

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

Faith-N-Hope Farms,

Appellant,

v.

Case Number: C0203923

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record supports that Faith-N-Hope Farms (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain the hardship civil money penalty (CMP) in lieu of a six month disqualification of Appellant from the SNAP as a retail food store as imposed by the Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(a), 7 CFR § 278.6(e)(5), and 7 CFR § 278.6(f)(1) in its administration of the SNAP, when it imposed a CMP 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 March 15, 2018 through April 2, 2018. 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 are best described as nonfood items, including two major items which had a price reported at \$10.00 each.

As a result of evidence compiled during this investigation, by letter dated May 24, 2018, Retailer Operations charged the owner with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits was noted in Exhibits A, B, and C, that warrants 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.

Appellant, via counsel, replied to the Charge letter by facsimile dated June 12, 2018 and letter dated June 11, 2018. Retailer Operations informed the owner by Determination letter dated July 10, 2018, that the violations cited in the Charge letter occurred at the firm and that Appellant's disqualification would cause hardship for SNAP households who rely on African food items since there are no other retailers within a one mile radius that carry those items. Therefore, in accordance with 7 CFR Part 278.6(f)(1) of the SNAP regulations, Retailer Operation's imposed a hardship CMP in the amount of \$3,486.00 in lieu of a six month period of disqualification.

The owner, via counsel, appealed the determination by letter dated July 17, 2018. The administrative review was granted by letter dated August 2, 2018.

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 which 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 investigation report documents that SNAP violations were recorded during three store visits that warrant a six month disqualification. The violations involved the repeated sale of a nonfood item for SNAP benefits in violation of 7 CFR § 278.2(a).

APPELLANT’S CONTENTIONS

Consideration of all contentions was made whether recapitulated here or not.

- The firm whether through its manger or any other person who has ever worked for the store has never violated the regulations.
- According to the FNS report on two occasion a lady rang up both food and non-food items. On the fourth occasion a male clerk from who the female clerk verified the store could accept the EBT card for non-food items and the male answered “no.”
- The May 24, 2018 letter stated the firm exchanged major non-food items.
- The manager, his wife and the clerk all provided affidavits in addition to the store’s attorney.
- The affidavits explained that the parties never intentionally accepted EBT cards for non-food items and was the result of inattention, not a deliberate attempt to defraud the EBT program.
- The store has never accepted an EBT card for the purchase of non-food items from an actual customer who is not an agent sent by FNS. The FNS never stated that it has conducted an investigation involving people other than the agent. It never stated that its investigation was prompted by report of fraudulent activities or even a suspicion of fraudulent activities.
- The FNS has no record of any unusual transaction trends involving the store.

- The total amount of purchases of non-food items allegedly sold to the disguised agent is less than 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The charge letter was not preceded by any warning regarding fraudulent activities involving the store.
- There was no bases for any such warning or suspicion involving the store.
- The FNS did not prove or allege that it has previously warned the store about any possible violations.
- FNS has not provided any evidence indicating that store personnel intended to violate any SNAP regulations. There is no such evidence.
- What the FNS is using as evidence of violations are acts initiated by a person it sent who was pretending to be a customer. That person did not point to a single independent transaction between the store and real customers that she/he observed to be fraudulent. Even the ineligible items she was pretending to be purchasing are limited to calling cards totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Case law favors the owner. At least in one case where a particular court denied the application, the firm had first received warning from the government. (*Rodriguez v U. S.* 534 F. Supp. 370 (1982))
- The FNS' determination does not follow its own regulations in 7 CFR 278.6 (d) and should be reversed.

The initial reply had the following contentions:

- At the time of these incidents the owner's current wife had been helping him at the store for barely 6 months since she came to the US. Other people like his nephew also helped in the store from time to time.
- The owner has always ensured that he and his firm comply with SNAP rules. He ensures that he trains people who assist in the store including his wife and nephew.
- On the days indicated in the exhibits it was probably his wife who assisted the USDA investigator with their purchase. Although she was trained by the owner, she is still new to the EBT system.
- Neither the owner nor his wife made this statement with the intention of making excuses for their mistakes. This statement is made in order to show that this was mistake and not an intentional act.
- His wife has no intention of violating the rules and whatever happened that day was pure human error.
- His wife has since been retrained on the use of EBT card and the need to check and double check to ensure absolute compliance.
- The owner and his firm are aware of how helpful the EBT system has been to the commercial viability of the firm. He assures the USDA that he would not sacrifice the success of his business for any amount of money at all, let alone the amount involved. He respects the laws governing EBT.
- The retailer requests that USDA change its decision to impose a six month suspension.

