

APPELLANT'S CONTENTIONS

The following may represent a summary of Appellant's contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The owner is aware of the mistake and promises to be more careful when scanning items;
- SNAP is a big part of sales and is convenient for customers;
- The owner will personally see that every transaction is carefully done and charged appropriately. The owner understands the importance of the SNAP program and requests that USDA reconsider keeping the store in the program; and,
- The owner will lose money if SNAP is stopped.

Appellant submitted a copy of a processing statement in support of these contentions.

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 decision of the Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the action at the time such action was made. In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that 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 untrue. 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. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. While store ownership may not have personally conducted

the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, that ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. 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 three employees working at the Appellant firm accepted SNAP benefits for ineligible items on four separate occasions during the investigative period indicating a series of SNAP violations most likely resulting from a lack of training as well as poor or no supervision. 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. 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. SNAP regulations explicitly state that FNS shall disqualify a store for a three year period if it is to be the first sanction for the firm, and the evidence shows that "It is the firm's practice to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket and the firm was previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations."

SNAP benefits, in general, are only authorized to be used for the purchase of foods for the household to eat as well as seeds and plants which produce food for the household to eat. The many nonfood items purchased are clearly not edible foods and are not plants or seeds, so one has to question the level of training these employees received by store ownership and/or management. The basic concept of "if you can't eat it, you can't buy it using SNAP" is not a difficult one for employees to grasp, yet these employees allowed the purchase of ineligible items using SNAP benefits on multiple occasions. Had an effective compliance policy and program been in effect at the firm, it is unlikely that these 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 these employees. Additionally, had store ownership and/or management been supervising these 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 these employees were deficient in their knowledge of SNAP rules and regulations had it periodically spot checked their 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 license at risk.

It is highly improbable, based on the willingness of these 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. Common sense dictates that these actions more likely than not represented an ongoing pattern and practice of SNAP violations at the Appellant firm. As previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight and training on the part of ownership to ensure employees, especially new employees, are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store ownership to not have a program of ongoing supervision of employee performance and conduct by periodically monitoring store transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the firm or conducting other activities that would jeopardize the licenses and income that the firm is dependent upon. Under SNAP regulations, a firm's practice to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket when the firm was previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations will result in a three year disqualification. The regulations do allow SNAP retailers to pay a hardship CMP, if eligible, as explained in the next section.

Based on this discussion, the decision by the Office of Retailer Operations and Compliance to disqualify the firm for a three year period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed. The assessment of a hardship CMP is discussed in the next section.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications. The matter under review is a term disqualification of three years and does not involve trafficking therefore a trafficking CMP cannot be considered under 7 CFR § 278.6.

A hardship CMP as an optional penalty in lieu of a three year disqualification was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and its disqualification would create a 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. FNS records show there are at least 26 comparably sized or larger SNAP retailers located within a 0.52 mile radius of Appellant's location that includes two supermarkets, two medium grocery stores, three small grocery stores, and 19 convenience stores. The nearest small grocery store is less than two blocks away while the two medium grocery stores are both approximately 3.5 blocks from Appellant's location while the nearest supermarket is less than one-half mile away. There are also many additional larger stores located slightly further away. All of the comparable stores stock adequate varieties of food in all four staple food categories and in perishables as required by FNS. Additionally, the larger stores located nearby stock a far greater quantity and variety of produce, fresh meats, and grocery items than the Appellant firm.

The nearby stores appear readily accessible to SNAP recipients and offer a variety of staple foods comparable to, or better than, those offered by Appellant, including ethnic foods. It is acknowledged that some level of inconvenience to SNAP users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience, however, does not rise to the level of hardship required by the regulations.

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP or a CMP is imposed in lieu of a period of disqualification. 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 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, ownership'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.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged and as admitted by store ownership. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA investigator and signed under penalty of perjury. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate 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. Accordingly, the determination by the Office of Retailer Operations and Compliance to impose a disqualification of three years against the Appellant firm from participating as an authorized retailer in SNAP is sustained. Furthermore, the Office of Retailer Operations and Compliance properly determined that Appellant was not eligible for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this decision. A new application for SNAP participation may be submitted ten (10) days prior to the expiration of the three year disqualification period. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on

the FNS web site. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

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.

ROBERT T. DEEGAN

May 18, 2022

ADMINISTRATIVE REVIEW OFFICER