

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

Bellingham Fruit/Produce,

Appellant,

v.

Case Number: C0224665

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 finding that a six-month disqualification from participating as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Bellingham Fruit/Produce (Appellant) by the Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action in its administration of SNAP, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, in its administration of SNAP, when it imposed a 6-month period of disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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

USDA conducted an investigation of the compliance of Appellant with Federal SNAP law and regulations from January 7, 2020 through January 9, 2020. By letter dated April 6, 2020, Retailer Operations charged 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 three out of three compliance visits. The Charge Letter further informed Appellant that the violations warranted a 6-month disqualification period, as provided in 7 CFR § 278.6(e)(5). The Charge Letter also stated that under certain conditions, FNS may impose a hardship civil money penalty (CMP) in lieu of a disqualification as provided in 7 CFR § 278.6(f)(1).. The Charge Letter noted that per 7 CFR § 278.6(b), Appellant has the right to present any information, explanation, or evidence regarding the charges and must reply within 10 calendar days of the receipt of the Charge Letter.

The case record shows that the following occurred on April 8, 2020. The owner's son called Retailer Operations regarding the charges and stated the firm will submit a written reply to the charges. Retailer Operations emailed the son a link to the USDA, FNS, SNAP retailer training information, per the son's request. Retailer Operations received a written response to the charges from Appellant's owner and son stating that he discussed the matter with his parents and they fully understand the nature of the incidents. They are perplexed by the purchases in the Report of Investigation. It is not common business practice to accept EBT payment for nonfood items or unapproved SNAP items. They are very strict and adamant on that policy. The staff is well trained. They have no recollection of doing this. They question if it is possible that this report is in error or that the investigator made an oversight. His parents' business has been around since the 1980s, they have been able to maintain their business successfully, and they make every effort to be compliant with local, State, and Federal government business laws and stipulations. They are willing to go to any hearing or talk to anyone to resolve this issue because they are confident that they have been compliant. He printed out the SNAP regulations that FNS emailed to him, on what SNAP can and cannot buy, and they will make extra efforts to make this visible to their customers. They stand by their compliance and are adamant about not accepting unapproved SNAP items, but will be extra vigilant about things falling through the cracks.

After reviewing the evidence and Appellant's reply, Retailer Operations issued a Determination Letter dated April 10, 2020. The Determination Letter stated that Retailer Operations considered Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1), and determined that Appellant was not eligible for the hardship CMP in lieu of the 6-month disqualification because there were other SNAP-authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

In a letter dated April 13, 2020, Appellant's owner and wife appealed Retailer Operations' assessment and requested an administrative review of this action. FNS granted Appellant's request for administrative review by letter dated April 21, 2020. Upon acceptance of the administrative review request, implementation of the six-month disqualification was held in abeyance pending completion of this review. On April 27, 2020, Appellant's son called to confirm the due date to submit documentation in support of the case, then emailed the information that day. Also provided was a letter of representation, signed by the owner, for his wife and son to discuss any matters pertinent to the case. On May 11, 2020, Appellant mailed a hard copy of the same information that was emailed.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means Appellant has the burden of providing relevant, credible evidence that 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 contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulations under 7 CFR § 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.

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 § 278.2(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 § 278.6(a) states, in part: 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.

7 CFR § 278.6(e)(5) states, in part, that a firm is to be disqualified 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.

7 CFR § 278.6(f)(1) states, in part: FNS may impose a CMP 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 January 7, 2020 through January 9, 2020, USDA conducted three compliance visits at Appellant. The Report of Investigation, dated January 14, 2020, was provided to Appellant as an attachment to the Charge Letter. The report, which included Exhibits A through C, provides full details on the results of each compliance visit. The report documents SNAP violations occurred during three of the three compliance visits and involved the sale of Hefty Storage Slider Bags (25 bags), Ziploc Slider Storage Gallon Bags (15 bags), Palmolive Dish Liquid (12.6 fl oz), and Scott Bathroom Tissue (1,000 sheets per roll), best

described in regulatory terms as “common nonfood items”. The misuse of SNAP benefits noted in Exhibits A, B, and C is in violation of 7 CFR § 278.2(a), and warrants a 6-month disqualification from SNAP.

APPELLANT’S CONTENTIONS

Appellant made the following summarized contentions in its request for administrative review. In reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically referenced herein.

