

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

Giammalvo's Market,

Appellant,

v.

Case Number: C0192105

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 there is sufficient evidence to support the assessment of a \$13,464.00 hardship civil money penalty (CMP) against Giammalvo's Market in lieu of a six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(1) and 7 CFR § 278.6(g), when it assessed a hardship CMP in the amount of \$13,464.00 against the Appellant.

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

The USDA conducted an investigation of the compliance of Giammalvo's Market with Federal SNAP law and regulations from March 2017 through August 2017. In a letter dated November 21, 2017, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three (3) out of four (4) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a

disqualification period of six months as provided in 7 CFR § 278.6(e)(5). The Appellant was informed it could respond to the charges within ten (10) calendar days following delivery of the charge letter. The charge letter was delivered to the store via UPS on November 27, 2017.

The Appellant responded to the charges in an undated letter received on December 27, 2017. The Appellant stated that the clerk identified in Exhibits A and D of the investigation report did not match the description of anyone working at the store. The Appellant admitted that the clerk identified in Exhibit C did work in the store and was not properly trained due to a change in management. The Appellant stated that the store has since retrained all store employees and the violations will not occur in the future. The Appellant also stated that a six-month disqualification would represent a hardship to the store and the local community.

After reviewing the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated May 31, 2018. The Retailer Operations Division concluded that the violations did occur at the store. However, the Retailer Operations Division determined that the Appellant was eligible for a hardship CMP in lieu of a six-month disqualification because the store was selling a substantial variety of staple food items and the firm's disqualification would cause a hardship to SNAP households. As a result, the determination letter informed the Appellant it was assessed with a \$13,464.00 hardship CMP in lieu of a six-month disqualification in accordance with 7 CFR § 278.6(f)(1). The store was informed that failure to pay the hardship CMP would result in a six-month disqualification.

In a letter dated June 11, 2018, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request for review was granted and the assessment of the hardship CMP was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and Section 278 of Title 7 of the Code of Federal Regulations (CFR).

7 CFR § 278.2(a) states, in part:

Coupons may be accepted by an authorized retail food store only from eligible households... only in exchange for eligible food.

7 CFR § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 271.2 states, in part:

Eligible foods means: (1) 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....

7 CFR § 278.6(e)(5) states, in part:

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) states, in part:

Amount of civil money penalties for hardship and transfer of ownership. FNS shall determine the amount of the civil money penalty as follows:

- (1) Determine the firm's average monthly redemptions ... 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

Notwithstanding the above, there is an agency limit of \$11,000 per violation as the maximum TOCMP amount.

SUMMARY OF CHARGES

During an investigation conducted from March 2017 through August 2017, the USDA conducted four (4) compliance visits at Giammalvo's Market. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated November 21, 2017. The investigation report included Exhibits A through D which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during three (3) of the four (4) compliance visits. The chargeable violations involved the sale of six (6) ineligible non-food items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a). These ineligible items consisted of a box of 100 coffee filters; a package of 250 toothpicks; two (2) packages of two (2) count sponges; a roll of cling wrap; and a 25 fluid ounce bottle of power degreaser dish soap as documented by Exhibits A, C and D and pictures in the case record. These violations were conducted by two (2) different clerks. One of these clerks refused to exchange SNAP benefits for cash in Exhibit D. A third clerk refused to exchange SNAP benefits for ineligible items in Exhibit B.

APPELLANT'S CONTENTIONS

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

- The violations were the store's first offense. Giammalvo's long history in the SNAP with no infractions coupled with the isolated and limited nature of the incidents demonstrates that the hardship CMP is too severe and should be reversed.
- The investigation report shows that no major ineligible purchases were made and that no cash was exchanged for SNAP benefits. In fact, the store explicitly refused to exchange cash for SNAP benefits. The sale of common ineligible items was inadvertent and unintentional.
- Inconsistencies in the description of the clerks in the investigation report casts doubt that certain ineligible items were purchased.
- The store has since retrained all of its clerks.
- The CMP when viewed in the context of the nature of the business and the alleged infractions is disproportionate and will severely harm the store and the community.
- At most, the store should be issued with a warning letter under 7 CFR 278.6(f)(7) or in the alternative the CMP should be reduced.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all

contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

The Appellant states that the charges warrant a warning letter. It is true that, in some limited cases, FNS may send a warning letter in lieu of a disqualification. SNAP regulations at 7 CFR §278.6(e)(7) state that FNS should “send the firm a warning letter if violations are too limited to warrant a disqualification.” The Retailer Operations Division will send a warning letter when investigation findings consist of only one or two sales of inexpensive non-food items. However, the investigation report documents that the chargeable violations in this case consisted of six (6) inexpensive non-food items over three (3) transactions; therefore, the Retailer Operations Division correctly determined that a warning letter was not appropriate in this case.

