

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

Gifted African Market, LLC,

Appellant,

v.

Case Number: C0202137

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record indicates that Gifted African Market, LLC (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a six month disqualification from the SNAP as imposed by the Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(f)(1), 7 CFR § 278.6(a), and 7 CFR § 278.6(e) in its administration of the SNAP, when it imposed a six month period of disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that a food retailer 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 Appellant with federal SNAP law and regulations during the period of October 31, 2017 through January 23, 2018. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate occasions that warrant a six month disqualification period. The items sold are best described in regulatory terms as common and major nonfood items.

As a result of evidence compiled during this investigation, by letter dated February 21, 2018, Retailer Operations charged the owner with violating the terms and conditions of the SNAP

regulations at 7 CFR § 278.2(a). Misuse of SNAP benefits was noted in Exhibits B, C, D, and E that warrants a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

The owner, via counsel, replied to the Charge letter in writing on March 4, 2018. The record notes that there was an oral reply on March 6, 2018, and an oral and written response on March 8, 2018. By Determination letter dated March 12, 2018, Retailer Operations informed Appellant that the violations cited in the Charge letter occurred at the firm and that a six month period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

Appellant, appealed Retailer Operations' determination and requested administrative review of this action by letter dated March 20, 2018. The appeal was granted by letter dated March 26, 2018. Additional information was provided by the owner under a cover letter dated March 29, 2018. This information was analyzed by Retailer Operations.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the 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 argument 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 § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 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: "Coupons may be accepted by an authorized retail food store only from eligible households or the households' authorized representative, and only in exchange for eligible food."

7 CFR § 278.6(e)(5) states 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(a) states: "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.”

In addition, 7 CFR § 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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.”

SUMMARY OF THE CHARGES

The USDA conducted five compliance visits at Appellant. A report of the investigation was provided to the Appellant as Exhibits with the Charge letter. The investigative report provides details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during five store visits, four of which warrant a six month disqualification. The violations involved the sale of major items that exceed the cost of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and common items such as, skin softener and paper towels, in exchange for SNAP benefits in violation of 7 CFR § 278.2(a).

APPELLANT’S CONTENTIONS

Consideration of all contentions was made whether recapitulated here or not.

- The owner is a pastor in a local church. He was away from the subject business during the period in question.
- The temporary employee who was assisting my client denies the allegations. My client submits that any alleged violation was due to the employee’s failure to follow the procedure outlined by management. The employee has been terminated and my client has increased the training required of its employees.
- We are in the process of reviewing the records to verify the veracity of the claims; however, this will take some time to accomplish.
- My client’s business is located on the East side of Columbus, and it is one of the only grocery/retail businesses in the area that sells food products specifically used by immigrant families in Western Africa.
- My client’s business sells a substantial variety of specific staple food items that are consumed by immigrants from Western Africa. Disqualification would cause hardship to SNAP households in the area. There are no other authorized retail food stores in the area that stock food items such as goat meat, sheep meat, yam, and plantains, fofu, palm oil, kenkui, shito (pepper sauce), milo and nido. The other store that sells the foregoing is located miles away, and it does not carry all of the items carried by my client’s business. I request that you consider a civil money penalty in lieu of a disqualification.
- The incident alleged was not intentional but purely administrative mistakes.
- I have never witnessed any illegality and will never intentionally authorize any employee to commit any act of illegality at the store.

- I terminated the employee and retrained the rest on the SNAP rules.
- I have re-negotiated with my accountant to audit all the transactions since 2016 to present to determine if any such act had occurred before or it was just a clerical or administrative mistake.
- I am willing to refund or subject myself to financial penalties.
- Termination will adversely affect the store, the church and community.
- Whatever my attorney wrote, I was not privy to it and did not know the content.
- I have bought a new cash register that can separate qualified food items from non-food items. This will eradicate charging non-food items on SNAP cards. Find attached receipts, termination letter for the suspected employee who committed the mistake, and sample training.
- I continue to training and supervise the employees to prevent future mistakes.

