

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

City Lee Market,

Appellant,

v.

Case Number: C0219467

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 City Lee Market (hereinafter “City Lee Market” or “Appellant”) 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 City Lee 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

The Department of Agriculture conducted an investigation of the compliance of City Lee Market with Federal SNAP law and regulations during the period September 30, 2019 through December 23, 2019. In a letter dated February 25, 2020, 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 three out of four 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 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).

In a response to the Retailer Operations Division of March 4, 2020, the Appellant replied to the charges therein stating that the store owner takes full responsibility for the SNAP mistakes made at the store. However, the owner was out of the country when these incidents occurred, even though they were less **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The owner was not aware that a small mistake will cause him to lose his SNAP authorization. A SNAP disqualification will create hardship on the owner and on customers. The Appellant is the only store within a mile distance which carries groceries, produce, and meat. A SNAP disqualification will impose extreme hardship to the owner financially. The Appellant is located in a poor area where customers use SNAP for purchases. With less customers, the owner will have to close the store and will not be able to make the payment and he will not be able to support his children who go to college. The owner has a very large family to feed. He has brothers and sisters, most of which live in Yemen with no support except from the owner. The Appellant requests that a civil money penalty be imposed in lieu of a SNAP disqualification. The owner has been in this business for 20 years and has never violated any laws—city, state, or Federal. The Appellant does not sell alcohol and the only thing making the business go is the grocery, meat, and produce sales.

After considering the Appellant's response and the evidence of this case, the Retailer Operations Division issued a Determination Letter dated March 17, 2020. 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 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 March 24, 2020, 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 April 3, 2020. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this review. In a letter postmarked April 22, 2020, the Appellant submitted additional information in support of the request for administrative 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 September 30, 2019 through December 23, 2019, USDA conducted four compliance visits at City Lee Market. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated February 25, 2020. 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 of the four compliance visits and involved the sale of a variety of items best described in regulatory terms as "common nonfood items". The misuse of SNAP benefits noted

in Exhibits B, C, and D warrant a disqualification as a SNAP retail food store for a period of six months. 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 response to the Charge Letter, in the administrative review request, and in subsequent correspondence, the Appellant stated the following summarized contentions, in relevant part:

- The store owner takes full responsibility for the SNAP mistakes made at the store. However, the owner was out of the country when these incidents occurred, even though they were less **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The owner was not aware that a small mistake will cause him to lose his SNAP authorization.
- The owner has been in this business for 20 years and has never violated any laws—city, state, or Federal. The Appellant does not sell alcohol and the only thing making the business go is the grocery, meat, and produce sales.
- The Appellant promises to teach its employees how to properly deal with the acceptance of SNAP benefits and what items are allowed to be purchased with these benefits.
- A SNAP disqualification will impose extreme hardship to the owner financially. The Appellant is located in a poor area where customers use SNAP for purchases. With less customers, the owner will have to close the store and will not be able to make the payment and he will not be able to support his children who go to college. The owner has a very large family to feed. He has brothers and sisters, most of which live in Yemen with no support except from the owner. With the corona virus situation, the store is not under mandatory shut down and it is currently open to the public, but its sales are over 60% down which hardly covers the rent and shop expenses. Utilizing SNAP benefits to sell essential groceries to customers will generate some extra cash for the owner and his family to survive these hard times and put food on the table.
- A SNAP disqualification will impose hardship on customers. The Appellant is located in a poor area where customers use SNAP for purchases. The Appellant is the only store within a mile distance which carries groceries, produce, and meat. While regular sales have dropped during the corona virus situation, the store's SNAP sales are consistent or have increased, proving that the store needs to continue to accept SNAP benefits to support those in the low income community who rather shop at the Appellant due to it competitive prices.
- The Appellant requests that a civil money penalty be imposed in lieu of a SNAP disqualification. While there may be other stores in the area, everyone is suffering hardship, including the Appellant.

In support of its contentions, the Appellant submitted Card Processing Statements for December 1, 2019 – December 31, 2019, January 1, 2020 – January 31, 2020, and February 1, 2020 – February 29, 2020.

ANALYSIS AND FINDINGS

SNAP Violations

This review is to either validate or to invalidate the determination made by the Retailer Operations Divisions; it is limited to the facts at the basis of the Retailer Operations Division's determination at the time it was made. Upon review, the evidence supports that the Appellant established a record of selling nonfood items as defined by Section 271.2 of the regulations, on three out of four occasions, or during 75% of the visits conducted at the store. 5 U.S.C. § 552 (b)(7)(E). Therefore, the violations in this case are not too limited to warrant a disqualification. The Exhibits furnished with the Charge Letter warrant a disqualification period of six months.

The owner requests that a SNAP disqualification not be imposed. The owner contends that he takes full responsibility for the SNAP mistakes made at the store. The owner was out of the country when these incidents occurred, even though they were less 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The owner was not aware that a small mistake will cause him to lose his SNAP authorization.

However, neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of SNAP benefits for transactions involving the sale of ineligible items to be defined as violative. No mention of minimum cost or types of ineligibles is cited in Section 278.6(e)(5) of the SNAP regulations, which states that FNS shall disqualify a store 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 in exchange for SNAP benefits due to carelessness by store employees or poor supervision by the firm's ownership or management.

The Appellant provided no evidence that SNAP training has been given to employees. Regardless of who the store owner utilizes to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. 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. The regulations stipulate 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 and poor supervision by the firm's ownership or management.

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. The Appellant did not provide any evidence that the violations cited in the Charge Letter did not occur.

No Prior Violations

The owner contends that he has been in this business for 20 years and has never violated any laws—city, state, or Federal. The Appellant does not sell alcohol and the only thing making the business go is the grocery, meat, and produce sales. 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.

Corrective Action

The Appellant contends that it promises to teach its employees how to properly deal with the acceptance of SNAP benefits and what items are allowed to be purchased with these benefits.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action 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 the store 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, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Financial Hardship

Regarding the Appellant's contentions that a SNAP disqualification will impose extreme hardship to the owner financially, 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 possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the 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 regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the 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.

CIVIL MONEY PENALTY

With regards to the Appellant's contentions that a SNAP disqualification will impose hardship on customers and its request that a civil money penalty be imposed in lieu of a 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 City Lee 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 City Lee 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 City Lee 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

May 19, 2020