

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review
Alexandria, VA 22302**

5th Street Supermarket LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0190282

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 **six-month disqualification** from participation as an authorized retailer in the Supplemental Nutrition Assistance Program¹ was properly imposed against 5th Street Supermarket LLC (hereinafter “5th Street Supermarket LLC” and/or “Appellant”) and its owners of record, by the Retailer Operations Division of the FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a) and (e) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a six-month disqualification against 5th Street Supermarket LLC in a letter dated April 25, 2018.

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.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of 5th Street Supermarket LLC with Federal SNAP law and regulations which consisted of five (5) visits completed between January 18, 2017, and February 21, 2017.

The USDA-FNS Report of Positive Investigation (hereinafter, “Investigative Report”) number TR37869 dated March 1, 2017 disclosed that on three (3) separate occasions 5th Street Supermarket LLC personnel accepted SNAP benefits for merchandise that was ineligible for purchase with such benefits from a USDA Investigator. Identification information ascertained from the Investigative Report indicates that these SNAP violations were handled at Appellant firm by one (1) unidentified male clerk.

As a result of the evidence compiled during the USDA investigation, in a letter dated March 29, 2018, the Retailer Operations Division, charged Appellant with violating 7 CFR § 278.2(a) of the SNAP regulations.

The Retailer Operations Division record indicates both a telephone call and a written response were received from Appellant’s owners. Following documented consideration of the responses provided the Retailer Operations Division issued a final determination letter, dated April 25, 2018, assessing a six-month disqualification from participation as an authorized retailer in the SNAP against 5th Street Supermarket LLC.

In a letter dated May 1, 2018, received in the offices of the Administrative Review Branch on May 3, 2018, Appellant, through its owners, submitted an appeal of the Retailer Operations Division’s assessment, requesting an administrative review of the action. The appeal was granted and implementation of the sanction has been held in abeyance, in accordance with 7 CFR § 279.4(a).

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)², 7 USC 2023 and 278 of Title 7 of the Code of Federal Regulations (CFR).³

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment through P.L. 113-79, enacted February 7, 2014.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

7 CFR § 278.2(a) “Use of Coupons”, states, in relevant part, “Coupons may be accepted by an authorized retail food store only from eligible households... only in exchange for eligible food.”

7 CFR § 271.2 defines **Eligible foods**” in relative part as “**Any food and food product** intended for human consumption **except** alcoholic beverages, tobacco and hot foods and hot food products prepared for immediate consumption...” (Emphasis Added)

7 CFR § 278.6 establishes the authority upon which a period of disqualification may be imposed against an authorized food store or wholesale food concern in the event that it has failed to comply with the Act.

7 CFR § 278.6(e) provides the following, in relevant part, with respect to penalties that may be assessed against firms determined to have violated the Act or regulations:

“...For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. A civil money penalty and a disqualification shall be considered sanctions for such purposes...”

7 CFR § 278.6(e)(5) applies to the period of disqualification under review, and specifies that FNS **shall**: [Emphasis added]

“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(e)(7), states, that FNS shall,

“Send the firm a warning letter if violations are too limited to warrant a disqualification.”

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 Food Stamp [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 CHARGES

USDA conducts investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of SNAP violations that may be occurring. In the instant case the Investigative

Report dated March 1, 2017, reveals that a USDA Investigator completed five (5) total investigative visits at 5th Street Supermarket LLC between January 18, 2017 and February 21, 2017.

The report materials were provided to Appellant as attachments to the charge letter dated March 29, 2018, and included exhibits A through E that provide detail of the investigative results. The Investigative Report reveals SNAP violations were recorded during three (3) of the five (5) reported visits, included as exhibits B, C, and D of the Investigative Report with the exchange of SNAP benefits for non-food items considered common ineligible items including paper towels and toilet paper.

The Investigative Report further discloses that exchange of toilet paper was refused in Exhibit A, by a different unidentified male clerk; and, cash was refused in exhibit E, by the unidentified male clerk who committed the SNAP violations recounted in Exhibits B, C, and D.

The regulations establish that an authorized food store may be disqualified from participating in the program 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.

APPELLANT'S CONTENTIONS

In the response to the letter of charges dated April 5, 2018, Appellant's owners indicated that it could not be explained why the clerk had committed human errors when processing manual transactions at the cash register that was in service one (1) year ago. The materials explain that in an effort to avert potential human error SNAP violations a new cash register, equipped with electronic scanning and pre-programmed software loaded with information on the eligibility of individual merchandise for redemption with SNAP benefits, was purchased and installed in July 2017, prior to the notification of the results of the USDA Investigation. Evidence of the purchase of the noted cash register was provided for consideration.

