

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

African Mini Market, Inc,

Appellant,

v.

Case Number: C0194487

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against African Mini Market, Inc. (hereinafter “Appellant”) by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a six-month disqualification against African Mini Market, Inc.

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

FNS records show that the Appellant firm, African Mini Market, Inc., was initially authorized for SNAP participation as a convenience store on August 11, 2015. Between February 21, 2018, and June 24, 2018, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigative report documented that personnel at African Mini Market, Inc. accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. According to the report, the Appellant firm sold foam plates, trash bags,

plastic storage bags, and paper towels in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated August 6, 2018, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The charge letter states that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further states that under certain conditions and in accordance with 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In a letter dated August 8, 2018, the Appellant replied to the charges and stated that the owner was not aware of the violations, but acknowledged that they could have happened. The Appellant stated that if they did happen, it was likely a mistake by the employee or the result of confusion. The Appellant apologized for the violations and assured FNS that such violations would not happen again. The Appellant further stated that the firm depends on its SNAP authorization for its survival and requests a warning since it is the firm's first violation.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated August 21, 2018. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the letter of charges and that a six-month disqualification penalty would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that consideration for a hardship CMP was given, but that the Appellant was not eligible for a CMP because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked August 29, 2018, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the sanction has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(5) establish the authority upon which a six-month disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

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 § 278.6(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....

Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section. [Emphasis added.]

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

7 CFR § 278.6(e) states, in part:

FNS shall take action as follows against any firm determined to have violated the Act or regulations...The FNS regional office shall:

(5) 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, in part:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm subject to a disqualification is selling a substantial variety of staple food items, and 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.

INVESTIGATION DETAILS

During an undercover investigation conducted between February 21, 2018, and June 24, 2018, the Food and Nutrition Service completed six compliance visits at African Mini Market, Inc. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the August 6, 2018, charge letter. The investigation report includes Exhibits A through F, and provides full details on the results of each compliance visit. SNAP violations were documented during three of the six visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the following nonfood items were purchased by an investigator using SNAP benefits:

- One package of foam plates (No brand indicated), Exhibit C
- One 10-count box of trash bags (*Home Select* brand), Exhibit C
- One 11-count box of trash bags (*Handi-Bag* brand), Exhibit D
- One 50-count box of food storage bags (*Freshrite* brand), Exhibit D
- One package of foam plates (No brand indicated), Exhibit E
- One 11-count box of trash bags (*Handi-Bag* brand), Exhibit E
- One 52-count roll of paper towels (*Plenty* brand), Exhibit E

The report indicates that in Exhibits A and B, the investigator did not attempt to purchase any ineligible items. In Exhibit F, the investigator attempted to obtain cash in exchange for SNAP benefits (i.e. trafficking), but this was refused by the clerk on duty. According to the report, three different cashiers conducted the three violative transactions.

The charge letter states that the violations that occurred in Exhibits C, D, and E warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The determination letter said that the main reason the firm could not remain authorized was because there are other vendors in the area who sell the same items as the Appellant.
- Appellant has provided a list of items available at the store as well as some photographs to show that African Mini Mart, Inc. has a lot of items that are not sold at other stores in the area.
- Appellant is willing to pay a fine in order to keep the business up and running.
- Appellant hopes that the disqualification can be reconsidered and that the firm be issued a warning instead. Appellant promises that violations like this will not happen again.

In support of its contentions, the Appellant submitted a list of roughly 250 different items available for purchase at the store, along with 32 color photographs of inventory found on the store's shelves.

It should be noted that just before requesting an administrative review, the Appellant submitted to the Retailer Operations Division what appears to be the same list of food items and many of the same or similar photographs. Because this information was submitted after the disqualification determination had already been made, it did not impact the Retailer Operations Division's decision.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The Appellant has not provided any evidence or documentation to counter FNS's investigation report. In fact, in its initial response to the charges, the Appellant appeared to acknowledge that the violations may have occurred, stating that if the violations did happen, they were likely due to an employee mistake or confusion. Because the violations themselves do not appear to be in dispute, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division and a six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Civil Money Penalty

In its request for review, the Appellant stated that the main reason the firm could not remain authorized was because the determination letter said that there are other vendors in the area who sell the same items as the Appellant. However, the Appellant does not agree. It believes it carries a lot of items that are not sold at other stores in the area. To support this contention, the Appellant submitted a list of approximately 250 items that are sold in the store, and 32 color photographs depicting food items on the store's shelves. Finally, the Appellant states that it is willing to pay a fine in order to keep the business up and running.

