

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

Family Best Farm Corp,

Appellant,

v.

Case Number: C0202796

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 a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Family Best Farm Corp. (hereinafter “Appellant”) by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a six-month disqualification against Family Best Farm Corp.

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

FNS records show that the Appellant firm, Family Best Farm Corp., was initially authorized for SNAP participation as a medium grocery store on August 19, 1997. Between April 4, 2018, and April 11, 2018, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigative report documented that personnel at Family Best Farm Corp. accepted SNAP benefits in exchange for ineligible merchandise on five separate occasions. According to the report, the Appellant firm sold steel

wool, bleach, fabric softener, multi-purpose cleaners, air fresheners, and scrub sponges in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated June 12, 2018, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The charge letter states that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further states that under certain conditions and in accordance with 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In a letter dated June 14, 2018, the Appellant replied to the charges, acknowledging that the violations occurred, stating that its employees had not been properly trained on how to process EBT transactions. The Appellant stated that it has retrained its employees to make sure they understand SNAP procedures. The Appellant further stated that it made a mistake by not installing a new point-of-sale system in the store that would have been able to prevent the violations. Appellant then committed to install such a system to ensure that program violations will never happen again. Finally, the Appellant argued that the store, which sells primarily fruits and vegetables and West Indian groceries, is located in a low-income area and that the majority of its clientele are SNAP customers. Accordingly, the Appellant requested a CMP in lieu of disqualification.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated July 5, 2018. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the letter of charges and that a six-month disqualification penalty would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that consideration for a hardship CMP was given, but that the Appellant was not eligible for a CMP because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked July 9, 2018, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the sanction has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 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 § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

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 § 278.6(a) states, in part:

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....

Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section. [Emphasis added.]

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

7 CFR § 278.6(e) states, in part:

FNS shall take action as follows against any firm determined to have violated the Act or regulations...The FNS regional office shall:

(5) 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, in part:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm subject to a disqualification is selling a substantial variety of staple food items, and 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.

INVESTIGATION DETAILS

During an undercover investigation conducted between April 4, 2018, and April 11, 2018, the Food and Nutrition Service completed five compliance visits at Family Best Farm Corp. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the June 12, 2018, charge letter. The investigation report includes Exhibits A through E, and provides full details on the results of each compliance visit. SNAP violations were documented during each of the five visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the following nonfood items were purchased by an investigator using SNAP benefits:

- One 28-ounce bottle of bleach (*Ajax* brand), Exhibit A
- One 4-pack box of steel wool pads (*Brillo* brand), Exhibit A
- One .85-ounce box of fabric softener (*Downy* brand), Exhibit B
- One 26-ounce bottle of multi-surface cleaner (*Windex* brand), Exhibit B
- One 8-ounce can of air freshener (*Air Wick* brand), Exhibit B
- One heavy duty scrub sponge (*Scotch-Brite* brand), Exhibit C
- One 15-ounce bottle of all-purpose cleaner (*Mistolin* brand), Exhibit C
- One .85-ounce bottle of fabric softener (*Downy* brand), Exhibit D
- One 15-ounce bottle of all-purpose cleaner (*Mistolin* brand), Exhibit D
- One 8-ounce can of air freshener (*Air Wick* brand), Exhibit D
- One 16-ounce bottle of bathroom cleaner (*Tilex* brand), Exhibit E
- One heavy duty scrub sponge (*Scotch-Brite* brand), Exhibit E

The report indicates that in Exhibits C and E, the investigator attempted to obtain cash in exchange for SNAP benefits, but the requests were refused. According to the report, two different cashiers conducted the five violative transactions.

The charge letter states that the violations that occurred in Exhibits A, B, C, D, and E warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- When the Appellant spoke to the Retailer Operations Division, two options were discussed: disqualification or a civil money penalty. This is why the Appellant sent the letter requesting the penalty option.
- Appellant apologizes for the violations and acknowledges its mistake of not educating its employees when they were hired.

- The store carries more than 80 percent fruits and vegetables and about 18-19 percent West Indian groceries, American groceries, snacks, and sodas. Only about 1 percent are taxable (nonfood) items.
- The store is located in a low-income area and the majority of customers are EBT customers.
- There are not any other fresh fruit and vegetable stores in the area.
- If the civil money penalty is not an options, the owner will be forced to close the store.
- If a monetary penalty could be imposed instead of disqualification, the Appellant would promise the following:
 - It will set up a new point-of-sale system with an optical scanner
 - It will clean up some of the tax items (paper towels, soap, air freshener, etc.)
 - It will educate its employees regarding SNAP when they are hired and once every year.