The owner provided a one page Termination of Employment letter, signed by an employee and the owner, dated February 28, 2018. He also provided a Union Telecard Alliance LLC Customer Registration and Customer Payment Receipt dated March 21, 2018, and four sales invoices, dated March 27, 28, and April 12, 2018, showing the separation of food and non-food items.

The owner also provided a four page document titled “In-Service Training.” The document provided information regarding the use of coupons, accepting coupons, making change, accepting coupons before delivery, paying credit accounts, redeeming coupons, and identifying benefit users per Section 278.2 Participation of Retail Food Stores. The document was signed by three employees and dated March 2, 2018. He also provided a 14 page document titled “Gifted African Market, LLC In-Service Training.” The document had information regarding the charge letter, review of evidence, basis for determination, penalties, criteria for civil money penalties for hardship and transfer of ownership, amount of civil money penalties for hardship and transfer of ownership, notifying the firm of civil money penalties for hardship and transfer of ownership, criteria for eligibility for a civil money penalty in lieu of permanent disqualification for trafficking, fines for the acceptance of loose coupons, fines for unauthorized third parties that accept food stamps, and review of determination per Section 278.6 disqualification of retail food stores, and imposition of civil money penalties in lieu of disqualification. The document was signed by three employees and dated on March 2, 2018.

ANALYSIS AND FINDINGS

It is important to clarify that the purpose of this review is to either validate or to invalidate the determination made by Retailer Operations. This review is limited to what circumstances were at the basis of Retailer Operations’ determination when the sanction was imposed. Upon review, the evidence supports that Appellant established a record of selling non-food items as defined by Section 271.2 of the regulations, on multiple occasions as noted in the Exhibits furnished with the Charge letter. 7 CFR § 278.6(e)(5) specifies that FNS shall “disqualify the firm 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 nonfood items due to carelessness or poor supervision by the firm’s ownership or management.” Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification.

The owner signed the FNS retailer application to become a SNAP authorized retailer which included a certification and confirmation that ownership 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.” By signing this document the owner confirmed that “I am aware that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal or disqualification from Supplemental Nutrition Assistance Program;” “It is my responsibility to ensure that the training materials are reviewed by all firm owners and all employees;” and “I accept responsibility on behalf of the firm for violations of the Supplemental Nutrition Assistance Program regulations, including those committed by any of the firm employees.”

Regardless of whom the owner of a store may utilize to handle store business, the owner is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in SNAP when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. To allow the store owner to disclaim accountability for the acts of persons whom the owner chooses to utilize to handle Appellant’s business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA.

The owner contends that a SNAP disqualification will have a negative financial impact on Appellant’s business. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Furthermore, 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 regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

The owner contends that he provided SNAP training to his employees, terminated an employee and acquired a new cash register. With regard to these contentions, the purpose of this review is to either validate or to invalidate the determination of Retailer Operations. This review is limited to what circumstances were at the basis of Retailer Operations’ sanction at the time such determination was made. It is not the authority of this review to consider what subsequent remedial actions may be undertaken so that a store might begin to comply with program requirements after violations have been charged.

There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment based on after-the-fact corrective actions implemented subsequent to findings

of program violations. Therefore, Appellant's contentions that corrective actions such as training, the termination of an employee, and the purchase of a new cash register, do not provide any valid basis for dismissing the charges or to mitigate the penalty imposed.

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six month period of disqualification. The record supports that authorized stores within a nearby radius of Appellant stock a variety of comparable staple foods at comparable prices including comparable ethnic items. Thus, the evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified.

CONCLUSION

Based on a review of the evidence, the record supports that the program violations at issue did occur at Appellant. The charges of violations are based on the findings of a formal USDA investigation. The investigative record is specific, thorough, and fully documented 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.

The record documents that Retailer Operations considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) and properly denied it. Therefore, the six month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained.

RIGHTS AND REMEDIES

This penalty shall become effective thirty (30) days after receipt of this decision. A new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the six month period of disqualification. Please contact the Retailer Center at 877-823-4369 with any questions regarding the SNAP application process.

See Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Section 279.7 of the regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction.

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.

M. Viens
Administrative Review Officer

May 4, 2018