

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

Hetman Fine Food And Deli,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0259495

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 Hetman Fine Food And Deli (hereinafter “Hetman Fine Food And Deli” 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 Hetman Fine Food And Deli.

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 Hetman Fine Food And Deli with Federal SNAP law and regulations during the period November 29, 2022 through December 6, 2022. In a letter dated January 23, 2023, 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. 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 24, 2023.

The record reflects that the Appellant did not provide the Retailer Operations Division with a response to the letter of charges within the 10-day required timeframe.

After considering the evidence of this case, the Retailer Operations Division issued a determination letter dated February 7, 2023. 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 an email correspondence of February 20, 2023, 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 February 28, 2023. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this review. In an email correspondence of March 21, 2023, the Appellant 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 November 29, 2022 through December 6, 2022, USDA conducted four compliance visits at Hetman Fine Food And Deli. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated January 23, 2023. 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" and a "major ineligible item". The misuse of SNAP benefits noted in Exhibits B, C, and D warrants 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 administrative review request and in subsequent correspondence, the Appellant stated the following summarized contentions, in relevant part:

- The Appellant apologizes for the occurrence of the SNAP violations.

- The Appellant primarily focuses on serving the Polish community.
- During the period from Thanksgiving to Christmas the store is usually busy and the Appellant has always tried to have enough staff for this period and hires additional help.
- Shortly before Thanksgiving the Appellant hired new employees.
- On November 28, 2022, two experienced cashiers unexpectedly had to leave the country for family reasons.
- The Appellant puts a lot of emphasis on training new employees to make sure they follow the rules. Each new employee is thoroughly trained and usually works for a certain period under the supervision of an experienced employee. New employees begin to work independently after training and working under the supervision of an experienced employee.
- Unfortunately, both new employees made SNAP violations. Upon receiving the SNAP card, the cashier should verify once again whether the products she has just packed for the customer are eligible to be purchased with SNAP benefits. The cashier asking the customer about the payment method before starting the transaction would have solved the problem.
- The Appellant tries to put price tags on all products. However, at times the price tag will be glued too weakly or two price tags will be placed on one product by mistake and omitted on another product. At the bread stand there is a price list with the prices for each type of bread. Some types of breads are delivered to the store with a label affixed by the bread supplier.
- The problem with the wrong date on the cash register was fixed by the IT specialist. It was most likely due to a voltage problem so the date and time on the register was incorrect.
- The Appellant will do its best to avoid future SNAP violations from occurring.
- A SNAP disqualification would impose a financial hardship on the Appellant.
- A SNAP disqualification would impose a hardship on area SNAP participants.

In support of these contentions, the Appellant submitted the following information for review:

- Signatures of four employees attesting that they have been retrained on the SNAP rules;
- A photo of the cash register with register receipt showing the correct date;
- A photo of a sign posted in the store listing what store items can and cannot be purchased with SNAP benefits;
- A photo of a sign posted in the store stating “No hot foods for EBT card”; and
- A photo of a sign posted in the store listing the prices of breads.

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.

The Appellant apologizes for the occurrence of the SNAP violations. The SNAP violations were conducted by two new employees. 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.

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 transactions cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. The FNS investigative report shows that 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 as noted in Exhibits B, C, and D is a violation of the SNAP rules and regulations and warrants a disqualification as a SNAP retail food store for a period of six months. 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.

The Appellant contends that the firm puts a lot of emphasis on training new employees to make sure they follow the rules. Each new employee is thoroughly trained and usually works for a certain period under the supervision of an experienced employee. New employees begin to work independently after training and working under the supervision of an experienced employee.

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.

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. As noted previously, 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.

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

With regard to the Appellant's contentions with respect to the implementation of corrective actions to ensure that future SNAP violations do not occur, 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.

Financial Hardship

With regard to the Appellant's contention that a SNAP disqualification would impose a financial hardship on the firm, 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 possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to

the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, 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 contends that a SNAP disqualification would impose a hardship on area SNAP participants.

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 Hetman Fine Food And Deli 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 Hetman Fine Food And Deli 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 Hetman Fine Food And Deli, 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

April 26, 2023