

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

Garfield Food Market & Deli,

Appellant,

v.

Case Number: C0202520

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 Garfield Food Market & Deli, (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 Garfield Food Market & Deli.

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, Garfield Food Market & Deli, was initially authorized for SNAP participation as a small grocery store on October 6, 2014. Between October 11, 2017, and October 20, 2017, 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 Garfield Food Market & Deli accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold paper towels, toothpaste, toilet paper, soap, air freshener, hair mousse, hand lotion, and a candle in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated November 28, 2017, 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 December 7, 2017, the Appellant replied to the charges. In its response, the Appellant did not deny that the violations occurred, but indicated that during the investigation, the store's manager was away from work recovering from a recent surgery. Due to the manager's absence, the firm had a temporary cashier who was not properly trained on SNAP procedures and did not know that violations were being committed. The owner was not at the store most of the time and was not aware of the mistakes that the temporary cashier had made.

In support of these contentions, the Appellant provided copies of EBT receipts for the transactions in question and two pages of medical records to prove the store manager's absence from work.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated December 14, 2017. This letter informed the Appellant that it was the determination of the Retailer Operations Division that the 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 December 26, 2017, 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 October 11, 2017, and October 20, 2017, the Food and Nutrition Service completed four compliance visits at Garfield Food Market & Deli. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the November 28, 2017, charge letter. The investigation report includes Exhibits A through D, and provides full details on the results of each compliance visit. SNAP violations were documented during all four 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 56-sheet roll of paper towels (*Smile & Save* brand), Exhibit A
- One 2.5-ounce tube of toothpaste (*Colgate* brand), Exhibit A
- One 121-sheet roll of paper towels (*Bounty* brand), Exhibit B
- One 4-count package of toilet paper rolls (*DuaLux* brand), Exhibit B
- One bar of white soap (*Dove* brand), Exhibit B
- One 8-ounce can of air freshener (*Glade* brand), Exhibit C
- One candle (*Sacred Heart of Jesus* brand), Exhibit C
- One 80-sheet roll of paper towels (*Simply Essentials* brand), Exhibit C
- One 7-ounce container of "Extra Control" mousse (*Finesse* brand), Exhibit D
- One 12-ounce bottle of dry skin lotion (*Dial* brand), Exhibit D
- One 7-ounce air freshener (*Renuzit* brand), Exhibit D

The report indicates that in Exhibit B, the clerk unlawfully charged sales tax for the SNAP purchase. In Exhibits C and D, the investigator attempted to exchange SNAP benefits for cash (i.e. trafficking), but these attempts were refused by the

clerk on duty. According to the report, the same clerk conducted all four violative transactions.

The charge letter states that the violations that occurred in Exhibits A, B, C, and D 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:

- Appellant did not mean for the violations to occur. During the time of the investigation, the store's manager was recovering from a surgery that she had on August 17, 2017. She was on leave until November 23, 2017. Due to this situation, the Appellant had a temporary cashier who was not properly trained and who was not aware that he was committing violations.
- Appellant owner is not at the store most of the time and was not aware of the mistakes the temporary cashier had made.
- Appellant apologizes for the situation, and hopes the administrative review officer will consider the unusual situation that occurred while the store manager was absent.
- Appellant also wants it to be known that customers prefer to shop at Garfield Food Market & Deli and use their SNAP benefits there.

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 the violations occurred, though it contends that they took place while the store manager was on medical leave. 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.

Owner/Manager Not Aware of Violations

The Appellant contends that the store's manager was on medical leave due to a recent surgery and was not in the store at the time the violations occurred. The Appellant owner is also not often in the store and was unaware of the mistakes that

the temporary cashier was making. The Appellant further contends that the cashier was not properly trained.

With regard to these contentions, the record shows that the Appellant owner signed an application to participate as a retailer in SNAP on July 28, 2014. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time. An owner or manager is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations. Regardless of which clerks are operating the cash register at a given time or whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of its employees would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA.

Therefore, the Appellant's claim that the violations were not the fault of the owner or manager does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Civil Money Penalty

Although not specifically requested by the Appellant, this review evaluated the Appellant's eligibility for a civil money penalty (CMP) in lieu of six-month disqualification. SNAP regulations at 7 CFR § 278.6(f)(1) state that a CMP in lieu of temporary disqualification is allowable 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 Garfield Food Market & Deli, a small grocery store, would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are at least 20 comparable or larger SNAP-authorized retail stores located within a one-mile radius of Garfield Food Market & Deli, including two superstores and two supermarkets.

It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their SNAP benefits elsewhere. However, in accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Therefore, pursuant

to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be assessed in this case.

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) occurred at Garfield Food Market & Deli 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, Garfield Food Market & Deli, 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

June 27, 2018