With regard to these contentions, there is unfortunately no basis to grant a civil money penalty in this case. It should be noted that Appellant's characterization of the determination letter is not quite accurate. The letter did not say that the store could not remain authorized because there were other vendors in the area who sell the same items. Instead, the letter states the following:

We have determined 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.

SNAP regulations at 7 CFR § 278.6(f)(1) permit a civil money penalty, or CMP, in lieu of disqualification only when the firm's disqualification would cause hardship to SNAP

households. According to this regulation, hardship is defined as “no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices” (emphasis added).

It is the determination of this review that a disqualification of African Mini Market, Inc., a convenience store, would not cause hardship to SNAP households because there are many other shopping options in the area. According to agency records, there are at least five dozen comparable or larger SNAP-authorized retail stores located within a one-mile radius of African Mini Market, Inc.

After reviewing the Appellant’s photographs and its list of inventory items, this review concedes it is possible that African Mini Market, Inc. might carry a small number of items that are not available at other nearby stores. However, a review of stores in the area shows that the types and quantities of food available at those other stores is often identical or is substantially similar to the inventory at African Mini Market, Inc. It is recognized that some SNAP households may experience a certain level of inconvenience because a small number of unique or cultural food items are temporarily unavailable for purchase with SNAP benefits at African Mini Market, Inc. However, such inconvenience does not rise to the level of hardship, which, as noted earlier, is defined as the absence of other authorized retail food stores in the area. The purpose of SNAP is not to provide households with every desired food variety, but to offer nutrition assistance to low-income individuals and families. With that objective in mind, it is clear to this review that nutritious food options are readily available in the immediate area of African Mini Market, Inc.

To reiterate, it is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified for a period of time and households are temporarily forced to use their SNAP benefits elsewhere. However, based on the regulation at 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be granted in this case.

Hardship to Appellant

In its initial response to the charge letter, the Appellant argued that the firm depends on its SNAP authorization for its survival. The Appellant further requests a fine or a warning letter so that the business can remain up and running. This contention implies that the Appellant itself will experience hardship if the six-month disqualification is upheld.

With regard to this contention, it is recognized that some degree of financial or economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship to the store’s ownership or to the firm itself would render virtually meaningless the 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 requirements, 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 financial hardship as a result of a six-month disqualification from SNAP does not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

As to the firm's request for a warning instead of disqualification, it must be noted that a warning letter is issued only when the violations that are committed are too limited to warrant a period of disqualification. This is in accordance with 7 CFR § 278.6(e)(7). In this case, the firm committed SNAP violations on three consecutive visits the investigator made to the store and never refused to sell ineligible items to the investigator. The repeated violations in this case demonstrate either a willful disregard of the rules or poor supervision by the firm's ownership or management. Such repetitive misuse of SNAP is serious enough to warrant a six-month disqualification pursuant to 7 CFR § 278.6(e)(5). Therefore, a warning is not an appropriate sanction in this case.

Remedial Actions Taken

The Appellant has offered a promise that program violations will not happen again.

With regard to this contention, it should be noted that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or that will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented after the discovery of program violations.

Therefore, the Appellant's insinuation that corrective action has taken place or that further remedial actions are planned does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

CONCLUSION

Based on an analysis of all information in this case, this review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at African Mini Market, Inc. during a USDA investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record appears to be specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood merchandise, and in all other critically pertinent details. Pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to

impose a six-month disqualification against the Appellant, African Mini Market, Inc., is sustained. In accordance with the Act and regulations, the disqualification penalty shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted 10 days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

February 28, 2019