

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

477 Food Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0178385

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record supports that 477 Food Corp. (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 Retailer Operations Division (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 conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of January 14, 2015 through January 16, 2015. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate occasions that warrant a six month disqualification period. The items sold on multiple dates are best described as common nonfood items.

As a result of evidence compiled during the investigation, by letter dated February 19, 2015, Retailer Operations charged the owner with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits was noted in Exhibits A, B, and C, 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 includes a reply to the Charge letter dated March 2, 2015. Original counsel also made a FOIA request dated March 2, 2015. The agency responded to the FOIA request April 12, 2015. Said counsel then made a FOIA appeal on May 21, 2015. The case was then held in abeyance. The agency provided current counsel a response to the FOIA appeal on May 16, 2019; it was denied in full. On the same date, Retailer Operations also sent counsel a ten day letter to reply to the original Charge letter. The record shows that counsel did not submit additional information regarding the Charge letter. Therefore, Retailer Operations considered the reply that was submitted by previous counsel on March 2, 2015.

Retailer Operations informed the owner by Determination letter dated July 11, 2019, 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 appealed the determination by letter dated July 17, 2019. The administrative review was granted by letter dated July 31, 2019. Counsel referenced a FOIA demand in his July 17, 2019 letter. This office forward this letter to the agency FOIA office by email on August 1, 2019. By email dated August 2, 2019, the FOIA office stated that the FOIA request would not be processed until the requesting attorney provided payment in full for prior FOIA materials. By email dated August 2, 2019, addressed to the FOIA office, counsel stated "I see that no FOIA request was made." The FOIA office notified this office August 2, 2019, that since no FOIA request was made, it was closing the case administratively. No further information was received from counsel by this office.

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 credible, 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 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: “Coupons 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(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(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 on the basis of 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(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 of the three compliance visits, conducted by one USDA investigator. The investigative report documents that SNAP violations were recorded during three store visits that warrant a six month disqualification. The SNAP violations of 7 CFR § 278.2(a) involved the sale of nonfood items for benefits including: dish soap, steel wool soap pads, dryer sheets, and a scrubber sponge. One clerk was described as making all three violative sales. Each of the three Exhibit states that a sales receipt was given to the investigator.

APPELLANT’S CONTENTIONS

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

- The USDA, based on three occasions during a three day period from January 14, 2015 thru January 16, 2015, has assumed, and wrongfully concluded, that this firm has engaged in accepting SNAP benefits in exchange for common ineligible non-food items. My client vehemently denies that he or anyone involved with or employed by this business has engaged in such activities.
- This business is open seven days per week, 24 hours each day. A substantial portion of its sales and revenues result from its participation in the SNAP. Approximately 70% of

this vendor's sales, come from the EBT transactions in exchange for eligible items and provide the income to keep this business profitable so it can continue its operation.

- A disqualification from SNAP participation for any time period will so adversely affect this business that it would cause irreparable injury and damage to the owner by forcing him out of business. Current employees will lose their source of livelihood, and members of the community who rely on this store to will be severely inconvenienced and suffer hardships.
- This vendor would not knowingly or intentionally jeopardize this source of business and his livelihood, by engaging in the illegal activity charged.
- Since being authorized in 2009, this business, has continuously trained and tested his employees concerning the SNAP regulations and requirements relating to the prohibitions against sales of ineligible items and exchanging cash for benefits.
- This vendor has established and implemented an effective compliance policy and program to prevent SNAP violations which was in effect at the time of the charges. During the time the vendor has been in the Program, he has maintained an exemplary record, and this allegation is the first occasion in which a member of this firm and its management was aware of conduct of any violations by the firm.
- Such an unblemished record is evidence of his continued compliance with the law and his training and supervision of his employees, up and including the present time.
- The investigation is suspect where an unidentified employee/cashier refused to exchange cash for Benefits on January 16, 2015.
- The USDA representatives failed to make a genuine effort during the investigation to determine the true identity and full name of the clerks employed, and specifically the identity of the clerk who allegedly committed the wrongdoing as noted Exhibits A, B and C. All that is furnished is a general description of the clerks , no name or his relationship to the owner after four visits to the store.
- The amount involved in the alleged ineligible sale activities is of such an insignificant amount that it raises a question about the credibility of the investigative reports. The behavior and activity of the investigator also effects the investigations, as his attempt to engage the cashier in trafficking raises and issue of credibility, where it is alleged that the cashier refused to exchange cash and sell ineligible items for an EBT transaction on numerous occasions.
- In each of the Exhibits, the time of entry and departure by the Investigator to and from the subject premises is redacted. The time spent in the store by the Investigator is important for the following reasons: (a) was the time sufficient for the Investigator to complete the selection of the multiple items from the various locations in this grocery store, wait on line at the counter, have the purchases totaled at said counter and pay for same, and (b) based on the hour of any given day, the owner herein can identify the clerk who was on duty at the time.
- The clerk's identity is of importance particularly when it will directly impact a business.
- Any surveillance cameras in this store are self-erasing and the images taken in January of 2015 are no longer available.
- The vendor is entitled to know whether there was one or multiple Investigators.
- There is a denial of receipt of the cash register tape. I am informed that the price of each product is displayed and sold in this store is carefully marked. Each customer receives a cash register receipt or tape when a purchase is made. The owner denies that USDA

