

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

Zak Market Inc.

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0221276

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 6-month disqualification from participating as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Zak Market Inc. (hereinafter Appellant), by the Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action in its administration of SNAP, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, in its administration of SNAP, when it imposed a 6-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 FNS.

CASE CHRONOLOGY

USDA conducted an investigation of the compliance of Appellant with Federal SNAP law and regulations from October 24, 2019 through November 7, 2019. By letter dated July 21, 2020, Retailer Operations charged 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 by two of Appellant's employees. The Charge Letter further informed Appellant's owner that the violations warranted a 6-month disqualification period, as provided in 7 CFR § 278.6(e)(5). The Charge 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 Appellant has the right to present any information, explanation, or evidence regarding the charges and must reply within 10 calendar days of receipt of the Charge Letter per § 278.6(b) of the SNAP Regulations.

The case record shows that Counsel provided a Letter of Representation dated July 28, 2020, and replied to the charges by letter dated August 10, 2020. After reviewing the evidence and Counsel's reply, Retailer Operations issued a Determination Letter dated September 2, 2020. The Determination Letter stated that Retailer Operations considered Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1), and determined that Appellant was not eligible for the hardship CMP in lieu of the 6-month disqualification because there were other SNAP-authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

By letter dated September 8, 2020, Counsel appealed Retailer Operations' determination and requested an administrative review of this action. FNS granted the request for administrative review by letter dated September 21, 2020. Upon acceptance of the administrative review request, implementation of the 6-month disqualification was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means Appellant has the burden of providing relevant, credible evidence that 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 untrue.

CONTROLLING LAW AND REGULATIONS

The controlling law 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 7 CFR § 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.

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 § 278.2(a) states, in part: Coupons may be accepted by an authorized retail food store only from eligible households only in exchange for eligible food.

7 CFR § 278.6(a) states, in part: 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 common nonfood items due to carelessness or poor supervision by the firm's ownership or management.

7 CFR § 278.6(e)(5) states, in part: 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) states, in part: FNS may impose a CMP 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.

SUMMARY OF THE INVESTIGATION

During an investigation conducted from October 24, 2019 through November 7, 2019, a USDA contracted investigator conducted four compliance visits at Appellant. The Report of Investigation, dated July 7, 2020, was provided to Appellant's owner as an attachment to the Charge Letter. This Report, which included Exhibits A through D, provides full details on the results of each compliance visit. The report documents SNAP violations occurred during three of the four compliance visits, by two of Appellant's employees, and involved the sale of 1 bag of Captiva Premium Party Cutlery, Plastic Forks (51 ct); 1 box of Quality Home Wooden Kitchen Matches (250 ct); 1 bag of Plastic Cutlery, Forks (50 ct); and 1 bag of Domo Plastic Bowls (12 oz/20 ct), best described in regulatory terms as "common nonfood items". The misuse of SNAP benefits noted in Exhibits A, C, and D is in violation of SNAP Regulations at § 278.2(a), and warrants a 6-month disqualification from SNAP.

APPELLANT'S CONTENTIONS

Appellant, through Counsel, made the following summarized contentions. In reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically referenced herein.

- It is alleged that an employee of Appellant accepted SNAP benefits in exchange for ineligible non-food items and that tax was charged on SNAP eligible items (Exhibit A).
- It is alleged that an officer purchased non-eligible items with SNAP benefits on three out of four visits (Exhibit B).
- Appellant's owner takes full responsibility for the alleged violations. These transactions occurred when he was not present at the business (Exhibit C).
- The clerk who conducted the transactions was new to the store and was trained regarding SNAP regulations. There is a compliance program in place (Exhibit C).
- The clerk involved in the transactions has since been discharged of her duties (Exhibit C).
- The register cannot separate the food and non-food items automatically. The investigating officer put all the items on the shelf at the same time, so the newly hired clerk got nervous and made a mistake due to her lack of retail experience (Exhibit C).
- Appellant's owner requests reconsideration of this decision and to remove this violation from his business. The owner guarantees that in the future there will be no misuse of SNAP regulations and he will keep a keen eye on all of his employees (Exhibit C).

- We respectfully request a hardship evaluation. The loss of revenue that would result from a disqualification to receive SNAP benefits from patrons would force Appellant to permanently close.
- Many people in the surrounding neighborhood have relied on Appellant for their food for many years and there have been no prior violations in the past.

In support of these contentions, the following was provided:

- Exhibit A – Charge Letter dated July 21, 2020
- Exhibit B – Report of Investigation dated July 7, 2020
- Exhibit C – Appellant Owner’s Statement dated July 27, 2020

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the determination made by Retailer Operations and is limited to the facts 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 Appellant 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, Appellant’s contentions that it has taken or will take corrective actions, though they would have been valuable towards preventing future Program violations, do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant, through Counsel, contends there is a compliance program in place. The violations occurred when the owner was not present. The clerk who conducted the transactions was newly hired, was trained regarding SNAP regulations, but was nervous due to having no prior retail experience.

