

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

E & J Grocery Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0212685

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), that the record supports that E & J Grocery Corp.(Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a six month disqualification of Appellant from the SNAP as imposed by the Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action in its administration of the SNAP, consistent with 7 CFR § 278.6(f)(1), 7 CFR § 278.6(a), and 7 CFR § 278.6(e), when it imposed a six 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 the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of February 21, 2019 through March 11, 2019. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate occasions that warrant a six month disqualification period. The items sold on multiple dates are best described as common nonfood items.

As a result of evidence compiled during the investigation, Retailer Operations, by letter dated March 21, 2019, charged the firm with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits was noted in Exhibits A, B, D, and E. Exhibits A, D, and E warrant a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain conditions FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

The record shows that the owner replied to the Charge letter on March 27, 2019. Retailer Operations informed the owner by Determination letter dated April 10, 2019, that the violations cited in the Charge letter occurred at the firm, and that a six month period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

The owner, via counsel, appealed the determination by letter dated April 22, 2019. The administrative review was granted by letter dated April 25, 2019. Counsel provided additional information dated May 16, 2019.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument 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 § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(5) establish the authority upon which a six month disqualification may be imposed against a retail food store.

7 CFR § 278.2(a) states: “Coupons may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food.”

7 CFR § 278.6(e)(5) of the SNAP regulations states 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(a) states: “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.”

7 CFR § 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause hardship to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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

A report of the investigation was provided to the Appellant as Exhibits with the Charge letter. The investigative report provides details on the results of each compliance visit. The investigative report documents that SNAP violations were recorded during three store visits that warrant a six month disqualification. The violations involved the sale of nonfood items for SNAP benefits in violation of 7 CFR § 278.2(a) including: soap, cleaner, scour pads, trash bags and laundry soap.

APPELLANT’S CONTENTIONS

Consideration of all contentions was made whether recapitulated here or not. Information as referenced below was advanced.

- E & J will face severe economic losses should it not be allowed to accept SNAP for six months. It is possible that having the SNAP program removed from the store will force E & J to close.
- For the first three months of this year (January to March), EBT deposits equaled approximately forty percent (40%) of the Company’s income. See attached copies of the first page of bank statements and spreadsheet of all deposits, compiled by the Company’s tax and payroll preparer, which support our calculation on the percentage of income.
- If the income was reduced by 40% the Company’s income would drop by 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering the Company only realized a net profit of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the income loss would result in a net loss of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for the year.
- Most businesses cannot survive long if they are losing money. The lost SNAP income would force the store to either cut staff or just close their doors for good. Neither option is good for the local economy, which is already in a depressed state.
- Hazleton, Pennsylvania is a small city that has seen a huge increase in the number of Hispanic residents over the last twenty years. In order to better accommodate the changing demographic, small stores, such as this one began to appear. A store like E & J is a vital part of its local community as it offers specialty food products that appeal to Hispanics. Many of these specialty items are not available in the “chain” grocery stores.

- Even if the items are available in larger stores, most people tend to shop where they are comfortable. Most big businesses in the area do not have Spanish speaking employees, and therefore Hispanic residents tend to frequent the smaller establishments.
- While it would be possible for E & J customers to go to another Hispanic store, doing so may be difficult for them as many do not have personal transportation.
- Should E & J shut down, these residents will be harmed.
- The owner has taken steps to ensure that the SNAP guidelines are adhered to in the future.
- As there is only one staff member aside from the owner, training will be easily accomplished, and the mistakes of the past should be avoided.
- Additionally, in an attempt to further negate any errors, the owner has purchased a Point of Sale cash register and now has the ability to ring items up as taxable or non-taxable or non-SNAP. This system was recently implemented and is expected to further assist with preventing future violations of SNAP regulations.
- As president my most sincere apology for the irregularities that caused this incident.
- As store manager I will implement all necessary regulations to prevent that this happens again.

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by Retailer Operations; it is limited to the facts at the basis of Retailer Operations' determination at the time it was made. Upon review, the evidence supports that Appellant established a record of selling nonfood items as defined by Section 271.2 of the regulations, on multiple occasions. The Exhibits furnished with the Charge letter warrant a disqualification period of six months. The regulations at 7 CFR § 278.6(e)(5) specify 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 nonfood items due to carelessness or poor supervision by the firm's ownership or management." Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification.

Appellant appears to misconstrue its initial SNAP authorization as having bestowed upon it a right or entitlement to SNAP income. It must be impressed upon Appellant that, SNAP authorization is an administratively-granted privilege subject to the terms and conditions for participation detailed in the Act and the regulations. Thus, if a firm does not conform to the applicable statutes and regulations, the same provide for the firm's removal from the program in accordance with the provisions detailed therein. SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation and subsequently abides by the statute and implementing regulations. That a firm has profited or otherwise benefited from a SNAP authorization does not create a business interest which supersedes the statute or implementing regulations.

The owner contends that a SNAP disqualification will have a negative financial impact on Appellant's business. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no

provision in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to the firm 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, and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship to Appellant 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 contention that Appellant may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the penalty imposed for the violations cited.

The owner contends she will provide SNAP training, and she has purchased a POS cash register. With regard to these contentions, it is important to clarify that the purpose of this review is to either validate or to invalidate Retailer Operations' determination. This review is limited to what circumstances were at the basis of Retailer Operations' action at the time such action occurred. It is not the authority of this review to consider what subsequent remedial actions may be undertaken so that a store might begin to comply with program regulations.

The preponderance of the evidence supports that Appellant sold nonfood items on multiple store visits in exchange for SNAP benefits, a program violation. The regulations stipulate FNS shall disqualify a 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 the sale of nonfood items due to carelessness and poor supervision by the firm's ownership or management.

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six month period of disqualification from SNAP. The record documents that there are other authorized stores within a nearby radius of Appellant that stock a variety of comparable staple foods at comparable prices, including ethnic foods. While some recipients may be inconvenienced, the evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified. Therefore, Appellant is not eligible for a hardship CMP.

CONCLUSION

The preponderance of the evidence in the record supports that the program violations charged did occur at Appellant. The responding owner did not dispute that violations occurred. The record documents that Retailer Operations considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations, and properly denied it. Therefore, the six month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained. The effective date of the decision is 30 days after receipt of the decision.

Please contact the Retailer Center at 877-823-4369 with general questions regarding the SNAP application process. Please consult the internet for USDA educational information. Please contact Andrew Haluptzok at (312) 877-2362 if you have operations questions.

RIGHTS AND REMEDIES

This penalty shall become effective thirty (30) days after receipt of this decision. A new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the six month period of disqualification.

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023), and to the regulations at 7 CFR § 279.7, with respect to your right to judicial review of this decision. 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 thirty (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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

June 19, 2019