

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

G&R Global Minimarket LLC,

Appellant,

v.

Case Number: C0196990

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the decision by the Retailer Operations Division to impose a one year disqualification against G&R Global Minimarket LLC (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5 and 6), and § 278.6(f)(1) in its administration of the SNAP when it imposed a one year period of disqualification against Appellant on September 21, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period January 6, 2017, through February 7, 2017. The investigation determined that personnel at the Appellant business accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. The items sold are best described in regulatory terms as common nonfood items and include items such as toilet tissue, trash bags, bathroom cleanser, carpet deodorizer, and stain remover. The investigative report indicates that these violative transactions were handled by two different clerks, one of whom was a store owner. The report also notes that the business was unable to exchange SNAP benefits for cash on one occasion (Exhibit D) because the clerk did not know how to complete the transaction. All four transactions were deemed clearly violative and would normally warrant a six month disqualification. However, SNAP regulations at 7 CFR 278.6(e)(4) require a one year disqualification period when a member of the firm's ownership or management commits violations, therefore a one year disqualification period is the appropriate sanction for this business.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated September 7, 2017, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations "... warrant a disqualification period of 1 year (Section 278.6(e)(4)). The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1))."

Ownership did not respond to the charge letter and no evidence was submitted to be considered in support of the CMP. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated September 21, 2017, that it determined that violations had occurred at the establishment, and that a one year period of disqualification from participating as an authorized firm in SNAP was warranted. This determination letter also states that Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated "... you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices."

By letter dated September 25, 2017, Appellant appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. No subsequent correspondence has been received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That

means 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, Sections 278.6(a) and 278.6(e)(5 and 6) establish the authority upon which a one year disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 271.2 states in part that, “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.” Further, the citation specifies that “Coupons may not be accepted in exchange for cash . . . or for any other nonfood use.”

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*, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system” (Emphasis added.)

7 CFR § 278.6(e)(5) of the SNAP regulations states, in part, 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(e)(4) of the SNAP regulations states, “Disqualify the firm for 1 year if: It is to be the first sanction for the firm and the ownership or management personnel of the firm have committed violations such as the sale of common nonfood items in amounts normally found in a shopping basket, and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations”

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.”

APPELLANT’S CONTENTIONS

In the request for administrative review, Appellant has stated as its position in the matter the following:

- The store owners had not received the prior notices sent to them;
- The business was started on January 1, 2017, without any prior experience in the grocery field and the owners tried very hard to make sure there was no human error on any of the processes. During the first two months in business it took a little bit of time to update the register with all non-EBT products which were the reason for any human oversight;
- The business was recently approved for WIC and Western Union and the owners beg for reconsideration as removing EBT will most likely result in having to close the business started nine months ago; and,
- The owners will provide any documents needed as well as the purchase of the business proving the day the business started and the monthly sales statements as well as notice from our frequent EBT customers that can attest to the business practices.

No documentation was submitted in support of any of these contentions.

The preceding may represent only a brief summary of Appellant’s contentions 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 herein.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, while the business having now updated its cash register with all non-EBT products is a positive step, it does not provide any valid basis for dismissing the charges, or for mitigating the penalty imposed.

The FNS retailer application contains a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application or reauthorization process. Store ownership did certify its understanding and agreement to abide by program rules and regulatory provisions when it initially applied for authorization as a SNAP retailer. The owners agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The "SNAP Training Guide for Retailers" is provided to all retail store owners upon their authorization/reauthorization and also clearly states that store owners or operators are legally responsible for their own actions as well as the actions of everyone working in their store whether paid or unpaid, new, full-time or part-time and that violations may include being disqualified from SNAP. Regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is liable for all violative transactions handled by store personnel and is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. This guide and the video accompanying it provide detailed information for SNAP retailers regarding compliance with SNAP rules and regulations; both are available in English and Spanish and are also online at the FNS retailer web site. The FNS web site cautions applicants about their responsibilities for training and overseeing store employees.

"You must read the SNAP Retailer Training Guide and watch the instructional video. Store owners accept responsibility for the actions of their employees. You are responsible for the actions of your employees. All of your employees must read the SNAP Retailer Training Guide and watch the instructional video . . . to ensure compliance with SNAP rules and regulations."

The investigative report shows that two different clerks, one of whom was an owner, working at the Appellant business during the investigation period transacted SNAP benefits for ineligible items indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The acceptance of SNAP benefits for ineligible items is a violation of the SNAP rules and regulations. The regulations state that FNS shall disqualify a store for a one year period if a member of the firm's ownership or management commits violations. A review of the record shows that the basis for Exhibit A is not persuasive and accordingly Exhibit A is dismissed. However, the remaining three violative visits, Exhibits B through D, are sufficient to sustain the charges and the one year disqualification period.

It is highly improbable, based on the readiness of the two store employees to exchange SNAP benefits for ineligible items, that the only instances of SNAP violations were those identified as part of the FNS undercover investigation and more likely than not that this represented an ongoing pattern of SNAP violations at the Appellant business. As previously stated, store ownership is responsible for all

SNAP transactions at the firm and therefore a certain minimal level of oversight on the part of ownership to ensure employees are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store owners to not be monitoring all transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the business or conducting other activities that would jeopardize the licenses and income that the business is dependent upon.

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications. A hardship CMP as an optional penalty in lieu of a one year disqualification was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and its disqualification would create a 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. Records show there are 20 SNAP retailers located within one mile of Appellant's store that includes three super stores and one supermarket. These nearby stores are easily accessible to customers and offer a comparable selection of staple foods. The Appellant business is also located on the corner of Shaw Street and Lanza Avenue both of which have scheduled bus service. Some level of inconvenience to SNAP benefit users is inherent in the temporary disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience, however, does not rise to the level of hardship required by the regulations.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA special agent and signed under penalty of perjury. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate 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. Accordingly, the determination by the Retailer Operations Division to impose a disqualification of one year against the Appellant business from participating as an authorized retailer in SNAP is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations as there are

other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. A new application for participation in SNAP may be submitted ten (10) days prior to the expiration of the one year disqualification period. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS web site at [www.fns.usda.gov/snap/retailer- apply](http://www.fns.usda.gov/snap/retailer-apply).

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

ROBERT T. DEEGAN
Administrative Review Officer

December 26, 2017