- We feel we have abided by SNAP regulations outlined by the State of Massachusetts. EBT cash in Massachusetts can buy anything you need except for firearms, gambling, adult oriented material, etc. Transactions are performed by myself, my husband, and another clerk who have been trained. We are perplexed at the allegations. We are aware of what SNAP can and cannot buy and make every effort to adhere to the stipulations that are imposed. We cannot comprehend that the investigator came three consecutive days and documented that each of us made SNAP violations. We ensure that when customers make purchases with EBT benefits, we process nonfood items for EBT cash and food items for EBT approved food items. This is common business practice for us. All of the nonfood items on the report are eligible for purchase with EBT cash. We would like to know if the investigator has any detailed receipts of nonfood items from us?
- We are honest, hardworking people trying to make an honest living like every else. Our hope is to retire relatively soon; any disruptions to our business may delay that plan. We have lost a lot of business due to the Coronavirus Pandemic and if we do not have the ability to offer SNAP, and possibly lose WIC, this would be drastic for our business.
- We are in the middle of a pandemic and the unemployment rate is so high. Chelsea is the hardest hit city in Massachusetts and has a lot of low-income families and individuals who rely on government assistance. If our ability to service these SNAP customers, is taken away, then it is hard on us and also hard on the people. We request a CMP in lieu of the six-month suspension if you feel we are in violation.
- I called FNS to see if there was an option for an in-person training and was told no. I was told about the optional online training resources, that nobody would monitor our compliance to the training, and we would be training ourselves. We are going to go through the materials thoroughly to ensure proper compliance and take recommendations to perform refresher training. If you would like, we can offer you documentation that we have been compliant on an annual or semi-annual basis. It would have been ideal if there was an actual physical training, but this is the best we can do at this point to establish a training program. Each of the staff who handles SNAP transactions will go through the videos on the training pages, and thoroughly go through the most recent SNAP training handbook that we have access to. We will do the following to ensure compliance and that we did the training:
 1. Record of materials reviewed
 2. Name of owner and employees
 3. Dates of training
 4. Signatures of owner(s) and employee(s).

- We interpret the report that we violated SNAP regulations, were disqualified for processing nonfood items as EBT food items, and understand it is not an appropriate way to handle the transactions. Although we could have made this error, we in no way did this intentionally, and from our knowledge, we do not recall this on said dates. We have run this business since 1981 and have worked with the Food Stamp Program as it evolved into SNAP, and never had any issues until recently. We cannot recall ever selling nonfood items with the EBT food option. Going forward, we will continue to make every effort to ensure SNAP benefits are used appropriately by our customers and will continue to abide by the laws. Due to the extenuating circumstances of this pandemic, we are asking you to understand our situation and be generous with your decision. We are making every effort to avoid a six-month disqualification and abide by the rules and regulations. We hope there are other alternative solutions and we can come to an amicable resolution to this matter.

Appellant provided a copy of the following in support of these contentions:

- Charge Letter and the Report of Investigation
- Using your EBT card from <https://www.mass.gov/guides/using-your-ebt-card-dated-8/19>
- Picture of its terminal setup to show the options for food stamps, cash, and balance information
- SNAP Retailer Training Materials from the USDA, FNS, SNAP Retailer Training website

ANALYSIS AND FINDINGS

This review is to either validate or invalidate the determination made by Retailer Operations and is limited to the facts at the basis of Retailer Operations' determination. The investigation report, dated January 14, 2020, documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the Charge Letter were conducted under the direction of a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, specific facts related thereto, and supported by documentation that includes written narratives, photographs, and receipts with specific details of the transactions. The documentation presented by Retailer Operations provides through a preponderance of the evidence that the reported violations occurred at Appellant.

The investigative report shows that three employees working at Appellant accepted SNAP benefits for ineligible nonfood items on three separate occasions during the investigative period indicating an ongoing pattern of SNAP violations as defined by 7 CFR § 271.2. The investigation report documents by a preponderance of the evidence that the store employees engaged in the misuse of SNAP benefits noted in Exhibits A, B, and C warranting a disqualification as a SNAP retail food store for a period of six months.

