

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

Apna Bazar Cash and Carry,

Appellant,

v.

Case Number: C0191069

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 six-month disqualification from 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 six-month disqualification against Apna Bazar Cash and Carry.

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 Apna Bazar Cash and Carry with Federal SNAP law and regulations from October 2016 through December 2016. In a letter dated August 21, 2017, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange

for merchandise which included major non- food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three (3) out of four (4) 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 responded to the charges in a faxed letter dated September 16, 2017. The Appellant stated that the SNAP transactions for non-food items were due to a faulty scanning software update that occurred prior to the investigation. The Appellant stated that corrective action had been taken including providing additional training to the store clerks regarding the handling of SNAP benefits.

After considering the Appellant's reply and all the evidence in the case, the Retailer Operations Division issued a determination letter dated September 26, 2017. The determination letter informed the Appellant 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 (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 dated October 5, 2017, 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... 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....

7 CFR § 278.6(e)(5) states, in part:

*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 October 2016 through December 2016, the USDA conducted four (4) compliance visits at Apna Bazar Cash and Carry. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated August 21, 2017. 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 three (3) of the four (4) compliance visits. The chargeable violations involved the sale of the following ineligible items: a black 26 cm frying pan; a packet of four (4) count forks; a silver mixing bowl; and a silver soup ladle. The violations appear to have been conducted by three (3) different clerks. The clerk in Exhibit B refused to exchange ineligible items for SNAP benefits; however, that same clerk participated in violations in Exhibit A.

APPELLANT'S CONTENTIONS

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

- The Appellant store has never had any prior violations.
- The store owners had no knowledge that its employees were accepting SNAP benefits for non-food items and did not benefit in any way.
- In October 2016, a faulty scanning software update deactivated the screen that differentiates between SNAP eligible and SNAP ineligible items.
- In December 2016, the store owners realized the glitch and took corrective action including the installation of new software, more intensive compliance procedures, and staff retraining, and posting of notices regarding SNAP eligible and ineligible items.
- The Appellant requests a formal warning letter in lieu of a six-month disqualification.
- In the alternative, the Appellant requests a CMP as the store carries specialty food items not available at other SNAP stores such as imported dairy products and sweets for its Indian, Pakistani, Nepali, and Middle Eastern customers.

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

Violations Warrant a Six-Month Disqualification

The Appellant notes that this is the firm's first SNAP violation. With regard to this contention, 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 or for mitigating the impact of those charges.

The SNAP regulations at 7 CFR § 278.6(e)(5) states, in part:

*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.]*

In some 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.” However, FNS considers the sale of a total of three (3) inexpensive non-food items over one, two or three transactions to equate to carelessness and the lack of thorough supervision on the part of ownership or management. The investigation report documents that the chargeable violations in this case consisted of one (1) inexpensive non-food item and three (3) major ineligible items exchanged for SNAP benefits over three (3) out of four (4) transactions; therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification.

Owner Responsibility

The Appellant states that the store owners were not aware of the violations and did not intend to violate the SNAP rules and regulations. However, regardless of whom the owners of a store may utilize to handle store business, the owners are accountable for the proper training of staff and the monitoring and 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 and Nutrition Act of 2008 and the enforcement efforts of the USDA. Whether or not the violations were in part attributable to store software issues does not change this fact.

Lastly, one of the store owners signed the FNS application to become a SNAP authorized retailer on December 17, 2013. That application included a certification and confirmation 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.”

Corrective Action

The Appellant states that the store has taken corrective action to insure these violations do not occur in the future. 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 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 have taken place or be planned.

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 after-the-fact corrective actions implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

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."

The Appellant requests a CMP and states that the store carries specialty food items not available at other SNAP stores such as imported dairy products and sweets for its Indian, Pakistani, Nepali, and Middle Eastern customers.

The case record documents that the Retailer Operations Division determined that a six-month disqualification of Apna Bazar Cash and Carry would not cause a hardship to SNAP households as there is another nearby SNAP authorized superstore that offers the same or similar international foods. Based on this evidence, a six-month disqualification of Apna Bazar Cash and Carry 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 therefore established that the violations as described in the letter of charges did in fact occur at Apna Bazar Cash and Carry 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 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 Apna Bazar Cash and Carry, 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, 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.

RONALD C. GWINN
Administrative Review Officer

December 1, 2017