

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

**Freunds Fish Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0245471**

**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 month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Freunds Fish Market (hereinafter “Freunds Fish 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 six month period of disqualification against Freunds Fish 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 conducted an investigation of the compliance of Freunds Fish Market with Federal SNAP law and regulations during the period October 22, 2021 through November 1, 2021. In a letter dated January 10, 2022, 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 four out of four compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5). 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 January 12, 2022.

The record reflects that on January 18, 2022, the Appellant's counsel requested an extension in time for providing a response to the letter of charges. By letter of January 20, 2022, the Retailer Operations Division granted counsel's time extension request to February 2, 2022.

In responses to the Retailer Operations Division of January 18, 2022 and February 9, 2022, the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After giving consideration to the Appellant's responses and the evidence of this case, the Retailer Operations Division issued a determination letter dated March 30, 2022. The determination letter informed the Appellant that the firm was disqualified from the SNAP for a period of six 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 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 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 April 1, 2022, the Appellant, through counsel, 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 April 5, 2022. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this review. In a letter of April 26, 2022, the Appellant, through counsel, submitted additional information in support of the request for administrative 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 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 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. 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, 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 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, 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.

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(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 October 22, 2021 through November 1, 2021, USDA conducted four compliance visits at Freunds Fish Market. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated January 10, 2022. 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 four 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, C, and D warrant a disqualification as a SNAP retail food store for a period of

six months. 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 brief 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 replies to the charge letter, in the administrative review request, and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant has not committed any violations in connection with the transactions set out in the charge letter.
- The pertinent proof at this stage of the disqualification process is the "preponderance of the evidence" standard, which means that the evidence must be adequate enough 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. See *L&M Grocery Market, Inc. v. Retailer Operations and Compliance*.
- The Department bears the burden of proof, not the retailer at this stage of the proceedings. See *Primo Meat Market vs. Retailer Operations Division*.
- The plain language of 7 CFR § 278.6(d), and logical application to its terms to a disqualification, indicates that absent intent, a less stringent action should be taken in response. Courts have also previously overturned disqualifications where FNS failed to adequately consider intent. See *infra Vasudeva v. U.S.*
- Clerks receive initial (within 30 days of their hiring) and periodic training on how to operate the cash register and more pertinently, how to process EBT transactions. Using USDA's training guidelines, each clerk is taught what items can and cannot be purchased with SNAP benefits.
- The clerk in Exhibit D refused to exchange SNAP benefits for cash.
- Contracted investigators are less reliable than the previous RIB investigators. Appellant's counsel is aware of investigators who have stolen items from the store, utilized sexual innuendo, going so far as to text store personnel in the middle of the night, and have flat out lied on their affidavits about the events of the store's transactions. The contracted investigator has every reason to make allegations against stores in an attempt to further a disqualification.
- It is FNS's burden of proof and where there is an inconsistency with the information received by the investigator, it should be disregarded if it cannot be reconciled.
- All ineligible items have been removed from the Appellant and are no longer offered for purchase since receipt of the charge letter.
- There is no evidence that the alleged sales of common nonfood items was due to carelessness or poor supervision by the store's ownership or management.
- The Appellant was not warned by FNS that violations of the SNAP rules may be occurring prior to charging the firm. A store owner or manager without such warning

would have to be specifically aware of the transactions or have exercised something less than “average supervision” for a sanction to be warranted.

- The violations are too limited to warrant a disqualification. The items involved are minor ineligible items for relatively de minimus amounts of money, indicating that the scope of the violations are de minimus.
- A warning letter should be issued in lieu of SNAP disqualification. This matter should be afforded the same standards set out in *Primo Meat Market vs. Retailer Operations Division* as a determination under similar circumstances which is different would be described as arbitrary and capricious and furthermore, without sufficient evidentiary support. The Appellant also cited *Dale v. Selby Superette & Deli v. U.S. Dep’t of Agric.*, *Kim v. United States*, *Vasudeva v. United States*, and *Wolf v. United States* in support thereof.
- The Appellant has not been cited for prior SNAP violations.
- Not holding the determinations in abeyance while a FOIA response is pending violates 7 CFR § 278.6(b)(1) according to *Triple E Express vs. ROD*, because the Appellant is not given a full opportunity to respond.
- According to USDA’s *Profile of SNAP Households* for the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (where the Appellant is located), approximately 11% of the households receive SNAP benefits.
- The Appellant services a much higher African American, Asian, and Hispanic population than the average SNAP retailer to whom their transactions are compared.
- The Appellant provided information regarding SNAP households’ shopping habits and cited the following studies in support thereof: *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017 Final Report*, Insight Policy Research, September 2020; *Shopping Pattern and Food Purchase Difference Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017; and *What Does SNAP Benefit Usage Tell Us About Food Access in Low-Income Neighborhoods?*, Social Science & Medicine, 2014.
- The Appellant is a specialty fish, seafood, and Asian market and sells a variety and quantity of staple food items to the surrounding community with 700+ items of fish or fish ingredients, rice, frozen vegetables and dishes.
- The Appellant requests the imposition of a hardship civil money in lieu of a SNAP disqualification. The Appellant is in an area with a higher per-capital population of SNAP households than the average store. The absence of a large grocery store in the immediate area has a direct impact on how the local SNAP participants rely upon the subject store. A full hardship analysis should not be limited to a rigid distance analysis. Instead, local circumstances which bear on the issue of convenience and accessibility should be weighted more significantly than a wrote-mile determination. The store is in an area with comparatively low numbers of large SNAP retailers, and a higher volume of SNAP participants. Though there are several stores within a mile that are authorized, the price, food quality, and service of the Appellant are known to the local neighborhood and are superior. The Appellant cited several Google reviews of the Appellant in support thereof.

