

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

Benadir Food Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0211772

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 Benadir Food Market (hereinafter “Appellant”) by FNS’s 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 Benadir Food Market.

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, Benadir Food Market, was initially authorized for SNAP participation as a small grocery store on February 10, 2010. Between February 25, 2019, and March 18, 2019, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigation report documented that personnel at Benadir Food Market accepted SNAP benefits in exchange for ineligible items on four separate occasions. According to the report, the Appellant firm sold bars of soap, trash bags, plastic spoons, antiperspirant, foam bowls, and dishwashing liquid in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible foods.

In a letter dated June 18, 2019, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the acceptance of SNAP benefits in exchange for ineligible nonfood merchandise warranted a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In a letter received by FNS on July 1, 2019, the Appellant responded to the charges, apologizing for the violations and stating that all employees would be retrained immediately. The Appellant further stated that a disqualification would harm the business because most of the firm's clients are SNAP recipients. The Appellant hoped that since the firm had not committed a major violation such as trafficking, FNS would allow it to remain authorized to accept SNAP.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated August 28, 2019. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the charge letter 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 September 6, 2019, the Appellant appealed the agency's determination by requesting an administrative review. The request was granted and implementation of the disqualification 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 25, 2019, and March 18, 2019, the Food and Nutrition Service completed five compliance visits at Benadir Food Market. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the June 18, 2019, charge letter. The investigation report includes Exhibits A through E, and provides full details on the results of each compliance visit. SNAP violations were documented during four of the five 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 135-gram bar of soap (*Dove* brand), Exhibit A
- One 135-gram bar of soap (*Dove* brand), Exhibit B
- One 12-count box of kitchen trash bags (*Sure-Tuff* brand), Exhibit B

- One 51-count package of plastic spoons (no brand indicated), Exhibit B
- One 51-count package of plastic spoons (no brand indicated), Exhibit C
- One 2.7-ounce container of antiperspirant (*Degree* brand), Exhibit C
- One 20-count package of foam bowls (*Axxion* brand), Exhibit C
- One 3.7 ounce bar of soap (*Irish Spring* brand), Exhibit D
- One 12-count box of kitchen trash bags (*Sure-Tuff* brand), Exhibit D
- One 12.6-fluid-ounce bottle of dishwashing liquid (*Ajax* brand), Exhibit D

The report indicates that in Exhibit E, the clerk on duty refused to exchange SNAP benefits for cash (i.e. trafficking). The report also states that the same clerk conducted all four violative transactions. The charge letter states that the violations that occurred in Exhibits B, C, and D 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:

- Appellant owner sincerely apologizes for the wrongdoing of its employee, who failed to adhere to USDA rules and regulations. Appellant takes this matter very seriously and will immediately retrain its employees in this matter.
- A disqualification from SNAP would cause hardship to the firm, as most of its clients are SNAP recipients.
- Since the store has not committed a major violation such as trafficking, Appellant hopes that FNS will allow the store to remain authorized to accept SNAP.

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 in this document.

ANALYSIS AND FINDINGS

The Appellant has not provided any evidence or documentation to counter FNS’s investigation report. In fact, the Appellant appears to acknowledge that violations occurred, apologizing for its employee’s wrongdoing and claiming that it will retrain all employees immediately. Because the violations do not appear to be in dispute, it is the determination of this review that SNAP violations did occur as charged and a six-month disqualification is warranted.

Remedial Actions Taken

The Appellant has apologized for the violations committed by one of its employee and contends that it will immediately retrain its employees in this matter.

With regard to this contention, it must be stated 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 facts that existed at the time the violations were committed. It is not the authority

of this review to consider any subsequent remedial actions, such as providing refresher training to employees, 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.

Accordingly, the planned remedial actions do not provide a valid basis for reversing the agency's disqualification determination.

Nature of the Violations

The Appellant hopes that since the store did not commit a major violation such as trafficking, FNS will allow it to remain authorized to accept SNAP.

Unfortunately, the regulations at 7 CFR § 278.6(e)(5) do not allow for a modification or a reduction of a disqualification period on the basis that the violation committed did not include trafficking. The regulations state that FNS “shall disqualify the firm ... if ... 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” (emphasis added). That the investigator was permitted by the firm to exchange SNAP benefits for ineligible items on four consecutive occasions strongly suggests a lack of supervision or oversight by store ownership or management. Additionally, the clerk's refusal to engage in trafficking in Exhibit E implies that he knew the rules regarding SNAP but either willfully ignored them or was careless in his processing of transactions during the investigator's four previous visits to the store.

Because the Appellant has not offered any evidence of a regular training program at the store or other evidence of management oversight, it is reasonable for this review to presume that the firm's ownership or management provided poor supervision to its employees which resulted in the violations cited in the investigative report. Accordingly, it is the finding of this review that the six-month disqualification in this case is appropriate and wholly in line with regulations at 7 CFR § 278.6(e)(5).

Hardship to Appellant

The Appellant contends that a disqualification from SNAP would cause hardship to the firm because most of its clients are SNAP recipients.

Unfortunately, SNAP regulations do not permit this review to consider a waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself. To allow an exemption from penalties based on a purported economic hardship to the firm or its ownership would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of 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.

Civil Money Penalty

Although not requested by the Appellant, this review evaluated the firm's eligibility for a civil money penalty (CMP) in lieu of a six-month disqualification. To address potential difficulties that SNAP households might face when a firm is disqualified, regulations at 7 CFR § 278.6(f)(1) allow for a CMP to be imposed instead of disqualification when the firm's disqualification would cause "hardship" to SNAP households. According to this regulation, hardship occurs when there is "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices."

It is the determination of this review that a disqualification of Benadir Food Market, a small grocery 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 a dozen similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of Benadir Food Market, including several supermarkets and superstores. There is also no evidence that Benadir Food Market sells its inventory at unusually low prices in comparison to nearby stores. Because hardship conditions do not exist in this case, a civil money penalty in lieu of disqualification is not an available option.

CONCLUSION

Based on a review of all information in this case, this administrative review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Benadir Food Market 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. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, Benadir Food Market, 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 authorization 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

December 16, 2019