

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

Valley Center Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0233159

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Valley Center Market (hereinafter “Appellant”) by FNS’s Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a six-month disqualification against Valley Center Market.

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

FNS records show that the Appellant firm, Valley Center Market, was initially authorized for SNAP participation as a retailer on August 28, 1996. Between November 6, 2020 and November 16, 2020, an FNS contractor conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigation report documented that personnel at Valley Center Market accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. According to the report, the Appellant firm sold plastic cutlery and foam plates in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible food.

In a letter dated December 22, 2020, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the acceptance of SNAP benefits in exchange for ineligible merchandise warranted a disqualification from SNAP for a period of six months pursuant to 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.

The record shows that the charge letter was delivered to the store via UPS courier service on December 23, 2020, but the Appellant did not respond.

After further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated January 5, 2021. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the charge letter and that a six-month disqualification penalty would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that consideration for a hardship civil money penalty was given, but the Appellant was not eligible for a CMP because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

After receiving the determination letter, the Appellant sent the Retailer Operations Division an e-mail dated January 7, 2021, claiming that it had not received the charge letter and asking how it could request a timely review.

In a letter postmarked January 11, 2021, the Appellant appealed the agency's determination by requesting an administrative review. The request was granted and the case was assigned to an administrative review officer. Implementation of the disqualification has been held in abeyance pending completion of this review. On July 12, 2021, the case was reassigned to administrative review officer Jon Yorgason.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 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 § 278.2(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...The FNS regional office shall:

(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.

INVESTIGATION DETAILS

During an undercover investigation conducted between November 6 and November 16, 2020, an FNS contractor completed four compliance visits at Valley Center Market. The agency's record indicates that a report of the investigation was provided to the Appellant as an attachment to the December 22, 2020 charge letter. The investigation report includes Exhibits A through D, and provides full details on the results of each compliance visit. SNAP violations were documented during three of the four visits; specifically, the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the store personnel allowed the investigator to purchase the following nonfood items:

- One 51-count package of plastic spoons (*Ariana* brand), Exhibit A
- One 14-count package of foam plates (*Good Time* brand), Exhibit B
- One 51-count package of plastic forks (*Ariana* brand), Exhibit B
- One 51-count package of plastic forks (*Ariana* brand), Exhibit C

The report states that in Exhibit D, the clerk on duty refused to sell SNAP-ineligible items to the investigator and also refused to allow an exchange of SNAP benefits for cash (i.e. trafficking). The report indicates that the same clerk was involved in all three SNAP violations. The charge letter states that the violations that occurred in Exhibits A, B, and C warrant a disqualification from SNAP for six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant requests consideration of a monetary penalty in lieu of disqualification or perhaps a reduction of the disqualification from six months to three months.
- Appellant recognizes that the violations did occur, but they were because of a new cashier. The employee has been properly retrained.
- If the firm cannot participate in SNAP for six months, the store will not be able to survive, especially during the difficult COVID-19 pandemic.
- Appellant apologizes for its carelessness and asks for a lighter penalty in light of the fact that this was the firm's first error.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions submitted, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

The Appellant has not provided any information or evidence to counter FNS's investigation report. In fact, the Appellant acknowledges that violations occurred and blames them on a new employee. Because the violations themselves are not in dispute, it is the finding of this review

that SNAP violations did occur as charged and a penalty is warranted. The balance of this review will examine the Appellant's remaining relevant contentions.

No Prior Violations / New Employee

The Appellant argues that this was the first time the firm had committed any violations and contends that the violations were mistakes by a new employee.

With regard to the first contention, the regulations do not contemplate a firm's history of compliance with program rules when determining whether or not a penalty is warranted. When program violations occur, specifically the exchange of ineligible nonfood items for SNAP benefits due to employee carelessness or poor supervision by the firm's ownership or management, a six-month disqualification is the required penalty, even on the first occasion.

As to the violations being committed by a new employee, such circumstances do not provide a valid basis for dismissing the charges or modifying the penalty in any way. The record shows that the Appellant owner signed an initial application and subsequent reauthorization applications to participate as a retailer in SNAP. By signing these applications, 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.

Based on the actions of a separate clerk in Exhibit D, in which she refused to sell ineligible items to the investigator and refused to allow an exchange of SNAP benefits for cash, it is likely that some employee training related to SNAP had previously taken place. But with program violations being committed on three consecutive visits to the store, it is apparent to this review that employee carelessness or poor supervision was more prevalent than it should have been. Accordingly, this review finds that a six-month disqualification penalty is proper and is entirely in line with SNAP regulations at 7 CFR § 278.6(e)(5). This penalty is also consistent with sanctions imposed upon other retailers that have committed similar violations.

It should also be noted that a six-month disqualification is the shortest sanction period allowed by SNAP regulations and this review has no authority to reduce the disqualification period further.

Remedial Actions Taken

The Appellant contends that the employee who committed the violations has been properly retrained.

With regard to this action taken by the 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, 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 on the basis of alleged or planned corrective actions implemented after the discovery of program violations. Accordingly, the Appellant's remedial actions do not provide a valid basis for dismissal or modification of the disqualification determination.

Hardship to Appellant

The Appellant contends that the store will not be able to survive a six-month disqualification, especially during the difficult COVID-19 pandemic.

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 the program for similar violations.

Civil Money Penalty

Although the Appellant did not respond to the charge letter, the Retailer Operations Division evaluated the firm's eligibility for a hardship civil money penalty in lieu of disqualification and determined that the firm was not eligible for this alternative penalty.

To address potential difficulties that SNAP households might incur when a firm is disqualified, regulations at 7 CFR § 278.6(f)(1) allow, in limited circumstances, for a civil money penalty to be imposed instead of disqualification. Specifically, the regulation states that a CMP is permitted when a firm's disqualification would cause "hardship" to SNAP households.

While it is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store is disqualified for a period of time and households are forced to use their benefits elsewhere, such inconvenience does not rise to the level of "hardship" unless there are no comparable SNAP-authorized stores in the area at which customers can shop. The regulation states that hardship to SNAP households occurs when 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); in such circumstances, a CMP in lieu of disqualification may be considered.

It is the determination of this review that a disqualification of Valley Center Market would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are at least four similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of Valley Center Market, including a small grocery

store and a medium grocery store. There is also no evidence that the inventory at other stores in the area is not comparably priced. Because hardship conditions do not exist in this case, a CMP in lieu of disqualification cannot be granted.

CONCLUSION

Based on a review of all available information in this case, this administrative review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Valley Center Market during a USDA-contracted investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record appears to be specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood merchandise, and in all other critically pertinent details. Furthermore, the contentions presented by the Appellant do not persuade this review to dismiss or modify the penalty in any way. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, Valley Center Market, is sustained.

In accordance with the Act and regulations, the disqualification penalty shall become effective 30 days after receipt of this decision. A new application for SNAP authorization may be submitted 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 Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 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.

JON YORGASON
Administrative Review Officer

January 11, 2022