While Appellant’s owner may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, that ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions.

Prior to becoming authorized to participate in SNAP on April 14, 2017, Appellant’s owner completed and submitted a SNAP Application for Retail Stores. When 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 SNAP. In addition, Appellant was provided with Program training and reference materials which reinforced the statements included in the SNAP Application. Unfortunately, Appellant’s owner is responsible for its employees, so whether these violations

were due to lack of training, intentional or unintentional, the owner is still responsible for the actions of all who work at Appellant.

If Appellant had an effective compliance policy and program in effect, it is unlikely that the two employees would have made such obvious mistakes. The more likely explanation is that ownership and/or management failed to properly train and subsequently supervise the employees. Additionally, had ownership and/or management been supervising the employee 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 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 ownership and/or management to ensure that its employees were not putting Appellant's SNAP authorization at risk.

There is no regulatory threshold for the dollar value of the ineligible items purchased. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items. SNAP regulations explicitly state that FNS shall disqualify a store for a 6-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 applicable regulations do not specify intent as being a required element for a 6-month disqualification.

These are clear signs of poor or no supervision by Appellant's ownership and/or management. It is highly improbable, based on the willingness of the two 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 Appellant. 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 6-month disqualification.

The Report of Investigation documents two of Appellant's employees 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 7 CFR § 271.2. The violations reported are based on the findings of a formal USDA investigation and the transactions cited in the Charge Letter were conducted under the direction of a USDA contracted investigator and are thoroughly documented. A complete review of this Report has yielded no error or discrepancy, is specific and thorough with regard to the dates of the violations, specific facts related thereto, and supported by documentation that includes written narratives, photographs, and receipts with specific details of the transactions. The Report of Investigation documents by a preponderance of the evidence that two of Appellant's employee engaged in the misuse of SNAP benefits noted in Exhibits A, C, and D warranting a disqualification as a SNAP retail food store for a period of six months.

No evidence was provided that the violations cited in the Charge Letter did not occur. In fact, Appellant's owner does not deny the violations occurred and takes full responsibility. Based on the evidence in this case, Retailer Operations' decision to disqualify Appellant for a 6-month period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

Financial Hardship

Appellant, through Counsel, contends that the loss of revenue from a disqualification to receive SNAP benefits from patrons would force Appellant to permanently close.

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from SNAP participation. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, 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, contentions that Appellant 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 (CMP)

Appellant, through Counsel, requests a hardship evaluation. A SNAP disqualification would impose a hardship for many people in the surrounding neighborhood who have relied on Appellant for their food, for many years.

A hardship CMP, as an optional penalty in lieu of a 6-month disqualification, was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and its disqualification would create a 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.

Agency mapping systems document that there are 39 comparable or larger SNAP-authorized stores within 1 mile of Appellant. Of these 39 stores, 10 are within .16 miles of Appellant, including 1 small grocery store, 1 medium grocery store, 1 large grocery store, 2 supermarkets, and 1 super store. All of the comparable stores stock adequate varieties of food in all four staple food categories and in perishables as required by FNS. The nearby stores appear readily accessible to SNAP recipients and offer a variety of staple foods comparable to, or better than, those offered by Appellant. It is acknowledged that some level of inconvenience to SNAP recipients is inherent in the disqualification from SNAP of any participating food store as the

normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience, however, does not rise to the level of hardship required by the regulations. Therefore, Retailer Operations' decision not to assess a hardship CMP in lieu of a 6-month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

The preponderance of evidence finds that the violations as described in the Charge Letter did in fact occur at Appellant, warranting a 6-month disqualification in accordance with SNAP regulations at § 278.6(e)(5). That regulation states 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 common nonfood items due to carelessness or poor supervision by the firm's ownership or management". Therefore, the decision to impose a 6-month disqualification, the least severe penalty allowed by regulation, against Appellant, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and regulations thereunder, the 6-month disqualification shall become effective 30 days after delivery of this letter. A new application for SNAP participation may be submitted 10 days prior to the expiration of this 6-month disqualification.

Questions regarding the application process can be answered by FNS' SNAP Retailer Service Center at 877-823-4369. Operational questions can be answered by Paul Arce at 503-820-4834 or paul.arce@usda.gov.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this Decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 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 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 30 days of delivery of this Decision. Please note that the judicial filing timeframe is mandated in the Act, and this office does not have the authority to 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.

KIM DAMERON
Administrative Review Officer

September 24, 2021