

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

Thumbs Up Market,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0227966

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), that the record supports that Thumbs Up Market (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a six-month disqualification of Appellant from the SNAP as imposed by the Office of Retailer Operations and Compliance (Retailer Operations).

ISSUE

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

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

The USDA investigated of the compliance of Appellant with federal SNAP law and regulations during the period of May 28, 2020, through June 15, 2020. The investigative report dated July 17, 2020, documented those personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple dates. The items sold are best described as common nonfood items and major items. As a result of evidence compiled during the investigation, by letter dated January 12, 2021, Retailer Operations charged Appellant with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits were noted in Exhibits A, B, C, and E, that warrants a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain conditions FNS may impose a civil money penalty (CMP) in lieu of a

disqualification. The record shows counsel replied to the Charge letter by letter dated January 22, 2021.

Retailer Operations informed Appellant by Determination letter dated June 16, 2021, that the violations cited in the Charge letter occurred at the firm, and that a six-month period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices. Counsel requested review by letter dated June 25, 2021. The review was granted by letter dated July 28, 2021. To date, no additional information has been received, and the timeframe for new information has passed.

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. That means the Appellant has the burden of providing relevant, credible evidence, that a reasonable mind, considering the record, would accept as sufficient to support a conclusion that the argument 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 § 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.

7 CFR § 278.2(a) states: “SNAP benefits may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food.”

7 CFR § 278.6(a) states: “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 based on 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) of the SNAP regulations states that a firm is to be disqualified 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 or poor supervision by the firm’s ownership or management.”

7 CFR § 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause hardship to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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

A report of the investigation was provided to the Appellant as Exhibits with the Charge letter. The investigative report provides details on the results of each compliance visit. The investigative report documents that SNAP violations were recorded during multiple store visits, that warrant a six-month disqualification. The SNAP violations of 7 CFR § 278.2(a) involved the sale by store personnel of nonfood items and major items for benefits. The nonfood items exchanged by store personnel included: tissue, cigarettes, wipes, dish liquid, and beer.

APPELLANT'S CONTENTIONS

Consideration was made of all contentions as presented, whether recapitulated here or not.

- We contest the determination regarding other authorized retail stores in the area.

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by Retailer Operations, and it is limited to the facts at the basis of Retailer Operations' determination at the time it was made. The documentation under review supports that the violative transactions were conducted at Appellant by store personnel on different dates. The record includes photos of the items purchased by the investigator, copies of the EBT total receipts with the store name and address, and donation sheets of the items donated by the investigator to a non-profit signed by a non-profit representative. All the EBT transactions were verified in the USDA system database.

Retailers are informed that it is their responsibility to ensure that store personnel are properly trained regarding the SNAP rules. Regardless of whom the owner of a store may utilize to handle store business, the firm's owner is accountable for the proper training of personnel, and the effective monitoring and handling of SNAP benefit transactions. Upon review, the evidence supports that Appellant's personnel established a record of selling nonfood items on multiple occasions, as defined by Section 271.2 of the regulations. Three violations are considered evidence of carelessness. The violations in this case are not too limited to warrant a disqualification period of six months. The regulations at 7 CFR § 278.6(e)(5) specify that FNS shall "disqualify the 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 nonfood items due to carelessness or poor supervision by the firm's ownership or management."

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six-month period of disqualification from SNAP. The record documents that there are other authorized stores within a nearby radius of Appellant that stock as large a variety of comparable staple foods at comparable prices. Retailer Operations concluded that the evidence did not support that it would cause hardship for SNAP recipients if Appellant were disqualified. Therefore, Appellant was deemed not eligible for a hardship CMP.

CONCLUSION

The preponderance of the evidence in the record supports that the program violations charged did occur at Appellant. The record documents that Retailer Operations properly evaluated Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations. Appellant provided no compelling evidence to support that a CMP was warranted. The nearby area of consideration around the store is more than 500 feet. On review, it is decided that Retailer Operations properly denied a CMP. Therefore, the six-month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained.

This penalty shall become effective thirty (30) days after delivery of this decision. A new application for participation in the SNAP may be submitted ten days prior to the expiration of the six-month period of disqualification. Please contact the Retailer Center at 877-823-4369 with general questions regarding the SNAP application process.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023), and to the regulations at 7 CFR § 279.7 with respect to the owner's right to judicial review of this decision. 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 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 (30) days of delivery 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

August 25, 2021