

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

Tropical Market LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0258800

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 Tropical Market LLC (“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 in the amount of \$5,226.00 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 Tropical Market LLC.

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

Tropical Market LLC was initially authorized to participate in SNAP on May 3, 2021. Between October 13, 2022, and November 5, 2022, the USDA conducted an undercover investigation of Tropical Market LLC 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 four separate occasions, including a major non-food item on two occasions.

In a letter dated December 6, 2022, the Retailer Operations Division charged Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise, including major non-

food items, in violation of 7 CFR § 278.2(a). The charge 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 civil money penalty (CMP) in lieu of disqualification.

Appellant replied to the Retailer Operations Division's charges in writing on December 19, 2022. In the response, Appellant questioned the investigation's validity, stating, in part, that the store did not have a male employee that matched the description provided in the report of investigation and the store did not sell Hefty Strong Lawn and Leaf trash bags or peppers. Appellant also stated its employees had denied violating the SNAP rules.

After considering Appellant's response and further evaluating the evidence, the Retailer Operations Division issued a determination letter, dated January 26, 2023. This letter informed 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 February 1, 2023, 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. In supplemental correspondences, emailed on February 25, 2023, and February 26, 2023, Appellant submitted additional information in support of the request for administrative review.

STANDARD OF REVIEW

In an appeal of an adverse action, an appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. This means an 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(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

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 October 13, 2022, and November 5, 2022, FNS completed four compliance visits at Tropical Market LLC. A report of the investigation was provided to Appellant as an attachment to the charge letter, dated December 6, 2022. The report included Exhibits A through D and provided full details on the results of each compliance visit. SNAP violations documented during each of the four visits included the exchange of ineligible non-food merchandise, including two major ineligible non-food items, for SNAP benefits. The report noted that the following ineligible non-food items were sold in exchange for SNAP

benefits: sunglasses with a case, detergent, Hefty Strong Lawn & Leaf Trash Bags, Formula 409 Multi-Surface Cleaner, and a dress.

The report noted that an investigator attempted to exchange SNAP benefits for cash in Exhibit D, but the clerk on duty refused. The charge letter states that the violations that occurred in Exhibits A, B, C, and D 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:

- Appellant did not refute the findings of the first three violative transactions.
- Appellant stated it is difficult to discipline a worker for the fourth transaction because there was no receipt, and the employee denied any wrongdoing.
- Appellant continues to educate its workers about the SNAP program.
- Appellant stated it does not have any male employees operating the cash register. None of the store's employees are over 6 feet tall and bald. Appellant can provide affidavits to that effect.
- Appellant has never sold brown-paper yard bags.
- Appellant requests a civil money penalty in lieu of disqualification.
 - Appellant is an ethnic specialty store with approximately 90% of its stock being from the African and Caribbean cultures.
 - Appellant offers fresh, natural foods, delicious cooking spices, and cultural products.
 - Many in the surrounding community are refugees. The SNAP program provides invaluable support for these individuals.
 - Appellant is the only store in the area offering specialty foods of African origin and fulfills a very specific niche.
 - Other grocery stores nearby do not offer comparable African ethnic specialty stock.
 - Appellant is near a large homeless shelter with people who rely heavily on their EBT cards and Appellant's store.
- This is the first SNAP violation at the store since it opened approximately 20 months ago.
- SNAP authorization is critical to Appellant's business.

On February 25, 2022, and February 26, 2022, Appellant provided additional information. Appellant's additional contentions are summarized as follows:

- Appellant has not been provided receipts from the investigator.
- Appellant does not even carry some of the items cited in the report of investigation.
- Appellant's employees denied having committed the alleged violations.
- Appellant's point-of-sale system printouts do not show SNAP violations.
- Appellant stated it would mail printed receipts for the days in question.

In support of these contentions, Appellant submitted nine screenshots from its point-of-sale system. Appellant indicated two screenshots were product search results showing the store does not sell yard waste bags. Three screenshots listed employees' names with remarks noting the gender of the employee and other descriptors such as employment termination year and a statement that the owner was not tall or bald. Appellant indicated the final four screenshots were transaction search results showing the store did not sell yard waste bags or Fabuloso from October 1, 2022, through December 31, 2022. This review received no paper receipts through the mail.

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.