Appellant contends it has never had any issues until recently and, going forward, will continue to make every effort to ensure SNAP benefits are used appropriately by its customers and will continue to abide by the laws. Due to the extenuating circumstances of this pandemic, Appellant asks for understanding and hopes there are other alternative solutions for an amicable resolution.

Retailer Operations determined that the violations committed represent the first sanction for Appellant and evidence carelessness or poor supervision. 7 CFR §278.6(e)(5) states that FNS shall disqualify a 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 and poor supervision by the firm's ownership or management.

A record of participation in 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 the violations upon which they are based. There is no provision in the Act, regulations, or agency policy that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees. The imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

Ownership of a SNAP-authorized firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. On November 12, 1997, the record shows that Appellant's owner signed the FNS 252 store application form to become an authorized retail food store, and again on March 30, 2017, when the owner signed the FNS 252R SNAP retail food store reauthorization form. Both of these forms included a certification and confirmation that the owner accepts responsibility on behalf of the firm for violations of 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 for cash and as payment for ineligible items, a violation of SNAP rules and regulations. 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.

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means 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. Appellant did not provide any evidence that the violations cited in the Charge Letter did not occur.

Based on this discussion, the decision by Retailer Operations to disqualify Appellant for a six-month period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

Financial Hardship

Appellant contends they are honest, hardworking people, trying to make an honest living like every else. Appellant hopes to retire relatively soon and any disruptions to its business may delay that plan. Appellant has lost a lot of business due to the Coronavirus Pandemic and the loss of SNAP, and possibly WIC, would be drastic to its business.

With regards to Appellant's contentions that a SNAP disqualification will impose financial hardship to the firm, it is recognized 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 for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty 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.

Furthermore, 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.

Corrective Action

Appellant contends it called FNS to see if in-person training was available and was told there was only optional, online training resources available. Appellant contends it is going to go through the materials thoroughly to ensure proper compliance and take recommendations to perform refresher training. Appellant contends staff who handle SNAP transactions will go through the videos on the training website, thoroughly review the most recent SNAP training handbook, and offers to forward compliance documentation to FNS on an annual or semi-annual basis of the following:

1. Record of materials reviewed;
2. Name of owner and employees;
3. Dates of training;
4. Signatures of owner(s) and employee(s).

As noted previously, the purpose of this review is to either validate or to invalidate the earlier decision of Retailer Operations. This review is limited to what circumstances were at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that Appellant may begin to comply with program requirements. 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 after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, Appellant's contentions that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY (CMP)

Appellant requests a CMP if found to be in violation. Appellant contends it is in the middle of a pandemic and the unemployment rate is high. Chelsea is the hardest hit city in Massachusetts and has a lot of low-income families and individuals who rely on government assistance. If Appellant's ability to serve its SNAP customers is taken away, it will be hard on these people.

Retailer Operations determined that Appellant was not eligible for a hardship CMP under 7 CFR § 278.6(f)(1). That regulation reads, in part, FNS may impose a CMP 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 case record documents that Retailer Operations determined that a 6-month disqualification would not cause hardship to SNAP households as there are other comparable or larger SNAP-authorized stores located within a 1.0-mile radius of Appellant. Appellant is classified by FNS as a small grocery store. Agency mapping systems document 20 SNAP-authorized stores are located within a 1.0-mile radius of Appellant, and include 1 medium grocery store, 1 supermarket, and 2 super stores. The superior stocked super stores are located 0.02 and 0.42 miles from Appellant.

Based on the evidence, the disqualification of Appellant would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, Retailer Operations' decision not to assess a hardship CMP in lieu of a 6-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 Charge Letter did in fact occur at Appellant, warranting a 6-month disqualification in accordance with 7 CFR § 278.6(e)(5). That regulation states 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". Therefore, the decision to impose a six-month disqualification, the least severe penalty allowed by regulation, against Appellant is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and regulations there under, the 6-month disqualification shall become effective 30 days after receipt of this Decision. A new application for SNAP participation of this firm may be submitted 10 days prior to the expiration of this 6-month disqualification.

Please contact the Retailer Service Center at 877-823-4369 with general questions regarding the SNAP application process. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this Decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. 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 owner resides or is 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 30 days of receipt of this Decision. Please note that the judicial filing timeframe is mandated in the Act, and this office cannot grant an extension.

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.

Kim Dameron
Administrative Review Officer

May 11, 2021