

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

Mounds Park Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0239569

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination by the Retailer Operations Division to impose a six-month disqualification of Mounds Park Market (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). However, the determination is modified to permit a civil money penalty (CMP) in the amount of \$2,036.00 as an option in lieu of the six-month disqualification.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a six-month disqualification against Mounds Park Market.

AUTHORITY

7 U.S.C. § 2023 and 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

Mounds Park Market was initially authorized to participate in SNAP on May 18, 2017. Between January 15, 2021, and January 25, 2021, the USDA conducted an undercover investigation of Mounds Park Market to ascertain the firm’s compliance with Federal SNAP law. Agency records show that during the investigation Appellant violated SNAP regulations by accepting SNAP benefits in exchange for ineligible non-food items on three separate occasions.

In a letter dated February 22, 2021, the Retailer Operations Division charged Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise, in violation of 7 CFR § 278.2(a). The letter informed Appellant that the violations warranted a six-month disqualification period from SNAP, as provided in 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions, and in accordance with § 278.6(f)(1), FNS may impose a CMP in lieu of disqualification.

Appellant responded to the charge letter on March 1, 2021. In the response, Appellant said that the firm was visited by an investigator on five occasions. Appellant claims that he and his mother were working during the first two visits, but that his brother was working during the last three times. Appellant took full responsibility for his brother's mistakes. Appellant also said families depend on the store because of the items sold and because they live nearby. Appellant said that he offers fresh foods and ethnic items, like halal foods. Appellant sought a CMP in lieu of disqualification. Included in the response were 18 photographs of store inventory.

After considering the Appellant's response and further evaluating the evidence, the Retailer Operations Division issued a determination letter, dated December 2, 2021. This letter informed the Appellant that the Retailer Operations Division found that the violations did occur as outlined in the charge letter and that a six-month disqualification would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that Appellant was considered for a hardship CMP but was ineligible because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

On December 10, 2021, Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the six-month disqualification has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, the appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. This means the 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

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and is promulgated through regulation under Title 7 CFR Part 278. Specifically, 7 CFR § 278.6(a) and (e) establish the authority upon which a six-month disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

7 CFR § 271.2 states, in part:

Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption....

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store...if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations....

Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.[Emphasis added.]

7 CFR § 278.6(e) states, in part:

FNS shall take action as follows against any firm determined to have violated the Act or regulations...

(5) Disqualify the firm for 6 months if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management.

7 CFR § 278.6(f)(1) states, in part:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm subject to a disqualification is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to SNAP households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices.

SUMMARY OF INVESTIGATION

During an undercover investigation conducted between January 15, 2021, and January 25, 2021, FNS completed five compliance visits at Mounds Park Market. A report of the investigation was provided to Appellant as an attachment to the charge letter, dated February 22, 2021. The report included Exhibits A through E and provided full details on the results of each compliance visit. SNAP violations documented during three of the five visits included the exchange of ineligible non-food merchandise for SNAP benefits. One clerk committed the violations. The report noted

that the following ineligible non-food items were sold in exchange for SNAP benefits: food storage bags, two packages of heavy-duty plastic cutlery, and disposable bowls.

The report indicated that in Exhibit A, the clerk on duty refused to allow the investigator to use SNAP benefits to buy toilet paper and disposable plates. In Exhibit B, the investigator did not attempt to commit program violations. In Exhibits E, although the clerk sold the investigator an ineligible item, he refused to exchange SNAP benefits for cash (i.e. trafficking). The report appears to indicate that one clerk conducted the three violative transactions. The charge letter states that the violations that occurred in Exhibits C, D, and E warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

Appellant's contentions regarding this matter are summarized as follows:

- Since the incident, I have participated in EBT training with my brother, to ensure every SNAP transaction is permitted.
- SNAP disqualification would hurt most, if not all the families, that shop at the store. Most customers use SNAP benefits and sense that we genuinely care about their food needs.
- We've been informed that various stores around the area do not carry the same variety of products we provided.
- This also means we lose WIC, which families depend on extremely.
- There has been a petition created that's been signed by our customers, expressing their concerns regarding the store losing SNAP and/or WIC and the stress and hardship this will cause them.
- This has affected my life drastically. I am a first-generation immigrant that depends on this business to take care of my family.
- Being the eldest son that understands English, I try to sustain this business independently, resting all on my shoulders.

In support of these contentions, Appellant submitted two pages, containing 38 customer signatures, petitioning for Mounds Market not to be disqualified as it would cause a great deal of stress and hardship to the residents of the surrounding neighborhood.

The preceding may represent only a summary of Appellant's contentions presented in this matter. However, in reaching a decision, full consideration was given to all contentions presented, including any not specifically summarized or referenced herein.

ANALYSIS AND FINDINGS

If a store has never been sanctioned and its personnel, due to carelessness or poor supervision, sells common nonfood items for SNAP benefits, then the penalty under SNAP regulations is a six-month disqualification of the store's SNAP authorization. A store may be eligible for CMP in lieu of disqualification if certain criteria are met.

This review examines the relevant information regarding the Retailer Operation Division's determination. Once the Retailer Operations Division establishes a violation occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that the disqualification should be reversed. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

In this case, the report of investigation, signed by the investigator under penalty of perjury, documents that the charges of violations are based on the findings of a formal USDA investigation. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough regarding the dates of the violations, the critical facts related thereto, and is supported by documentation that confirms details of the transactions. The Retailer Operations Division has thoroughly documented the transactions in which personnel at the store exchanged ineligible items for SNAP benefits.

In response to the charge letter and on administrative review, Appellant did not offer any evidence or alternative theories to counter the agency's investigative report. In fact, Appellant, concedes that the violations occurred, claiming to have retrained his brother, who was the clerk that committed the violations. Because the violations themselves do not appear to be in dispute, this review finds, by a preponderance of the evidence, that program violations did occur as charged by the Retailer Operations Division and a six-month disqualification is warranted. However as described below, Appellant is eligible for a CMP in lieu of disqualification, as provided below. The balance of this review will address the Appellant's remaining contentions.

Remedial Actions Taken

Appellant claims to have retrained his brother, who committed the violations.

It should be noted that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken, or that will take place, so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty based on alleged or planned corrective actions implemented after findings of program violations.

Therefore, the Appellant's contention that corrective action has taken place does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

Hardship Civil Money Penalty (CMP)

A review of the Retailer Operations Division's case file found insufficient evidence to support the denial of a CMP. A CMP in the amount of \$2,036.00 is assessed as an option in lieu of the six-month disqualification. Therefore, it is unnecessary to address Appellant's contentions regarding the CMP.

CONCLUSION

This review finds, by a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at Mounds Park Market. during a USDA investigation. However, the Retailer Operations Division's determination to impose a six-month disqualification period is modified to provide the option of a CMP in lieu of disqualification, in accordance with 7 CFR § 278.6(f). In accordance with 7 CFR § 278.6(g), this CMP shall be assessed in the amount of \$2,036.00. The Retailer Operations Division will be informed of this decision. Appellant may expect to hear from that office in the near future with respect to the arrangements for payment of this CMP.

In accordance with the Food and Nutrition Act and SNAP regulations, this penalty shall become effective 30 days after receipt of this decision. Should Appellant choose to accept disqualification rather than pay the CMP, Appellant may submit a new application for SNAP authorization 10 days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this determination are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in SNAP regulations, at 7 CFR § 279.7. If 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a Complaint is filed, it must be filed within 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.

MICHELLE WATERS
Administrative Review Officer

July 21, 2022