

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Donna Maria Food Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0196861

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support a finding that the three-year disqualification of Donna Maria Food Market (Donna Maria or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program, as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(1) and 7 CFR § 278.6(a), (e)(2), and (e)(3) in its administration of the SNAP, when it imposed a three-year period of disqualification against Appellant.

AUTHORITY

7 USC § 2023 and the 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 USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of April 11, 2017, through May 24, 2017. The investigative report documented that Appellant’s owner accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. The investigative report also noted that Appellant sold

major ineligible items consisting of twelve and 24 packs of beer (Exhibits E, F, and G) on three visits. On two occasions (Exhibits H and J) the exchange SNAP benefits for cash was refused.

As a result of evidence compiled during this investigation, by letter dated August 17, 2017, the Retailer Operations Division charged ownership with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a) and (e)(3) noted the violations warranted a three-year disqualification period. The letter also stated that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

Appellant' counsel replied to the charges by letter dated September 22, 2017. Appellant, though counsel, accepted full responsibility for the violations but requested that the fact that Appellant had no previous violations and that a disqualification would cause hardship to area recipients be considered. After giving consideration to the retailer's reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated October 5, 2017, that the violations cited in the charge letter occurred at the firm and that a three-year period of disqualification was warranted. The letter stated that eligibility for a hardship CMP was not applicable as 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 16, 2017, counsel requested an administrative review of the Retailer Operations Division's determination. The appeal was granted, and implementation of the sanction 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 clear 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, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a), (e)(2), and (e)(3) establish the authority upon which a three-year disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 271.2 states in part that, "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) specifies in relevant part, "Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible

food.” Further, the citation specifies that “Coupons may not be accepted in exchange for cash . . . or for any other nonfood use.”

7 CFR § 278.6(a) states, *inter alia*, that “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*, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system . . . ” (emphasis added)

Section 278.6(e)(2) of the SNAP regulations states, in part, that a firm is to be disqualified for five years if “it is the firm’s practice to sell expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages in exchange” for SNAP benefits.

Section 278.6(e)(3) of the SNAP regulations states, in part, that a firm is to be disqualified for three years if “it is the firm’s practice to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket and the firm was previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations; or . . . any of the situations described in paragraph (e)(2) of this section occurred and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations.”

In addition, 7 CFR § 278.6(f)(1) provides for civil money penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households benefit because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It reads, *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 SNAP households benefit because there is no other authorized retail food store in the area selling as large a variety of staple food items.”

SUMMARY OF CHARGES

Donna Maria is a convenience store, originally authorized by FNS on August 28, 2014. During an investigation conducted between April 11, 2017, and May 24, 2017, a USDA investigator and confidential informant conducted seven compliance visits at Appellant. A report of the investigation dated July 18, 2017, was provided to Appellant as an attachment to the charge letter. The investigation report included Exhibits A through G which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during four of the seven compliance visits and involved the sale of common ineligible items including slider bags, laundry detergent, air freshener spray, aluminum foil, bath tissue, trash bags, cigarettes, disinfecting wipes, and a fidget spinner. The investigative report also noted that Appellant’s sold major ineligible items consisting of twelve and 24 packs of beer (Exhibits E, F, and G) on three visits. On two occasions (Exhibits H and J) the exchange SNAP benefits for cash was refused.

APPELLANT'S CONTENTIONS

Appellant, through counsel, made the following summarized contentions in its request for review postmarked October 16, 2017, in relevant part:

- Appellant requests that the determination that Appellant is not eligible for a CMP be reviewed.
- Appellant has a spotless record.
- The penalty will cause hardship the on the community

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

The charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the supervision of an 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, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The documentation presented by the Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm.

Appellant, through counsel, contends that the charges are minimal and should be dismissed. Upon review, the evidence indicates that Appellant established a record of selling non-food items, as defined by Section 271.2 of the regulations, on multiple occasions as noted in Exhibits D, E, F, and G furnished with the charge letter. In addition, on three separate occasions Appellant sold either a 12 pack or 24 pack of beer in exchange for SNAP benefits. 7 CFR § 278.6(e)(2) require FNS to disqualify a firm for five years if it is the firm's practice to sell expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages in exchange" for SNAP benefits. Section 278.6(e)(3) of the SNAP regulations reduces the sanction to three years if "FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations." Therefore, the imposition of a three-year disqualification is appropriate.

Refused Cash

Appellant, through counsel, states that Appellant did not exchange cash for SNAP benefits. This is true and for this reason the Retailer Operations Division did not charge Appellant with a more serious violation. If Appellant had exchanged cash for SNAP benefits during the investigation, the store would have been permanently disqualified. That Appellant did not exchange benefits

for cash not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

No Previous Violations

Counsel contends that Appellant has a spotless record. 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 the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

CIVIL MONEY PENALTY

Appellant, through counsel, contends that the disqualification will cause a hardship on the community. 7 CFR § 278.6(f)(1) 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 Retailer Operations Division determined that there are 11 authorized stores located within a one-mile radius of Appellant, including eight other convenience stores, one supermarket, and two super stores. Thus, in its letter dated October 5, 2017, the Retailer Operations Division determined that a hardship CMP would not be appropriate, as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

Some degree of inconvenience to SNAP customers is inherent whenever any SNAP authorized retailer is disqualified. For example, the normal shopping pattern of SNAP customers may be temporarily altered during the period of disqualification. Nevertheless, the determination of the Retailer Operations Division that the six-month disqualification of Donna Maria from the SNAP would not create a hardship to customers, as differentiated from potential inconvenience, is sustained and a civil money penalty in lieu of disqualification is not appropriate in this case.

CONCLUSION

A review of the evidence in this case confirms that the Retailer Operations Division’s initial determination to impose a three-year disqualification in lieu of a CMP was proper. The record documents that the Retailer Operations Division properly considered Appellant’s eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations. Appellant is located in an area where there are other authorized SNAP retailers, selling as large a variety of staple food items at comparable prices. Given the evidence under review, the CMP was appropriately denied. Therefore, the three-year disqualification of Appellant from participating as an authorized retailer in the SNAP is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 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 Appellant's owners resides 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 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

November 21, 2017