

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

Harrys Market,

Appellant,

v.

Case Number: C0206187

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 a six-month disqualification of Harrys Market (hereinafter Appellant), from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as initially imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a six-month disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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 Harrys Market, with Federal SNAP law and regulations from May 15, 2018 through August 14, 2018. In a letter dated August 29, 2018, Retailer Operations Division charged the Appellant firm with accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on four (4) out of four (4) compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

In an Email dated September 7, 2018, Appellant replied to the charge letter and generally stated that ownership was not sure under what circumstances the mistakes happened however, each employee was spoken to and none of them recalled any of the mentioned transactions. All employees go through a formal training before being hired and ownership personally checks or test them on a regular basis to ensure they are up to date on their knowledge.

Appellant stated that soon it will be implementing these measures to ensure that this must never happen again.

1. All employees will be signing a statement stating that they received the training.
2. I will have written SNAP policies for them.
3. I will be making a sign to go over periodically with my employees that what items are eligible or not eligible under SNAP program.
4. I will be posting a sign for my customers about items that are allowed and not allowed under SNAP program.

Appellant requested consideration of the listed measures and stated that it was open to any further recommendations.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated October 1, 2018. The determination letter informed the Appellant it was disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter dated October 12, 2018, the Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal was accepted and the implementation of the six-month disqualification was held in abeyance pending completion of this review.

FOIA REQUEST

In correspondence dated November 7, 2018, Appellant, through counsel, submitted a FOIA request for all records related to the store. The request was processed on November 8, 2018. The record reflects that in an email dated December 20, 2018, counsel received the requested documentation with a copy sent to Appellant via UPS.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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

The controlling statute in this matter is contained in the Food & 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) establish the authority upon which a period of disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, inter alia: “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, inter alia: “Eligible food 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, inter alia: “FNS may disqualify any authorized retail food store... if the firm fails to comply with the Food and Nutrition Act of 1977, 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, inter alia: “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, inter alia: “FNS may impose a civil money penalty as a sanction in lieu of when... the firm’s disqualification would cause hardship to Food Stamp [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

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

1. After a careful review of the Department’s allegations set forth in the charging letter, and a review of the pertinent case law on this issue, the Department appears to lack sufficient evidence upon which to base an allegation of trafficking against the Appellant.
2. The store has a clear policy against trafficking and the sale of ineligible items as a whole.
3. The Investigator’s affidavit is hearsay by definition, an out of count statement offered to prove the truth of the matter asserted.
4. In the event this Division affirms the Department’s finding of trafficking, the Appellant would request that a civil money penalty (CMP) be issued against them in lieu of permanent disqualification.

Appellant, through counsel, provided a letter dated December 8, 2017, from the Oakland Police Department commending Appellant on successfully preventing the purchase of tobacco products to a minor; a January 2018 copy of the USDA Profile of SNAP Households report, and three undated signed copies of a IRUMA Investments Employee SNAP Training DBA: Harrys Market list of eligible/ineligible items under SNAP benefits with acknowledgement that the individual understood the SNAP policies.

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

FNS initially authorized Harrys Market as a convenience store on July 25, 2016. During an investigation from May 15, 2018 through August 14, 2018, the USDA conducted four (4) compliance visits at Appellant's store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated August 29, 2018. 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 committed during four (4) of the four (4) compliance visits. They involved the sale of three (3) 24 count boxes of Diamond spoons, five (5) 10 count packages of Kleenex tissues and two (2) Scotch Brite sponges. The clerk refused the exchange of an undisclosed amount of SNAP benefits for cash in Exhibit D.

With regard to Appellant's contentions, through counsel, it is important to note that Appellant was not charged with trafficking as implied in the response. The record reflects that the transactions, as listed in the investigative report, were verified as having been conducted at Appellant's store on the dates and times cited in the Investigative report. Additionally, although Appellant stated that they are not sure how the violations occurred since they go over what can and cannot be accept for SNAP benefits regularly with their employees, Appellant acknowledge that the violations took place in the store. It is noted that the retailer plans to put in place a more formal training program for training their employees and placing signs at the checkout counter to inform their customer that SNAP will be accepted only for eligible food items.

It is important to clarify for the record that the purpose of this review is to determine if the earlier decision of the Retailer Operations Division, to disqualify Appellant from participation in the SNAP for a period of six months, was in fact a correct one. It is not within the scope of this review to consider what subsequent actions Appellant may have taken so that its store may begin to comply with program requirements.

Based on a review of the evidence in this case, there is no question that program violations did occur. Clerks working at Appellant sold common ineligible items to an FNS investigator on four (4) separate investigative visits. The investigative record is specific and accurate with regard to the dates of the violations, the exchange of SNAP benefits for ineligible items, and in all other critically pertinent detail. As such, the contentions presented do not constitute valid

grounds for dismissal of the current charges of violations, or for mitigating the impact of those charges. Based on a review of the evidence in this case, it appears that the SNAP violations at issue did, occur as charged.

CIVIL MONEY PENALTY

Appellant's request for a trafficking CMP does not apply in this case because Appellant was not charged with trafficking. Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR §278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification because there were at least 27 authorized retailers within a one-mile radius of Appellant. These retailers included four small grocery stores, two medium grocery stores, two superstores and 19 additional convenience stores. These authorized retailers are selling as large a variety of staple foods at comparable prices. Therefore Retailer Operations Divisions determination to deny the hardship CMP is sustained.

CONCLUSION

The documentation presented by Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm. 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 common nonfood items due to carelessness or poor supervision by the firm's ownership or management.

The violations were determined by Retailer Operations Division to represent the first sanction for the firm and evidence carelessness and poor supervision. Therefore, the imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

It is therefore established that the violations as described in the letter of charges did in fact occur at the Appellant firm warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). Based on the discussion herein, the decision to impose a six-month disqualification against Harrys Market is appropriate and the action is sustained.

In accordance with the Act and regulations, the six-month period of disqualification shall become effective thirty (30) days after receipt of this letter. The Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to 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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

May 14, 2019