

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

Fouad Market Halal Food #1,

Appellant,

v.

Case Number: C0211094

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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) civil money penalty in lieu of a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Fouad Market Halal Food #1 (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 civil money penalty against Fouad Market Halal Food #1.

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, Fouad Market Halal Food #1, was initially authorized for SNAP participation as a convenience store on December 7, 2017. Between November 28, 2018, and February 8, 2019, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigation report documented that personnel at Fouad Market Halal Food #1 accepted SNAP benefits in exchange for ineligible items on three separate occasions. According to the report, the Appellant firm sold a woven bowl, a ceramic bowl, four bars of soap, and a storage container in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible foods.

In a letter dated May 16, 2019, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the acceptance of SNAP benefits in exchange for ineligible nonfood merchandise warranted a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In a letter dated May 23, 2019, the Appellant responded to the charges, acknowledging that the firm did not follow proper regulations during the three transactions in question. The Appellant apologized for the mistakes and claimed that actions had been taken to prevent future violations. The Appellant further stated that a large number of customers who shop at the store rely on SNAP benefits and claimed that a six-month disqualification would greatly affect the business. Finally, the Appellant requested a fine instead of disqualification.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division determined that violations did occur as outlined in the letter of charges and that the violations warranted disqualification from SNAP for a period of six months. However, rather than impose a six-month disqualification against the firm, the Retailer Operations Division determined that the firm was eligible for a CMP in lieu of disqualification because it was selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households.

The Agency's determination letter, dated July 16, 2019, notified the Appellant of the decision to impose a civil money penalty in lieu of disqualification and stated that the monetary penalty of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was due 15 calendar days from receipt of the determination letter.

In a letter postmarked July 25, 2019, the Appellant appealed the agency'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 the imposition of a civil money penalty, 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), (e)(5), and (f)(1) establish the authority upon which a six-month

disqualification or hardship civil money penalty 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.... FNS may, in lieu of a disqualification, subject a firm to a civil money penalty of up to an amount specified in § 3.91(b)(3)(i) of this title for each violation if FNS determines that a disqualification would cause hardship to participating households.

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.

7 CFR § 278.6(g) outlines the steps for calculating the CMP amount:

(1) Determine the firm's average monthly redemptions of [SNAP benefits] for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations.

(2) Multiply the average monthly redemption figure by 10 percent.

(3) Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph (e) of this section. The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) of this title for each violation.

INVESTIGATION DETAILS

During an undercover investigation conducted between November 28, 2019, and February 8, 2019, the Food and Nutrition Service completed three compliance visits at Fouad Market Halal Food #1. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the May 16, 2019, charge letter. The investigation report includes Exhibits A through C, and provides full details on the results of each compliance visit. SNAP violations were documented during each of the three 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 woven bowl (no brand indicated), Exhibit A
- On 4-bar package of soap (*Taous* brand), Exhibit B
- One ceramic bowl (no brand indicated), Exhibit B
- One storage container (no brand indicated), Exhibit C

The report indicates that in Exhibit C, the clerk on duty refused to allow an exchange of SNAP benefits for cash (i.e. trafficking). The report states that two different clerks conducted the three violative transactions.

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

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contention in its request for administrative review:

- Appellant would like to appeal the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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 in this document.

ANALYSIS AND FINDINGS

The Appellant has not provided any evidence to counter FNS's investigation report. In fact, in its original response to the charge letter, the Appellant acknowledged that violations occurred and claimed that it has taken corrective actions to prevent further violations. The Appellant also requested a fine instead of disqualification. Because the violations themselves are not in dispute, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division and that a six-month disqualification is warranted.

Civil Money Penalty

As noted earlier, the Retailer Operations Division has determined that the Appellant is eligible for a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) civil money penalty in lieu of a six-month disqualification because the firm is selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households. Specifically, the Retailer Operations Division determined that Fouad Market Halal Food #1 is the only authorized store in the area that carries unique halal foods. The Retailer Operations Division determined that without access to such food items, SNAP households would experience hardship.

The Appellant's only contention in its request for administrative review appears to be a complaint about the amount of the civil money penalty.

After reviewing the evidence in this case, this review finds that a civil money penalty for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in lieu of a six-month disqualification was properly imposed in accordance with regulations cited earlier.

Regulations at 7 CFR § 278.6(g) outline the steps for calculating the CMP amount. The CMP is calculated on the basis of the store's SNAP redemptions during the 12 months immediately prior to the firm being charged with SNAP violations. Modifications to the CMP by the administrative review officer may occur only when there is an error in calculation or when the CMP exceeds the statutory limit. This review has no authority to decrease a CMP amount for any other reason.

The calculation of the CMP in this case is as follows:

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

In this case, the calculated CMP of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is less than the sanction limit of 5 U.S.C. § 552 (b)(7)(E). Because the CMP amount is less than the sanction limit, the total penalty is 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Based on the information above as well as the regulations cited at 7 CFR § 278.6(g), it is the determination of this review that a CMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was properly assessed in this matter. Accordingly, a modification to the CMP amount is not appropriate.

CONCLUSION

Based on a review of all information in this case, this administrative review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Fouad Market Halal Food #1 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. Therefore, pursuant to 7 CFR § 278.6(a)

and (f)(1), the decision to impose a civil money penalty in lieu of a six-month disqualification against the Appellant, Fouad Market Halal Food #1, is sustained.

In accordance with the Act and regulations, this penalty shall become effective 30 days after receipt of this decision. To pay the civil money penalty or to establish an installment plan, the Appellant must contact FNS's Financial Management Accounting Division at (703) 605-0483. It should be noted that if the Appellant does not pay the CMP as required, the firm will be disqualified from SNAP for a period of six months. In such an instance, a new application for SNAP participation may not be submitted until 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

November 4, 2019