In support of its contentions, the Appellant submitted a total of 30 undated color photographs showing the outside of the store as well as various food items available for purchase. Only 12 were unique photos. The remaining 18 were duplicates. The Appellant also submitted a letter of support from Brooklyn Crown Heights community member **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, who contends that a disqualification of Family Best Farm Corp. would adversely affect the community's health because the residents would no longer be able to buy affordable fresh fruits and vegetables.

The Appellant also submitted approximately 700 letters signed by purported SNAP customers. Each letter is nearly identical, stating that Family Best Farm Corp. is the only fruit and vegetable store in the area and that if the store closes, the household would be forced to drive or travel by bus to shop at another location.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The Appellant has not provided any evidence or documentation to counter FNS's investigation report. In fact, the Appellant appears to acknowledge that violations occurred by offering an apology and by blaming the violations on employees who had not been properly trained. Because the violations themselves do not appear to be in dispute, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division and a six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Civil Money Penalty

The Appellant contends that when it spoke to the Retailer Operations Division, two options were offered for resolving the issue at hand: 1) a six-month disqualification, or 2) a civil money penalty (CMP). The Appellant argues that a CMP should be considered because the store is located in a low-income area and the majority of its customers are EBT customers. Also, the Appellant claims that there are not any other fresh fruit and vegetable stores in the area. To support these claims the Appellant submitted an estimated 700 signed customer statements and a letter from a member of the community attesting that Family Best Farm Corp. is the only fruit and vegetable store in the area and that a disqualification would create hardship to the customers.

Both this review and the Retailer Operations Division evaluated the Appellant's eligibility for a civil money penalty. SNAP regulations at 7 CFR § 278.6(f)(1) permit a CMP in lieu of a temporary disqualification only when the firm's disqualification would cause hardship to SNAP households. According to this regulation, hardship is defined as "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices."

It is the determination of this review that a disqualification of Family Best Farm Corp., a medium grocery store, would not cause hardship to SNAP households because there are many other shopping options in the area. According to agency records, there are at least three dozen comparable or larger SNAP-authorized retail stores located within a one-mile radius of Family Best Farm Corp., including two superstores, two supermarkets, and two fresh produce stores, all of which are located within one-third of a mile of Family Best Farm Corp, and all of which have similar staple food inventory at comparable prices.

As to the hundreds of signed customer statements and the letter from 5 U.S.C. § 552 (b)(6) & (b)(7)(C), these are of little evidentiary value and do not prove that hardship exists in this case. As noted earlier, 7 CFR § 278.6(f)(1) clearly indicates that hardship – as defined by regulation for purposes of determining eligibility for a civil money penalty – exists *only* when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Such conditions are not present in this case. As such, a civil money penalty is not a possibility. It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified for a period of time and households are temporarily forced to use their SNAP benefits elsewhere. However, based on the regulation cited above, the Appellant's request for a hardship civil money penalty in lieu of disqualification cannot be granted.

Remedial Actions Taken

In its original reply to the charges, the Appellant contended that upon learning of the violations, it immediately took steps to retrain its employees on SNAP procedures. It further contends that if given an opportunity to pay a civil money penalty rather than suffer a disqualification, it will take further remedial actions, including setting up a new point-of-sale system with an optical scanner and providing regular employee training. The Appellant contends that these actions will ensure that violations do not occur again in the future.

With regard to these contentions, it should be noted that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or that will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented after the discovery of program violations.

Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

Hardship to Appellant

The Appellant has argued that if a civil money penalty is not an option, the owner will be forced to close the store.

With regard to this contention, it is recognized that some degree of financial or economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship to the store's ownership or to the firm itself would render virtually meaningless the 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 requirements, 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 financial hardship as a result of a six-month disqualification from SNAP does not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

CONCLUSION

Based on an analysis of all information in this case, this review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Family Best Farm Corp. during a USDA investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record appears to be specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood merchandise, and in

all other critically pertinent details. Pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, Family Best Farm Corp., is sustained.

In accordance with the Act and regulations, the disqualification penalty shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted 10 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 Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

January 29, 2019