This review examines the relevant information regarding the Retailer Operations 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 material error or discrepancy. The investigation report appears to be specific and thorough regarding the dates of the violations, the critical facts related thereto, and is supported by documentation that confirms the details of the transactions. The record further indicates that the Retailer Operations Division has documented the transactions in which personnel at the store allegedly exchanged ineligible items for SNAP benefits.

As described below, Appellant has not provided sufficient credible and convincing evidence to overturn the Retailer Operations Division's determination. This review finds, by a preponderance of the evidence, that program violations did occur as charged by the Retailer Operations Division.

First SNAP Violation

Appellant maintains that this is the first time the store has had an issue related to SNAP. While this may be true, 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 the violations upon which they are based.

Other Contentions

Appellant contends it does not even carry brown-paper yard or yard waste bags, the description of the clerk in Exhibit D does not match a store employee, and the store's staff denies violating SNAP regulations. Further, Appellant stated that records from its point-of-sale system do not show SNAP violations.

Regarding Appellant's contention about the employee descriptions in the report of investigation, it should be noted that physical descriptions of store personnel based on one investigator's recollection are unlikely to be exact. Estimating one's age, weight, or height is particularly subjective and can vary from investigator to investigator. As such, this review considers such descriptions to be of little overall value in this matter.

In support of its contention that the store does not carry brown-paper yard or yard waste bags, Appellant offered screenshots of product searches conducted in the store's point-of-sale system. The bags, reported in Exhibits B and D of the report of investigation, were identified as a 10-count box of Hefty Strong Lawn & Leaf Trash Bags. The investigator's photograph of that item matched a product pictured at Appellant during the April 27, 2021, contractor store visit completed at the store. During the April 27, 2021, store visit, the 10-count box of Hefty Strong Lawn & Leaf bags was shelved near the other trash and storage bags. Based on the investigator and store visit contractor's photographs, this review finds the store likely offered this item for sale despite Appellant's contention.

Appellant submitted screenshots from its point-of-sale system to support its contention that it did not sell yard waste bags or Fabuloso during the investigative period. However, the investigator stated in the report of investigation that the store's employees did not record the ineligible items by their product names. Instead, eligible items, such as rice or spices, were recorded on the point-of-sale system and receipt. This review notes that Fabuloso cleaner was not purchased according to the report of investigation. The multi-surface cleaner noted in Exhibit D was Formula 409 Multi-Surface Cleaner.

In this case, the investigator not only produced a written record of the transactions, including a listing of the specific items purchased and total amount spent, but provided each of the receipts received from the store and photographs of the merchandise purchased. The investigator also submitted copies of donation sheets certifying that the items purchased were later donated. These donation sheets were signed by both the investigator and the representative of the receiving organization. There is also an electronic record of every transaction claimed by the investigator. While the agency's electronic records do not identify what was purchased, they do prove definitively that transactions occurred at Appellant for the amounts claimed by the investigator on the same dates as listed on the report.

In this case, the preponderance of the evidence leans decidedly in the agency's favor. As such, it is the determination of this review that SNAP violations did occur as charged and a penalty is warranted.

Remedial Actions Taken

Appellant stated it continues to educate its workers about the SNAP program.

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, 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 to Appellant

Appellant claims that remaining SNAP authorized is very important to the success of its business.

With regard to this contention, SNAP regulations do not permit this review to consider dismissing or modifying a disqualification penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself. To allow an exemption from penalties based on a purported financial hardship to the firm or its ownership would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of 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 that are complying fully with program requirements, but also to those retailers that have been disqualified from SNAP for similar violations.

Hardship Civil Money Penalty

A review of the Retailer Operations Division's case file found insufficient evidence to support the denial of a civil money penalty. Therefore, it is unnecessary to address Appellant's contentions regarding the civil money penalty.

Regulations at 7 CFR § 278.6(g) outline the steps for calculating the civil money penalty amount. In this case, a civil money penalty in the amount of \$5,226.00 is assessed as an option in lieu of the six-month disqualification.

CONCLUSION

This review finds, by a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at Tropical Market LLC 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 civil money penalty in lieu of disqualification, in accordance with 7 CFR § 278.6(f). In accordance with 7 CFR § 278.6(g), this civil money penalty shall be assessed in the amount of \$5,226.00. 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 civil money penalty.

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 civil money penalty, 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. 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.

AMIE CHURCHILL
Administrative Review Officer

April 7, 2023