Affidavits were submitted by the owner, his wife and his nephew. The owner stated that his wife and nephew do not remember accepting EBT cards for non-eligible purchases. They do state

that it is possible they might have accepted the card for non-food purchases as a result of inattention. Neither his wife nor nephew deny the charges but state that the occurrence is not the result of a deliberate attempt. They now know the importance of strictly and carefully screening EBT purchases.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the earlier determination made by Retailer Operations, and is limited to the facts at the basis of Retailer Operations' determination at the time such action was taken. 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. Exhibits A, B, and C, furnished with the Charge letter warrant a disqualification period of six months. There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of claims that repeated sales of ineligible items were mistakes not made on purpose. That this was not a mistake but a pattern is indicated by the fact that ineligible items were sold on three different dates. A warning letter is not appropriate when the violations are this numerous.

The acceptance of SNAP benefits for ineligible items is a violation of the SNAP rules and regulations. 7 CFR Section 278.6(e)(5) specifies 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.

Regardless of who the store owner utilizes to handle store business, the owner is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in SNAP 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 owner was provided multiple and redundant resources through which a thorough knowledge of Program rules and requirements could readily be obtained. These materials are also readily available on the internet.

Different clerks sold the nonfood items at Appellant. In the initial reply, the owner did not dispute that the violations did occur. The regulations stipulate "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 as the sale of common nonfood items due to carelessness and poor supervision by the firm's ownership or management."

Counsel contends that the total cash amount involved in the violations is trivial at less than **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. No mention of minimum cost 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 the sale of common nonfood items in exchange for FSP benefits due to carelessness or poor supervision by the firm's ownership or management.

As to the court case cited by counsel, the administrative review process should determine whether FNS followed the Food and Nutrition Act and the regulations issued under the Act when it sanctioned Appellant. The administrative review officer is not responsible for determining whether any legal cases cited by counsel apply to Appellant's situation. If the final agency decision is appealed to the federal district court, the judge is responsible for determining whether case law cited by counsel is on point and applicable to Appellant's case.

There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective actions implemented subsequent to findings of program violations. Therefore, Appellant's contention that corrective actions such as training has been given does not provide any valid basis for dismissing the charges or mitigate the penalty imposed.

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that it was appropriate to impose a hardship CMP in lieu of a six month period of disqualification. The record documents Appellant sells African specialty staple food items. Retailer Operations determined there are no other retailers in the nearby area that sell as large a variety of staple food items at comparable prices, and therefore, Appellant's disqualification would create a hardship for the SNAP recipients in the community. A hardship CMP in the amount of \$3,486.00 was imposed. Review was made of the calculation of the CMP, and the amount is deemed to have been correctly computed per the applicable regulations.

CONCLUSION

Based on a review of the evidence, the record by a preponderance of the evidence supports that the program violations charged did occur at Appellant. The USDA investigative record is specific, thorough, and fully documented with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail.

The record documents that Retailer Operations properly considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) and Section 278.6(g).. Retailer Operations granted a hardship CMP in the amount of \$3, 486.00 in lieu of the six month disqualification of Appellant from participation as an authorized retailer in the SNAP. This determination is sustained.

Please review the July 10, 2018 Determination letter with the enclosed Bill for Collection for payment information and take action as described. For billing inquiries, please contact the FNS

Retailer Repayment Financial Management Accounting Division at (703) 605-0483, or by email at RetailerRepayment@fns.usda.gov.

If the owner chooses, or is unable to pay the hardship CMP for the total amount as specified on the Bill for Collection, Appellant will be disqualified for a period of six months. The owner should promptly contact Retailer Operations at (832) 308-5450, if he chooses to have the six month period of disqualification imposed rather than pay the total amount of the CMP.

RIGHTS AND REMEDIES

Your 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 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 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

September 5, 2018