

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

980 Columbus Food Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0209585

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 participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against 980 Columbus Food Corp. (Appellant) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a six month period of disqualification against 980 Columbus Food Corp. on July 8, 2019.

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

The Department of Agriculture conducted an investigation of the compliance of 980 Columbus Food Corp. with Federal SNAP law and regulations during the period February 20, 2019 through May 8, 2019. In a letter dated June 18, 2019, the Retailer Operations Division charged the 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 four out of four compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

The Appellant did not reply to the charges documented in the June 18, 2019 Charge Letter. After considering the evidence of this case, the Retailer Operations Division issued a Determination Letter dated July 8, 2019. The Determination Letter informed the Appellant that it was disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The Determination Letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a hardship civil money penalty under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked July 18, 2019, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated August 6, 2019. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this review.

The record indicates that in the July 18, 2019 request for administrative review, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against 980 Columbus Food Corp. pursuant to the Freedom of Information Act (FOIA). The record reflects that FNS provided a response to counsel's FOIA request, dated October 16, 2019, and received no further communication from the Appellant or counsel with regard to the agency's response.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might 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, 7 U.S.C. § 2021, and promulgated through regulations under Title 7 CFR Part 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 or wholesale food concern.

7 CFR § 278.2(a) states, inter alia:

Coupons may be accepted by an authorized retail food store only from eligible households . . . only in exchange for eligible food.

7 CFR § 271.2 states, inter alia:

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, inter alia:

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.

7 CFR § 278.6(e)(5) states, inter alia:

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, inter alia:

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

During an investigation conducted from February 20, 2019 through May 8, 2019, USDA conducted four compliance visits at 980 Columbus Food Corp. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated June 18, 2019. The investigation report included Exhibits A through D which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during four of the four compliance visits and involved the sale of a variety of items best described in regulatory terms as "common nonfood items". The misuse of SNAP benefits noted in Exhibits A, B, C, and D warrant a disqualification as a SNAP retail food store for a period of six months. The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the request for administrative review, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The store is located on a busy corner, is a large sized retail deli/convenience store approximately 1,000 square feet in size with approximately 500 square feet in storage located in the basement. It is at all times well stocked with staple food inventory specifically designed to accommodate those low income customers who regularly purchased items with SNAP benefits, receiving regular deliveries. The store sells fruits, vegetables, and other cooking ingredients including rice, beans, and pasta. The store has numerous shelving, refrigerators, and freezers which stock eligible food stuffs. The store also has a deli case with a deli counter, large salad area, and a vast array of sandwiches. The vast majority of people who patronize this store are regular customers.
- The USDA, based on four occasions during a mere ten week period from February 20, 2019 through May 8, 2019, has assumed, and wrongfully concluded, that this firm has engaged in accepting SNAP benefits in exchange for common ineligible non-food items. The Appellant vehemently denies that he or anyone involved with or employed by this business has engaged in such activities.
- By virtue of the hours that this retail deli/grocery store is open for business, the owner cannot be in attendance at all times. Therefore, he must rely upon the competence, honesty, and good judgment of store employees, particularly the clerks and cashiers, during his absence. The owner denies that the incidents forming the basis of the complaint as set forth in the letter of charges, and exhibits annexed thereto, took place. The charges of sales of ineligible items are vehemently denied. It would be irrational and illogical to accept and conclude that the owner of a solvent and successful business would jeopardize that business and his livelihood by risking a six month disqualification from participation in the SNAP, especially in light of the meager amount of the alleged items to have been sold.
- The investigation is suspect where an unidentified employee/cashier refused to exchange cash for benefits on May 8, 2019. 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 in Exhibits A, B, C, and D. 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 between February 2019 and May 2019 are no longer available for reviewing.
- The Appellant is entitled to know whether there was one or multiple investigators. There is a denial of receipt of the cash register tape. 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. The Appellant requests that in lieu of such six month disqualification, a civil money penalty (CMP) be imposed.
- It should be pointed out that this retail deli/grocery business is open to the public seven days per week, from 6:00 am through 12:00 am each day. By virtue of the location of this firm, and the community in which it is situated, a substantial portion of its sales and revenues result from its participation in the SNAP. Approximately 75% of the Appellant's sales and revenues 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 due to the loss of revenue. In addition, the store's current employees will lose their source of livelihood. The owner has invested over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in renovating the store, installing new ceilings, floors, electrical systems, plumbing, shelving, counters, and fixtures. The Appellant would not knowingly or intentionally jeopardize the business and his livelihood by engaging in the illegal activity charged.
- The business is staffed by four full-time employees. Since being authorized in 2011, the Appellant 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. The Appellant has established and implemented an effective compliance policy and program to prevent violations of the SNAP which was in effect at the time of the alleged charges. The Appellant 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 the Appellant's continued compliance with the law and training and supervision of its employees, up to and including the present time.

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by the Retailer Operations Divisions; it is limited to the facts at the basis of the Retailer Operations Division's determination at the time it was made. Upon review, the evidence supports that the Appellant established a record of selling nonfood items as defined by Section 271.2 of the regulations, on four 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 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".

The Appellant 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 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. The regulations stipulate 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 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. The Appellant also contends that the dollar amount involved in the violations is small. As to the dollar value of the ineligible items sold, regardless of cost, the Appellant established a record of selling nonfood items as defined by Section 271.2, on four occasions. No mention of minimum cost is cited in Section 278.6(e) 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 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.

FNS recognizes 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 or internal agency policy directives for waiver or reduction of an administrative

penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the 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 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, the Appellant's contention that the firm 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.

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 the Appellant sold nonfood items on multiple store visits in exchange for SNAP benefits, a regulatory citation.

CIVIL MONEY PENALTY

The Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty (CMP) under 7 CFR § 278.6(f)(1). That regulation 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." [Emphasis added]. Please note that internal FNS policy memoranda clarifies the regulation by defining "in the area" to mean within a one mile radius for an urban store such as 980 Columbus Food Corp. The location of 980 Columbus Food Corp. is classified as a primarily urban area by 2010 Federal Census data.

The case record documents that the Retailer Operations Division determined that the six month disqualification of 980 Columbus Food Corp. would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores located within a one mile radius of the Appellant firm. 980 Columbus Food Corp. is classified by FNS as a medium grocery store. Agency mapping systems document that there are 36 comparable or larger SNAP authorized stores located within a 1.0 mile radius of the Appellant firm.

Based on the evidence, the disqualification of 980 Columbus Food Corp. would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division's decision not to assess a hardship CMP in lieu of a six month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is therefore established that the violations as described in the letter of charges did in fact occur at 980 Columbus Food Corp. warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). That regulation states 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”. Therefore, the decision to impose a six month disqualification, the least severe penalty allowed by regulation, against 980 Columbus Food Corp., the Appellant firm, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six month period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this six month period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you reside or are 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, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

January 29, 2020