

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

Elm Street Market,

Appellant,

v.

Case Number: C0208943

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support a finding that the six-month disqualification of Elm Street Market (Elm Street Market 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) and (e)(5) in its administration of the SNAP, when it imposed a six-month 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 June 13, 2018, through July 2, 2018. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on five separate occasions. As a result of evidence compiled during this investigation, by letter dated August 6, 2018, the Retailer Operations Division charged ownership with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a) and noted the violations warranted a six-month disqualification period. The letter also stated that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

Appellant replied to the charges by phone on August 22, 2018. Appellant indicated that it saw the transactions on video and cannot deny them. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated August 22, 2018, that the violations cited in the charge letter occurred at the firm and that a six-month 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.

On August 28, 2018, Appellant requested an administrative review of the Retailer Operations Division's determination. . The appeal was granted and implementation of the withdrawal has been 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) 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 § 278.6(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**, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system . . .
(emphasis added)

Section 278.6(e)(5) of the SNAP regulations states, in part, that a firm is to be disqualified for six months:

[I]f 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 § 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 § 278.2(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. . . . Coupons may not be accepted in exchange for cash . . . or for any other nonfood use.

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

Elm Street Market is a convenience store originally authorized by FNS on April 28, 2011. During an investigation conducted between June 13, 2018, and July 2, 2018, a USDA investigator conducted five compliance visits at Appellant. A report of the investigation dated July 11, 2018, was provided to Appellant as an attachment to the charge letter. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during each of the five compliance visits and involved the sale of common ineligible items including plastic cups and trash bags. 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 A, B, C, D, and E furnished with the charge letter.

APPELLANT’S CONTENTIONS

Appellant made the following summarized contentions in its August 28, 2018, administrative review request, and subsequent correspondence postmarked October 4, 2018, in relevant part:

- The area is close to a food desert.
- Winters are difficult in Keene.
- Most of the low-income people have younger children making walking to a larger market problematic.
- Appellant is unlike the closest convenience stores because it sells fresh vegetables, sliced deli meats, raw hamburger, and cooked roast beef.
- The disqualification puts an undue hardship on the community by making them walk further to find nutritious food offerings.

- Appellant is a small family business and a disqualification puts an undue burden on the business.

In support of its contentions, Appellant provided the following documents:

- Six statements from employees;
- A photograph of some fresh produce; and
- An article concerning the owner's boating accident.

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 by a 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.

7 CFR § 278.6(e)(5) states, as noted above, that 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 but not limited to the sale of common nonfood items due to carelessness and poor supervision by the firm's ownership or management.

Part-time Employees

Appellant stated that the employees only worked a few hours per week. Ownership signed the FNS application to become a SNAP authorized retailer on October 6, 2014, which included a certification and confirmation that the owner would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or **part-time**." The violations listed on this certification include accepting SNAP benefits for cash and as payment for ineligible items, a violation of the SNAP rules and regulations. FNS sends all firms the SNAP Retailer Training Guide and instructional video in their approval package and requires ownership to share it with all employees to ensure compliance with rules and regulations. Firms are required to read the SNAP Retailer Training Guide and watch the instructional video.

Warning

Appellant explains that if it knew about the transactions then it would have taken corrective action. It should be noted that a warning letter is not prerequisite to a disqualification. However, the SNAP regulations do provide for a warning letter in some cases. Specifically, 7 CFR 278.6(e)(7) states the following: “Send the firm a warning letter if violations are too limited to warrant a disqualification.” As previously stated, the investigative report documented that ineligible items were exchanged for SNAP benefits on five separate occasions. These violations are not considered “violations that are too limited to warrant a disqualification.” Therefore, Appellant’s contention does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Economic Hardship

Appellant contends Appellant is a small family business and a disqualification puts an undue burden on the Appellant. It is recognized that 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 a 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 excuse ownership 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, Appellant’s contention that the firm will 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 imposition.

Civil Money Penalty

Appellant states it is located near a food desert and it will be a hardship for low-income people in the area if it is disqualified. 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 is one super store, one supermarket, three combination groceries, and three other convenience stores located less than a one-mile radius from Appellant. Thus, in its letter dated August 22, 2018, 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 Appellant 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

The determination by the Retailer Operations Division to impose a disqualification of six months against Elm Street Market from participating as an authorized retailer in SNAP is sustained. In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective 30 days after receipt of this letter. A new application for participation in SNAP may be submitted ten 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 7 USC § 2023 and 7CFR § 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

December 18, 2018