The Appellant notes that this is the firm’s first violation after many years in the SNAP. Regarding this contention, the SNAP regulation at 7 CFR § 278.6(e)(5) states, in part that “FNS shall take action as follows against any firm determined to have violated the Act or regulations ... **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 non-food items due to carelessness or poor supervision by the firm’s ownership or management.”

FNS considers the sale of a total of three (3) inexpensive non-food items over one, two or three transactions to equate to carelessness and the lack of thorough supervision on the part of ownership or management. However, the investigation report documents that the chargeable violations in this case consisted of six (6) non-food items exchanged for SNAP benefits over three (3) transactions. Although the clerk in Exhibit B refused to exchange ineligible items for SNAP benefits, and the clerk in Exhibit D refused to exchange cash for SNAP benefits, this does not ameliorate or mitigate the penalty for exchanging SNAP benefits for non-food items as documented by Exhibits A, C and D.

The violations as cited in the charge letter would normally warrant a six-month disqualification. However, the Retailer Operations Division determined that the assessment of a hardship CMP of \$13,464.00 in lieu of a six-month disqualification was appropriate. A preponderance of the evidence supports the decision of the Retailer Operations Division.

Reliability of Investigation Report

The Appellant claims that the clerk described in Exhibits A and D does match the description of any known store employees. The Appellant also notes that in Exhibit D the employee is identified as a male but in the accompanying narrative the employee is referred to as “she.” Therefore, the Appellant concludes that the entire investigation report is not reliable.

Regarding these contentions, the charges of violations are based on the findings of a formal USDA investigation and were conducted under the direction of a USDA investigator. A complete review of the investigation report indicates that there is only one inconsistency in the report; namely the apparently inadvertent use of the pronoun “she” in reference to the male clerk who conducted the transactions in Exhibit D. However, this mistake when reviewed within the full context of the entire investigation report does not appear to be a fatal error. A review of all other facts as documented in the report has yielded no known error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The case file contains pictures of the ineligible items purchased and pictures of the EBT receipts that match the transaction data in the investigation report. Therefore, the Appellant’s contentions do not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Owner Responsibility

The Appellant states that the violations in Exhibit C were due to an employee not being properly trained due to a change in managers. For this reason, the Appellant states that the violation was inadvertent and unintentional. Regarding these contentions, SNAP authorized firms are responsible for reviewing the SNAP training materials, providing training for its employees, and generally familiarizing themselves with all SNAP rules and regulations pertaining to retailers. Also, please note that the violation of exchanging ineligible non-food items for SNAP benefits does not require an element of intent by the violator. Even if the clerk did not know this was a violation, the store is liable.

In addition, a store owner signed the SNAP reauthorization application for Giammalvo’s Market during its last reauthorization on February 15, 2017 and acknowledged that the owners were aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owners would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations including accepting SNAP benefits in exchange for ineligible non-food items.

Corrective Action

The Appellant stated that all the store employee had been retrained on SNAP rules and regulations so that there will be no violations in the future. With regard to this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time of the Retailer Operations Division’s action. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that a store may 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 assessment on the basis of alleged corrective actions implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that corrective action has taken place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Hardship CMP

In the alternative, the Appellant asks for a reduced hardship CMP as the firm is a small family owned business and the amount of \$13,464.00 is excessive when compared to the violations. Regarding this contention, the SNAP regulations at 7 CFR § 278.6(g) prescribes how to calculate the amount of the hardship CMP utilizing a mandated formula. As such, there is no discretion granted to the Retailer Operations Division, or to the Administrative Review Officer, in the calculation of the hardship CMP. Therefore, a reduced hardship CMP cannot be granted.

7 CFR § 278.6(g) states that the hardship CMP is to be calculated on a formula which includes the SNAP redemption volume of the store during the twelve (12) months prior to the firm being charged with violations. Modifications to the hardship CMP may occur only when there is an error in calculation or the amount exceeds the agency limit of \$11,000 per violation. Using the methodology described in 7 CFR § 278.6(g), Retailer Operations Division correctly calculated the amount of the hardship CMP under 7 CFR § 278.6(g) as \$13,464.00. That calculation is shown below:

5 U.S.C. § 552 (b)(7)(E)

CONCLUSION

A review of the evidence in this case documents that personnel at Giammalvo's Market exchanged SNAP benefits for ineligible nonfood items during three (3) compliance visits and that the chargeable violations occurred as documented in Exhibits A, C and D of the investigation report. However, the Retailer Operations Division determined that a six-month disqualification of Giammalvo's Market would create a hardship for SNAP households as there is no other authorized retail food store in the area selling a comparable or larger variety of staple food. Therefore, in lieu of a six-month disqualification, the Retailer Operations Division assessed a hardship CMP against the Appellant of \$13,464.00. The decision in this case is hereby sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a 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 you

reside or are 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, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

August 13, 2018