

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

18th Ave. Market,

Appellant,

v.

Case Number: C0209429

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a five-year disqualification against 18th Ave. Market (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(2) in its administration of SNAP when it imposed a five-year period of disqualification against Appellant on September 27, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of the Appellant’s compliance with federal SNAP law and regulations during the period of May 24, 2018 through August 15, 2018. The investigation reported that Appellant allowed an unauthorized firm to accept SNAP benefits on three separate occasions.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated September 11, 2018, that its firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter stated, in relevant part, that “. . . the violations warrant a disqualification period of 5 years (Section 278.6(e)(2)). Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant replied to the Retailer Operations Division’s charges in writing. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

The Retailer Operations Division notified Appellant in a letter dated September 27, 2018 that the firm was being disqualified for five years from participation as an authorized retailer in SNAP. This determination letter also stated that Appellant’s eligibility for a hardship civil money penalty (CMP) according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated to Appellant that “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

In a letter dated September 24, 2018, Appellant appealed the Retailer Operations Division’s assessment and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been on hold 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 evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(2) establish the authority upon which a five-year disqualification may be imposed against a retail food store or wholesale food concern.

Section 278.6(e)(2) of the SNAP regulations states, in part, that a firm is to be disqualified for five years if the firm had been previously advised of the possibility that violations were occurring and of possible consequences of violating the regulations, and:

It is the firm's practice to sell expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages in exchange” for SNAP benefits; or Personnel of

the firm knowingly accepted SNAP benefits from an unauthorized firm or an individual known not to be legally entitled to possess coupons.

In addition, 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 households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. 7 CFR § 278.6(f)(1) reads, in part:

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 because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices. FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction.

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** (Emphasis added.)

APPELLANT’S CONTENTIONS

Appellant’s responses regarding this matter are essentially as follows:

- The owner thought he could use the EBT machine at the second location as he was the sole owner of both firms.
- Appellant was only doing this while waiting for approval to be SNAP authorized at the second location.
- Appellant has been authorized for three years and always follows the rules. This was the first time the firm has had an issue related to SNAP.
- Appellant did not receive a warning.
- Appellant’s staff did not make any violations. Appellant provided eight store pictures.
- A five-year disqualification will put the business in financial jeopardy.

These explanations may represent only a brief summary of Appellant’s contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant contends that the owner thought he could use the EBT machine at the second location, as he was the sole owner of both firms. Appellant explained it was only doing this while waiting

for approval to be SNAP authorized at the second location. Appellant also contends its staff did not make any violations.

When ownership signed the FNS application to become a SNAP authorized retailer, this included a certification and confirmation that Appellant would not use its SNAP authorization at an unauthorized location. Regardless of whom the ownership of a store may use to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions.

The investigation supports, and Appellant's ownership admits, that Appellant's SNAP authorization was used to accept SNAP benefits for an unauthorized firm. There is no provision in SNAP regulations to permit an owner to use its SNAP authorization at an unauthorized firm, even if that firm has the same ownership or has submitted an application for SNAP authorization. Therefore, Appellant's contentions do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant Warned Previously

Appellant maintains it has been authorized for three years and always follows the rules. Appellant stated this was the first time the firm has had an issue related to SNAP, and it never received a warning. The record shows that Appellant received an Official Warning Letter dated March 6, 2017. This letter advised Appellant that violations were occurring at the firm and warned Appellant that another violation could result in loss of SNAP authorization.

Appellant knowingly accepted SNAP benefits from an unauthorized firm after receiving a warning of the possibility violations were occurring and the consequences of violations. For these types of violations 7 CFR § 278.6(e)(2) of the SNAP regulations provides that the minimum period for a disqualification is five years. This penalty is only permitted if the firm has not been sanctioned previously. Therefore, a five-year disqualification for the violations committed is the appropriate sanction in this case.

No Undue Hardship to Appellant

Appellant maintains that disqualification would pose an extreme hardship to the firm. Economic hardship is a likely consequence whenever a store is permanently disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship to the firm would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, 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, Appellant's contention that it will incur

economic hardship due to an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Investigative Record

Based on a review of the evidence, it appears that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted under the supervision of a USDA investigator and all are fully documented. The investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to impose a disqualification of five years against 18th Ave. Market from participating as an authorized retailer in SNAP is sustained.

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. A new application for participation in SNAP may be submitted ten (10) days prior to the expiration of the five-year disqualification period. In addition, Appellant had previously been advised by the Retailer Operations Division of the further requirement, pursuant to 7 CFR § 278.1(b)(4), to post a collateral bond or irrevocable letter of credit as a further condition for continued participation in the SNAP.

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 Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) 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.

RICH PROULX
Administrative Review Officer

November 13, 2018