

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

Al Malik Grocery Inc,

Appellant,

v.

Case Number: C0211009

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 there is sufficient evidence to support a one-year disqualification of Al Malik Grocery Inc. (hereinafter Appellant), from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as initially imposed by the Retailer Operations Division.

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 one-year disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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 USDA conducted an investigation of the compliance of Al Malik Grocery Inc., with Federal SNAP law and regulations from September 17, 2018 through October 19, 2018. In a letter dated November 5, 2018, Retailer Operations Division charged the Appellant firm with accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on four (4) out of four (4) compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of one year as provided in 7 CFR § 278.6(e)(5) and (6).

In correspondence dated November 10, 2018, Appellant replied to the charge letter and generally stated that it regrets and apologized that the violations happened in the store and offered to explain. Appellant stated that all employees are very well trained and aware of the SNAP program, which items are eligible and which are not. Appellant also stated that it hired a new trainee who was being trained by the supervisor. The trainee was confused and thought that small kitchen items related to food were eligible for SNAP. Appellant admitted that the violations were wrong and indicated that ownership spoke with all employees and thoroughly explained the SNAP program. Appellant apologized and stated that it would never happen again.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated November 20, 2018. The determination letter informed the Appellant it was disqualified from the SNAP for a period of one year in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). 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 dated November 24, 2018, the Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal was accepted and the implementation of the one-year disqualification was held in abeyance pending completion of this review.

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

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008¹, 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) establish the authority upon which a period of 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 food means: Any food or food product intended for

¹ *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*

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 1977, 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(e)(6) states, inter alia: “Double the appropriate period of disqualification prescribed in paragraphs (e)(2) through (5) of this section as warranted by the evidence of violations if the same firm has once before been assigned a sanction.”

7 CFR § 278.6(f)(1) states, inter alia: “FNS may impose a civil money penalty as a sanction in lieu of 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.”

APPELLANT’S CONTENTIONS

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

1. All of my employees are very well trained and aware of the SNAP program and which items are eligible and which are not.
2. We hired a new trainee who was trained by the supervisor. He was confused and thought that small kitchen items related to food were eligible for SNAP.
3. My firm specialized in selling Pakistani, Indian, and Bangladeshi and Arabic food especially Halal Meat products for the Muslim Community. If my firm is disqualified from SNAP this will cause suffering for the Muslim Community and a huge loss for my firm.
4. I spoke with all employees and thoroughly explained the SNAP program. Please accept my apologies and consider us for a civil money penalty (CMP).

Appellant provided a copy of the charge letter dated November 5, 2018, its response to the charge letter dated November 10, 2018, the determination letter dated November 20, 2018 and the Investigative Report dated October 22, 2018. In subsequent correspondence postmarked December 18, 2018, Appellant provided a notarized letter dated December 17, 2018, from the president of Gulzar-E-Madina Masjid, a letter dated December 16, 2018, from the president of Madni Masjid of Bronx, and a letter dated December 16, 2018, from the founder of Bronx Community Council all attesting to need of the Appellant’s presence in the community.

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

ANALYSIS AND FINDINGS

FNS initially authorized Al Malik Grocery Inc. as a small grocery store which was previously disqualified from SNAP for six-months. The Appellant's store was reinstated in the SNAP program on October 24, 2014. During an investigation from September 17, 2018 through October 19, 2018, the USDA conducted four (4) compliance visits at Appellant's store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated November 5, 2018. 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 committed during four (4) of the four (4) compliance visits. They involved the sale of one 6-count package of Top Grade stainless spoons, one 10-count box of Top Grade 26 gallon trash bags, one Three Rivers/Chanini stainless food strainer, two 75 sq. ft. rolls of Red & White aluminum foil, one 20-count box of Ziploc pint size freezer bags, one Housewares by Pride 13 inch stainless steel skimmer and one 72-count package of Pride plastic cutlery set. The clerk refused the exchange of an undisclosed amount of SNAP benefits for cash in exhibit D.

Appellant apologized for the SNAP violations and contends that a new trainee was confused and thought that small kitchen items related to food were eligible for SNAP. Appellant also contends that a disqualification will be a huge loss for the store. With regard to these contentions, it is important to note that as owner of the store, Appellant is liable for all volatile transactions handled by either paid or unpaid store personnel. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food Stamp Act and the enforcement efforts of the USDA.

Additionally, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations 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, as amended, 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, 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.

Furthermore, it is important to clarify for the record that the purpose of this review is to determine if the earlier decision of the Retailer Operations Division, to disqualify Appellant from participation in the SNAP for a period of one year, was in fact a correct one. It is not within the scope of this review to consider what subsequent actions Appellant may have taken so that its store may begin to comply with program requirements.

Based on a review of the evidence in this case, there is no question that program violations did occur. Clerks working at Appellant sold common ineligible items to an FNS investigator on four (4) separate investigative visits. The investigative record is specific and accurate with regard to the dates of the violations, the exchange of SNAP benefits for ineligible items, and in all other critically pertinent detail. As such, the contentions presented do not constitute valid grounds for dismissal of the current charges of violations, or for mitigating the impact of those charges. Based on a review of the evidence in this case, it appears that the SNAP violations at issue did, occur as charged.

The record reflects that Appellant was previously disqualified from SNAP, for violations against the program, for a period of six-months. In this regard, SNAP regulations at 7 CFR § 278.6(e)(6) states, inter alia: "Double the appropriate period of disqualification prescribed in paragraphs (e)(2) through (5) of this section as warranted by the evidence of violations if the same firm has once before been assigned a sanction." Therefore, in this case, the disqualification period of one-year is appropriate.

CIVIL MONEY PENALTY

Appellant requested consideration of a civil money penalty and contends that the firm specialized in selling Pakistani, Indian, and Bangladeshi and Arabic food especially Halal Meat products for the Muslim Community. If my firm is disqualified from SNAP this will cause suffering for the Muslim Community. With regard to these contentions, Retailer Operations Division considered Appellant's eligibility for a hardship CMP 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 one-year disqualification because there were at least 131 authorized retailers within a one-mile radius of Appellant. These retailers included 51 convenience stores, 16 combination/other stores, 42 additional small grocery stores, 11 medium grocery stores, 2 large grocery stores, 4 supermarkets and 5 superstores. The record reflects that there are multiple stores within a one mile radius offering comparable international specialty stock (same as Appellants) with the closest two being .47 miles and .51 miles from Appellant's store. These authorized retailers are selling as large a variety of staple foods at comparable prices. Therefore, there is no perceived hardship to the Muslim community.

CONCLUSION

The documentation presented by Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm. 7 CFR § 278.6(e)(5) specifies 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 or poor supervision by the firm’s ownership or management. As previously stated, 7 CFR § 278.6(e)(6) states, inter alia: “Double the appropriate period of disqualification prescribed in paragraphs (e)(2) through (5) of this section as warranted by the evidence of violations if the same firm has once before been assigned a sanction.”

The violations were determined by Retailer Operations Division to represent the second sanction for the firm and evidence carelessness and poor supervision. Therefore, the imposition of a one year disqualification, the least severe penalty allowed by regulation, is appropriate.

It is therefore established that the violations as described in the letter of charges did in fact occur at the Appellant firm warranting a disqualification of one year in accordance with 7 CFR § 278.6(e)(6). Based on the discussion herein, the decision to impose a one-year disqualification against Al Malik Grocery Inc. is appropriate and the action is sustained.

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

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

June 6, 2019