representatives were not given such tapes at the time that they were presented with the EBT receipts.

- These inadequacies, inaccuracies and insufficiencies affect the reliability, veracity and sufficiency of the investigative reports and the meager and questionable sale of ineligible items charged. This charge cannot be sustained as a matter of fairness and justice to disqualify this vendor for six months from participation in the SNAP. It is hereby requested that in lieu of such six month disqualification, a CMP be imposed.
- In connection with the within FOIA demand, I am enclosing herewith a document signed by the owner, for and on behalf of 477 Food Corp., instructing you to furnish the information and authorizing me to receive same. (No enclosed document was found with counsel's reply.)

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by Retailer Operations; it is limited to the facts at the basis of Retailer Operations' determination at the time it was made. Upon review, the evidence supports that Appellant established a record of selling nonfood items as defined by Section 271.2 of the regulations, on three occasions, or on 100% of the store visits conducted at the store. Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification. The Exhibits furnished with the Charge letter 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."

Counsel contends that SNAP training has been given to employees. No evidence was provided to substantiate this contention. Regardless of who the store owner utilizes to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in SNAP when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The regulations stipulate that FNS 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 and poor supervision by the firm's ownership or management.

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. There is no provision in the Act, or regulations, that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees. Counsel also contends that the total dollar amount involved in the violations is small. As to the dollar value of the ineligible items sold, regardless of cost, Appellant established a record of selling non-food items as defined by Section 271.2, on three occasions. No mention of minimum cost is cited in Section 278.6(e)(5) of the SNAP regulations, which states that FNS shall disqualify a store 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 the sale of common nonfood items in exchange for FSP benefits due to carelessness or poor supervision by the firm's ownership or management.

FNS recognizes 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 the waiver or suspension of an administrative penalty on the basis of possible economic hardship to a store based on the imposition of such penalty. To allow the owner to be excused from an assessed sanction based on economic hardship to Appellant would forsake fairness and equity to authorized stores that abide by the SNAP regulations, and to authorized store owners who have been disqualified for a similar regulatory violation.

The charges of violations are based on the findings of a formal USDA investigation. The transactions are fully documented, and a review of this documentation has yielded no indication of error or discrepancy in the reported findings. The investigative record is specific and thorough with regard to the dates of the violations, the specific facts related to the sales of nonfood items, and in all other critically pertinent detail. The preponderance of the evidence supports that Appellant sold nonfood items on multiple store visits in exchange for SNAP benefits, a regulatory violation.

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 a variety of comparable staple foods at comparable prices. The evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified. Therefore, Appellant is 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 considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations, and properly denied it. Therefore, the six month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained.

RIGHTS AND REMEDIES

This penalty shall become effective thirty (30) days after receipt of this decision. A new application for participation in the SNAP may be submitted ten (10) 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. Please contact Arlasa Davis at (212) 520-7614 if you have operations questions regarding this case.

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 your client'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 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

September 9, 2019