

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

Ammi Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0215340

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 six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP) as 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, when it imposed a six-month disqualification against Ammi Inc.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulation 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 Ammi Inc. with Federal SNAP law and regulations from February 2019 to March 2019. In a letter dated April 25, 2019, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for merchandise which included 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 chargeable violations warranted a six-month disqualification period as provided in 7 CFR § 278.6(e)(5). The Appellant was informed it could respond to the charges within ten (10) calendar days following delivery of the charge letter. The charge letter was delivered to the store via UPS on April 26, 2019.

The Appellant, through counsel, responded to the charges in a letter dated May 3, 2019. The Appellant requested various case information under the Freedom of Information Act (FOIA). In addition, the Appellant denied trafficking in SNAP benefits and requested a civil money penalty (CMP) in lieu of a permanent disqualification. However, it should be noted that the Appellant was not charged with trafficking; instead the Appellant was charged with accepting SNAP benefits in exchange for ineligible non-food items, a violation which is subject to a six-month disqualification for a first time violation.

The Appellant's counsel received the agency's official FOIA response on May 29, 2019. The Appellant, through counsel, made additional responses to the charges in a letter dated September 5, 2019. Among other contentions, the Appellant stated that the charges were arbitrary and capricious and that the appropriate penalty would be a warning letter and not a six-month disqualification.

After considering the Appellant's contentions and the evidence in the case, the Retailer Operations Division issued a determination letter dated September 11, 2019. The determination letter informed the Appellant it was disqualified from the SNAP for a six-month period 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 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 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 September 20, 2020, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The request for review was granted. Upon acceptance of the administrative review request, implementation of the six-month 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, 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 law in this matter is covered in the Food & 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) 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, in part:

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

7 CFR § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the “Food and Nutrition Act of 2008, as amended, for the purchase of 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....

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 ... (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 non-food items** due to carelessness or poor supervision by the firm’s ownership or management. [Emphasis added.]

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’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.

SUMMARY OF THE CHARGES

During an investigation conducted from February 2019 to March 2019, the USDA conducted four (4) compliance visits at Ammi Inc. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated April 25, 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 all four (4) compliance visits as documented by Exhibits A, B, C, and D. The chargeable violations in Exhibits A, B and C involved the sale of two (2) 20-count packages of 18 ounce Solo plastic

cups; a 10-ounce bottle of Splash gas line antifreeze; a 40-count box of Bounce fabric softener sheets; and a Lil' Auto Store brand 6" adjustable wrench. The chargeable violations were all committed by the same clerk. In Exhibit D, the same clerk refused to exchange SNAP benefits for cash and a package of auto jumper cables; however, the clerk did accept SNAP benefits for a Scotch Brite non-scratch scrub sponge.

APPELLANT'S CONTENTIONS

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

- The penalty imposed in this case is both arbitrary and capricious based on two (2) cases with similar or identical fact patterns from 1979 and 1993.
- A warning letter is the appropriate sanction in this case as FNS did not take any steps prior to the imposition of the sanction to warn the store; the violations were all conducted by the same clerk; the clerk refused to exchange cash and one ineligible item for SNAP benefits; and the owner has taken remedial action to retrain staff.
- Federal regulations require a clear and convincing finding that the violations occurred due to the carelessness or poor supervision of the owner.
- In summary, the actions that occurred at the store do not rise to the level of a mandatory six-month disqualification.

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

Investigation Report

The Appellant states that the agency action is arbitrary and capricious. However, the investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The investigation report documents by a preponderance of the evidence that personnel at the store exchanged ineligible items for SNAP benefits.

Violations Warrant a Six-Month Disqualification

The Appellant states that it should only receive a warning letter under the circumstances of this case. However, the SNAP regulation at 7 CFR § 278.6(e)(5) states, in part, that "FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ...

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 non-food items due to carelessness or poor supervision** by the firm's ownership or management." [Emphasis added.] The investigation report documents that the number of chargeable violations over multiple transactions in this case equate to carelessness or poor supervision by ownership under agency standards.

It is true that, in some limited cases, FNS may send a warning letter in lieu of a disqualification. SNAP regulations at 7 CFR § 278.6(e)(7) state that FNS should "send the firm a warning letter if violations are too limited to warrant a disqualification." **5 U.S.C. § 552 (b)(7)(E)** However, the investigation report in this case documents that the chargeable violations in this case consisted of five (5) non-food items conducted over three (3) transactions; therefore, the Retailer Operations Division correctly determined that a warning letter was not appropriate.

The clerk also exchanged SNAP benefits for an ineligible item in Exhibit D. Although he also refused to exchange cash and jumper cables for SNAP benefits in Exhibit D, this does not ameliorate or mitigate the penalty for the clerk exchanging SNAP benefits for the five (5) non-food items as documented by Exhibits A, B, and C. Therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification, the least severe penalty allowed by regulation under these circumstances.

Owner Responsibility

The store owner signed the SNAP authorization application for Ammi Inc. on September 5, 2018. That application included a signed certification that the owner would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations including accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible non-food items.

Corrective Action

The Appellant states the store has taken some corrective action by retraining employees to insure that there are no further violations. Regarding this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is **limited** to what circumstances existed at the time of the violations that was the basis of the Retailer Operations Division's action. It is not the authority of this review to consider what subsequent remedial actions may be planned or taken so that a store may 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 assessment on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations. Therefore, the Appellant's

contention that corrective action has taken place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Case Law

The Appellant cites two cases from 1979 and 1993 in support of its contentions that a warning letter is the appropriate penalty. It should be noted that considerations of legal precedent through case law, or the lack thereof in relation to the present case, is beyond the scope of this review. Instead this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any application of a supposed judicial precedent would best be addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

HARDSHIP CIVIL MONEY PENALTY

The Retailer Operations Division determined that the Appellant was not eligible for a hardship 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.]

The case record documents that the Retailer Operations Division determined that a six-month disqualification of Ammi Inc., a convenience store, would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores in the area. The Retailer Operations Division determined through agency mapping systems that there are seven (7) comparable or larger SNAP authorized stores located within a one-mile radius of Ammi Inc. These SNAP authorized stores include three (3) combination grocery stores and a supermarket that have a larger depth and breadth of staple food at comparable or likely better prices.

In addition, there is no evidence that Ammi Inc. carries any specialty or international foods that cannot be obtained at these other stores. Based on this evidence, a six-month disqualification of Ammi Inc. would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division 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 established that the violations as described in the letter of charges did in fact occur at Ammi Inc. warranting a disqualification of six (6) 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 non-food 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 Ammi Inc., Appellant, is appropriate and the action is **sustained**.

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

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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.

RONALD C. GWINN
Administrative Review Officer

January 24, 2020