

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

Bhuvaneshwari Food Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0252718

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA) that there is sufficient evidence to support a finding that a six-month disqualification of Bhuvaneshwari Food Mart (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(1) and 7 CFR § 278.6(a) and (e)(5) in its administration of the SNAP, when it imposed a six-month period of disqualification against Appellant.

AUTHORITY

7 USC § 2023 and the 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 USDA investigated the compliance of Appellant with federal SNAP law and regulations during the period of April 29, 2022, through May 6, 2022. The investigative report documented personnel at Appellant’s firm accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. As a result of evidence compiled during this investigation, by letter dated June 8, 2022, the Retailer Operations Division charged ownership with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a) and noted the violations warranted a six-month disqualification period. The letter also stated that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

On June 8, 2022, Appellant, through counsel, responded to the charge letter. Attached to the response was a sworn statement of the General Manager; Google area maps depicting high-density population and distances to other EBT stores; and petitions signed by EBT customers who shop regularly at the Food Mart. Key points in the response included the following:

- Appellant stated that it had a hard time finding full-time employees and that they have to do a better job at training.
- Appellant lists new training procedures.
- Appellant asked for a CMP in lieu of a disqualification.

After considering the evidence and the Appellant's reply, the Retailer Operations Division notified Appellant in a letter dated July 19, 2022, that the violations cited in the charge letter occurred at the firm and that a six-month period of disqualification was warranted. The letter stated that eligibility for a hardship CMP was not applicable as there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

By email dated July 25, 2022, Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The appeal was granted, and implementation of the disqualification has been 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 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(5) establish the authority upon which a six-month disqualification may be imposed against a retail food store or wholesale food concern.

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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system . . .

Section 278.6(e)(5) of the SNAP regulations states, in part, that a firm is to be disqualified for six months:

[I]f 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.

In addition, 7 CFR § 278.6(f)(1) provides for civil money penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause "hardship" to SNAP households benefit because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It reads:

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 benefit because there is no other authorized retail food store in the area selling as large a variety of staple food items.

SUMMARY OF CHARGES

During an investigation conducted between April 29, 2022, and May 6, 2022, an investigator conducted four compliance visits at Appellant's firm. A report of the investigation dated May 12, 2022, was provided to Appellant as an attachment to the charge letter. 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 each of the compliance visits and involved the sale of spoons, forks, sandwich bags and tinfoil. Upon review, the evidence indicates that Appellant established a record of selling non-food items, as defined by Section 271.2 of the regulations, on multiple occasions as noted in Exhibits A, B, C and D, furnished with the charge letter.

APPELLANT'S CONTENTIONS

Appellant, through its representative, made the following summarized contentions in its administrative review request dated July 18, 2022, and subsequent correspondence, in relevant part:

- As confirmed by attached email, Appellant has downloaded program into system to prevent EBT customers from paying for non-EBT items using their EBT card.
- Appellant requests review of eligibility of a CMP rather than a disqualification.
- Appellant has taken appropriate measures to ensure that they will serve EBT customers in full compliance with SNAP regulations.

The preceding may represent only a summary of the Appellant's contentions presented 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. In support, Appellant has also included a letter from the Walnut Hills Association in support of the firm, and an email from an IT Service Tech confirming that an App called, "Inventory++" has been installed on Appellant's systems which prevent the purchase of non-EBT items from a

customer's EBT card. Counsel also refers to the sworn statement, google aerial map and petition which were previously submitted in the reply to the charge letter.

ANALYSIS AND FINDINGS

The investigation report documents that the charges of violations are based on the findings of a formal investigation. The transactions cited in the letter of charges are thoroughly documented. A complete review of this documentation has yielded no error or discrepancy. The investigation report is specific and thorough regarding the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The documentation presented by the Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm.

The Retailer Operations Division determined that the violations committed by Appellant represent the first sanction for the firm and evidence carelessness or poor supervision. 7 CFR §278.6(e)(5) states that FNS shall disqualify a firm 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 due to carelessness and poor supervision by the firm's ownership or management. The imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

According to the referred to sworn statement, Appellant states that they had difficulty keeping and finding full-time employees and had to depend on family members to work part-time and that the part-time workers sold the non-EBT items. With regard to this contention, the record shows that the Appellant owner signed an application to participate as a retailer in SNAP. By signing the application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time, or part-time. Regardless of which clerks are operating the cash register at a given time and regardless of whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. As such, the circumstances in this matter are not a valid reason to dismiss the charges in any way.

The Appellant further asserts that training has been enhanced and that new installed software will prevent future violations. With regard to these steps taken by Appellant, it must be made clear that this review is limited to the facts that existed at the time the violations were committed. This review has no authority to consider any subsequent remedial actions, such as retraining employees or upgraded software, that may have been taken or that will take place so that a store may enhance or begin to comply with program requirements. Accordingly, the Appellant's remedial actions do not provide a valid basis for dismissal or modification of the disqualification determination.

Appellant also asks for the imposition of a civil money penalty in lieu of a disqualification. In support, Appellant has included a petition signed by customers, google aerial shots and a letter from the Walnut Hills Association. 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 [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 Retailer Operations Division determined that there are 11 authorized stores and redeeming stores located within a one-mile radius of Appellant. Thus, in its letter dated July 19, 2022, the Retailer Operations Division determined that a hardship CMP would not be appropriate, as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

This review acknowledges the wishes of the local community. Inconvenience to SNAP customers is inherent whenever any SNAP authorized retailer is disqualified. For example, the normal shopping pattern of SNAP customers may be temporarily altered during the period of disqualification. Nevertheless, the determination of the Retailer Operations Division that the six-month disqualification of Appellant from the SNAP would not create a hardship to customers, as differentiated from potential inconvenience, is sustained and a civil money penalty in lieu of disqualification is not appropriate in this case.

CONCLUSION

The determination by the Retailer Operations Division to impose a six-month disqualification against Bhuvaneshwari Food Mart participating as an authorized retailer in SNAP is sustained. In accordance with the Food and Nutrition Act, and the regulations, this penalty shall become effective 30 days after receipt of this letter. A new application for participation in SNAP may be submitted ten days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7CFR § 279.7. 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 the Appellant’s owner resides or is 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 days of receipt of this Decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

David A. Shively
Administrative Review Officer

May 24, 2023