Appellant also indicated that in an effort to support the availability of healthy products a large selection of produce had been added to inventory. The expanded produce availability is indicated to have been positively recognized by the City of Philadelphia health inspectors. Copies of invoices/receipts for the purchase of produce together with 50 photographs of Appellant's inventory offerings were also provided for consideration.

Improvement of the checkout process and addition of fresh produce is explained to provide a benefit not only to Appellant but to the community who can get everything they need at affordable prices without having to take a car or bus out of the area.

A six-month disqualification of SNAP is explained to be expected to have a major negative impact on Appellant, and the family who gains its support from Appellant revenues. It is noted that while a six-month suspension might not seem long it needs to be recognized that following that period the accountant serving Appellant has indicated it will take approximately three (3) more months to re-establish SNAP authorization. A request for reconsideration of the proposed

sanction is requested citing that cash register improvements would have averted the current charges had it been in place at the time of the USDA Investigation.

In the request for administrative review letter dated May 1, 2018 Appellant's ownership recounts that steps were taken prior to notification of the SNAP violations to prevent human error with the purchase and implementation of a cash register system capable of determining product eligibility for SNAP redemption. A request to shorten the sentence is made noting that the six-month disqualification will likely include nine (9) months of ineligibility, with re-application processing, which is excessive when consideration that the violations represent human error which everyone makes.

The preceding represents only a brief summary of Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

That SNAP benefits are not for the purchase of non-food items is clear in the "Act" and in the SNAP regulations, with noted exceptions, such as seeds used to grow food, and hunting equipment in remote areas of Alaska. This and other rules governing SNAP were provided to Appellant upon initial SNAP authorization in September 2013, and have been restated in various retailer notifications routinely provided to all SNAP authorized retailers as well as in the 2015 reauthorization of Appellant.

Appellant has not denied that the violations occurred, instead offering explanation that they resulted from human error and providing information on corrective actions including replacement of the manual cash register and improvement of produce inventory undertaken prior to notification of the SNAP violations. Neither the Act, nor the regulations pursuant to the act support mitigation or reversal of penalties clearly defined within the SNAP regulations on the basis of corrective actions.

Further, although a negative economic impact is anticipated to occur from the imposition of the six-month disqualification as required in regulations, there is no provision in the Act or the SNAP regulations to consider economic circumstances in the implementation of prescribed sanctions. The SNAP regulations support the re-application of Appellant 10 days prior to the expiration of the disqualification period which will hopefully avert extended processing of the re-authorization of Appellant.

The SNAP regulations at 7 CFR § 278.6(e)(5) defines the period of disqualification applicable in the circumstance under review, and specifies that FNS **shall**: "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."

Civil Money Penalty:

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 Food Stamp [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.” The record reflects that the Retailer Operations Division has rendered a finding that pursuant to 7 CFR § 278.6(f)(1), it would not be appropriate to impose a civil money penalty in lieu of a period of disqualification on Appellant firm.

The Retailer Operations Division record reflects that 5th Street Supermarket LLC is classified within FNS definitions as a small grocery store; and, that there are 71 SNAP authorized small grocery stores and larger firms within a one (1) mile radius of Appellant. The availability of alternative SNAP Authorized venues is verified with a review of the SNAP Retailer Locator tool located at <https://www.fns.usda.gov/snap/retailerlocator> .

Based on the availability of the alternative SNAP authorized retailers the Retailer Operations Division has determined that the temporary disqualification of Appellant would not create a hardship to customers.

It is recognized that some degree of inconvenience to SNAP customers is inherent from the temporary disqualification of any participating food store. Although the normal shopping pattern of such SNAP customers may be temporarily altered during the period of disqualification, the determination that the disqualification of 5th Street Supermarket LLC would not create a hardship to customers, as differentiated from potential inconvenience is sustained and a civil money penalty in lieu of disqualification is found not to be appropriate in this case.

CONCLUSION

The charges of violations are based on the findings of a formal USDA investigation in which all transactions cited in the letter of charges were fully documented and evidentiary materials are included in the record that validate the report as provided. A complete review of this documentation has yielded no swaying error or discrepancy. The Investigative Report is specific and thorough with regard to the dates of the violations and the specific related facts.

The documentation presented by the Retailer Operations Division clearly provides a preponderance of the evidence that the violations as reported occurred at Appellant firm and, 7 CFR §278.6(e)(5) specifies that FNS **shall** “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.”

It is established that the violations as described in the letter of charges dated March 29, 2018, did in fact occur at Appellant’s firm, warranting a disqualification of six (6) months in accordance with 7 CFR §278.6(e)(5).

Based on the discussion above, the decision to impose a six-month disqualification against 5th Street Supermarket LLC is proper and the action is sustained.

In accordance with the Act and regulations, **the six (6) month period of disqualification shall become effective thirty (30) days after receipt of this letter.** Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six (6) month disqualification period.

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 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.

NANCY BACA-STEPAN
Administrative Review Officer

July 13, 2018