In support of its contentions, the Appellant, through counsel, submitted the following information for review:

- *Profile of SNAP Households in 2018*, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), USDA FNS; and
- Six (6) food stock photos.

## ANALYSIS AND FINDINGS

### SNAP Violations

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.

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.

Regardless of who the store owner utilizes to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. 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. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations.

The charges of violations are based on the findings of a formal USDA investigation conducted of the compliance of Freunds Fish Market with Federal SNAP law and regulations during the period October 22, 2021 through November 1, 2021. Investigators are trained thoroughly before entering any retail establishment and all protocols, including but not limited to what can and cannot be said. Investigators sign, under penalty of perjury, that investigative reports are true and correct. The investigators in these cases are licensed by the states and on top of being prosecuted for perjury, can lose their jobs and their licenses giving them no incentive to fabricate the information contained in the Reports of Investigation.

All transactions are fully documented and a complete review of this documentation has yielded no known error or discrepancy in the reported findings. 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 documentation on record includes EBT receipts and photos showing that 14 ineligible nonfood items and 11 eligible food items were purchased with SNAP benefits by the investigator. Also on record is documentation that confirms that the ineligible nonfood items and the eligible food items previously noted were donated to and signed for by a charitable organization following the transaction. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the

donation was made, and the official's initials next to the items donated. Moreover, the total purchase costs of each of the transactions involved in the investigation is documented on SNAP terminal receipts obtained during each transaction and matches the reported purchase totals indicated in the investigation report.

The Appellant is correct that the clerk in Exhibit D refused to exchange SNAP benefits for cash. However, the FNS investigative report documents by a preponderance of the evidence that two male employees working at the Appellant firm accepted SNAP benefits for ineligible nonfood items on four separate occasions during the investigative period indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The investigation report documents by a preponderance of the evidence that the store employees engaged in the misuse of SNAP benefits noted in Exhibits A, B, C, and D, warranting a disqualification as a SNAP retail food store for a period of six months. The owner submitted no evidence to support that the transactions did not occur at the Appellant.

The Appellant contends that the violations were minor in nature and too limited to warrant a disqualification. Therefore, a warning letter should be issued in lieu of SNAP disqualification. However, neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of SNAP benefits for transactions involving the sale of ineligible items to be defined as violative. No mention of minimum cost or types of ineligibles is cited in Section 278.6(e)(5) of the SNAP regulations, which states that FNS shall disqualify a store 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 in exchange for SNAP benefits due to carelessness by store employees or poor supervision by the firm's ownership or management.

The Appellant contends that there is no evidence showing that the alleged sales of common nonfood items was due to carelessness or poor supervision by the store's ownership or management. However, 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. The regulations do allow SNAP retailers to pay a hardship CMP, if eligible, as explained in the Civil Money Penalty section of this Final Agency Decision.

The Appellant is correct that the firm has no previous history of SNAP program violations or warnings. However, 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 those charges.

With regard to the Appellant's contentions that the owner was not given any prior notice by FNS that violations were occurring, 7 CFR § 278.6(d)(2) & (3) of the SNAP regulations provides that "The FNS office making a disqualification or penalty determination . . . shall consider . . . any prior action . . . to warn the firm about the possibility that violations are occurring . . .". The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn the Appellant about the possibility that violations were occurring because there were no prior warnings.

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 as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. 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 six month period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Corrective Action**

The Appellant contends that since receipt of the charge letter, all ineligible items have been removed from the store and are no longer offered for purchase.

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 on the basis of after-the-fact corrective action implemented subsequent to 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.

### **FOIA**

The Appellant contends that not holding determinations in abeyance while FOIA responses are pending violates 7 CFR §278.6(b)(1) according to *Triple E Express vs. ROD*, because the Appellant is not given a full opportunity to respond. With regard to this contention, effective October 26, 2020, the changes to 7 CFR § 278.6 and 7 CFR § 279.4 went into effect. These changes prohibit holding determinations and administrative reviews in abeyance while FOIA responses are pending. The finding in *Triple E Express* was based on outdated regulations.

### **Case Laws**

With regard to the case laws cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

### **Previous Administrative Review Decisions**

With regard to the Appellant's contentions that this matter should be afforded the same standards based on the Final Agency Decisions in other cases, this administrative review decision is based on the specific circumstances of this case as documented by the materials provided by the Appellant and the Retailer Operations Division. This administrative review decision does not establish policy or supersede Federal law or regulations. The determination in this case conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

### **CIVIL MONEY PENALTY**

The Appellant contends that a SNAP disqualification would impose a hardship on area SNAP customers and therefore, requests the imposition of a hardship civil money penalty in lieu of a six month 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).

Based on the evidence, the disqualification of Freunds Fish 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 six month 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 Freunds Fish Market warranting a disqualification of six 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 nonfood 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 Freunds Fish 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 six month 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 six month 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

May 23, 2022