

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

Moriah Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0252076

FINAL AGENCY DECISION

It is the decision of the United State Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the six-month disqualification of Moriah Market (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate. However, the determination is modified to permit a civil money penalty in the amount of \$17,520.00 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 7 CFR § 278.6(f)(1) and 7 CFR § 278.6(a) and (e)(4) 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 October 24, 2022, through November 9, 2022. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. As a result of evidence compiled during this investigation, by letter dated November 28, 2022, the Retailer Operations Division charged

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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. Appellant, through its previous counsel, replied to the charge letter on December 7 and December 8, 2022. Counsel explained that the other African specialty stores were not comparable.

After considering the retailer's reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated December 12, 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 letter dated December 27, 2022, Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The appeal was granted and implementation of the penalty 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 . . .

7 CFR 278.6(e)(5) 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.

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.

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, 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 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 October 24, 2022, and November 9, 2022, an investigator conducted five compliance visits at Appellant. A report of the investigation dated November 17, 2022, was provided to Appellant as an attachment to the charge letter. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during three of the compliance visits and involved the sale of soap, toilet paper, magic tape. 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, D, and E, furnished with the charge letter.

APPELLANT’S CONTENTIONS

Appellant made the following summarized contentions in its administrative review request dated December 27, 2022, and subsequent information email on January 31, 2023, in relevant part:

- The decision to deny the CMP is not supported by facts and circumstances of this case.
- Appellant is unlike any other store in Portland in terms of the variety of staple foods and its ability to procure them in large volumes.
- There are qualitative and quantitative differences between Appellant and the other four stores that sell to African immigrant customers.
- There are letters from customers explaining the specific types of products that only find at Appellant and the hardship that they would experience if Appellant is disqualified.
- The evidence submitted show that the large variety of staple food items that Appellant procures cannot be found at another African food store.
- A disqualification would be a hardship for hundreds of African immigrant households who depend on Appellant.

In support of Appellant's contentions, counsel submitted the following:

- Store owner declaration.
- Letters from customers.
- News articles regarding the owners and the store.
- Copy of legal notice posted to the door of a nearby African specialty store.

The preceding may represent only a brief 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.

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 EBT receipts in the record show the name and location of Appellant, and all transactions were identified in the system data to support that they did occur at Appellant. 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.

Civil Money Penalty

There is insufficient evidence to support the denial of a civil money penalty. A civil money penalty in the amount of \$17,520.00 is assessed as an option in lieu of the six-month disqualification.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to impose a disqualification of six months against Moriah Market from participating as an authorized retailer in SNAP is modified. Consistent with 7 CFR § 278.6(f), a civil money penalty shall be imposed as an option in lieu of completion of the six-month disqualification period. In accordance with 7 CFR § 278.6(g), this civil money penalty shall be in the amount of \$17,520.00. The Retailer Operations Division will be informed of this decision. Appellant

should hear from that office in the near future with respect to the arrangements for payment of this civil money penalty.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. Should Appellant choose to accept disqualification rather than pay the civil money penalty, a new application for participation in SNAP may be submitted ten (10) 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.

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.

MARY KATE KARAGIORGOS
Administrative Review Officer

April 24, 2023