

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

**Bonitos Market,**

**Appellant,**

**v.**

**Case Number: C0206078**

**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 retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Bonitos Market by the Retailer Operations Division of FNS.

**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 period of disqualification against Bonitos Market on July 5, 2018.

**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**

The Department of Agriculture conducted an investigation of the compliance of Bonitos Market with Federal SNAP law and regulations during the period March 20, 2018 through May 15, 2018. In a letter dated June 21, 2018, the Retailer Operations Division charged the 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 five out of eight 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).

In responses received by the Retailer Operations Division on June 25, 2018 and June 29, 2018, the Appellant replied to the charges therein indicating that the SNAP violations were committed by an employee who inadvertently allowed ineligible items to be purchased with SNAP benefits without being fully aware of the SNAP rules. Bonitos Market has regular customers who purchase food items including milk, sugar, beans, and bread. A SNAP disqualification will impose a hardship on SNAP customers as they will have to cross the street through a traffic light to purchase food items and they will not be able to purchase milk after 9:00 pm, the closing time of the store located across the street.

After considering the Appellant's replies and the evidence of this case, the Retailer Operations Division issued a Determination Letter dated July 5, 2018. The Determination Letter informed the Appellant that 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 postmarked July 13, 2018, the Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated July 20, 2018. 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, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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 statute 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 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, 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 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, inter alia:

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, 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(f)(1) states, inter alia:

FNS may impose a civil money penalty as a sanction in lieu of disqualification 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.

### **SUMMARY OF THE CHARGES**

During an investigation conducted from March 20, 2018 through May 15, 2018, USDA conducted eight compliance visits at Bonitos Market. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated June 21, 2018. The investigation report included Exhibits A through H which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during five of the eight compliance visits and involved the sale of a variety of items best described in regulatory terms as "common nonfood items". The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

### **APPELLANT'S CONTENTIONS**

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

In the Appellant's replies to the Charge Letter and in the administrative review request postmarked July 13, 2018, the Appellant stated the following summarized contentions, in relevant part:

- The SNAP violations were committed by an employee who inadvertently allowed ineligible items to be purchased with SNAP benefits without being fully aware of the SNAP rules.
- This is the first time that Bonitos Market has been cited for SNAP violations.
- The Appellant requests that FNS impose a Warning Letter in lieu of a SNAP disqualification of Bonitos Market.
- Bonitos Market has regular customers who purchase food items including milk, sugar, beans, and bread.
- There is no food store on the same side of the street within a few blocks where customers can purchase food items. The customers have to cross the street through a traffic light to purchase food items.
- Many of Bonitos Market's customers have small children who come to the store to purchase food items.
- Some customers come to Bonitos Market late at night to buy milk as the other store located on the opposite side of the traffic light closes by 9:00 pm or so.
- It will impose a hardship on the subject firm's customers to have to cross the traffic light to reach the other store to purchase food items at night.
- In light of this customer hardship, the Appellant requests consideration of a civil money penalty in lieu of a six month SNAP disqualification.

## ANALYSIS AND FINDINGS

### SNAP Violations Inadvertent

The Appellant contends that the SNAP violations were committed by an employee who inadvertently allowed ineligible items to be purchased with SNAP benefits without being fully aware of the SNAP rules.

The Appellant's contention cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at Bonitos Market. Regardless of whom the ownership of a store may utilize to handle store business (i.e., regardless of whether a store owner, store manager, store clerk, friend, family member, etc. was involved in the violative transactions), ownership is accountable for the proper handling of SNAP benefit transactions. Prior to becoming authorized to participate in the SNAP on December 9, 2013, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store's employees---paid, unpaid, new, temporary, full-time, part-time, etc. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of program rules could result in fines, legal sanctions,

withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

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 because of the wrongful conduct of an owner, manager, or someone acting on their behalf. In this case, the individual who committed the SNAP violations was not specifically identified during the investigation. A six month disqualification is the appropriate sanction for violations which result from employees not being fully aware of the SNAP rules, the carelessness of employees, or due to inadequate supervision by the store owner. As 7 CFR § 278.6(e)(5) of the SNAP regulations states, “Disqualify the firm for six months if ... the evidence shows that personnel of the firm have committed violations ... due to the carelessness or poor supervision by the firm’s ownership or management”. The Appellant’s implied contention that the SNAP violations were inadvertently committed by a store employee who was not fully aware of the SNAP rules cannot be accepted as a valid basis for diminishing the penalty. 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 and the enforcement efforts of the USDA.

### **First Time Violator**

The Appellant contends that this is the first time that Bonitos Market has been cited for SNAP violations. However, 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.

### **Warning Letter**

The Appellant requests that FNS impose a Warning Letter in lieu of a SNAP disqualification of Bonitos Market. 7 CFR § 278.6(d)(2)&(3) of the SNAP regulations provides that “The FNS office making a disqualification or penalty determination ... shall consider ... any prior action ... to warn the firm about the possibility that violations are occurring....” The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn Bonitos Market about the possibility that violations were occurring because there were no prior warnings.

Moreover, USDA conducts investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of violations that may be occurring. As was outlined in the investigative report that was provided to the Appellant as part of the Charge Letter, in the investigation of Bonitos Market, the Appellant was charged with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These violations occurred on five out of eight compliance visits. 7 CFR § 278.6(e)(5) of the SNAP regulations is specific in 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 nonfood items due to carelessness by employees or poor supervision by the firm's ownership or management".

As such, the Retailer Operations Division's decision to impose a six month SNAP disqualification for Bonitos Market is appropriate for the SNAP violations that occurred during the investigation period.

### **CIVIL MONEY PENALTY**

The Appellant contends that Bonitos Market has regular customers who purchase food items including milk, sugar, beans, and bread. There is no food store on the same side of the street within a few blocks where customers can purchase food items. The customers have to cross the street through a traffic light to purchase food items. Many of Bonitos Market's customers have small children who come to the store to purchase food items. Some customers come to Bonitos Market late at night to buy milk as the other store located on the opposite side of the traffic light closes by 9:00 pm or so. It will impose a hardship on the subject firm's customers to have to cross the traffic light to reach the other store to purchase food items at night. In light of this customer hardship, the Appellant requests consideration of a civil money penalty in lieu of a six month SNAP disqualification.

The Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty (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]. **5 U.S.C. § 552 (b)(7)(E).**

Based on the evidence, the disqualification of Bonitos Market would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division's 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 Bonitos Market 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 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 Bonitos Market, the Appellant firm, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six month period of disqualification shall become effective thirty (30) days after receipt of this letter.

A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this six month period.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (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, 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.

LORIE L. CONNEEN  
Administrative Review Officer

November 19, 2018