

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

Hein Oriental Market,

Appellant,

v.

Case Number: C0201706

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 Hein Oriental Market, (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 Hein Oriental Market.

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, Hein Oriental Market, was initially authorized for SNAP participation as a combination grocery/other store on April 3, 2017. Between September 20, 2017, and October 19, 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 Hein Oriental Market accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold dish soap, toothpaste, toothbrushes, sponges, a scrub brush, and a cylindrical metal coin receptacle in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated December 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 phone call on January 3, 2018, and in a letter faxed on January 16, 2018, the Appellant replied to the charges. In its response, the Appellant apologized for the violations and stated that the cashiers did not intentionally or knowingly make any errors. Appellant further claimed that in April 2017, an intoxicated customer attempted to obtain 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash in exchange for SNAP benefits. The owner rejected the transaction and the customer became belligerent. Appellant further stated that it has received from its accountant a list of items that cannot be purchased with SNAP benefits. This list will be kept close so that cashiers can review it as necessary. Appellant stated that it wants to make things right and requests another chance.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated January 18, 2018. 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 January 26, 2018, 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 September 20, 2017, and October 19, 2017, the Food and Nutrition Service completed four compliance visits at Hein Oriental Market. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the December 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 each of the 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 12.6-ounce bottle of dish soap (*Ajax* brand), Exhibit A
- One toothbrush (*Oral B* brand), Exhibit B
- One tube of toothpaste (*Colgate* brand), Exhibit B
- One 12.6-ounce bottle of dish soap (*Ajax* brand), Exhibit C
- One package of sponges (*Peacock* brand), Exhibit C
- One yellow scrub brush (no brand indicated), Exhibit C
- One round tin Benjamin Franklin coin bank, Exhibit D
- One toothbrush (*Colgate* brand), Exhibit D
- One tube of toothpaste (*Colgate* brand), Exhibit D

The report indicates that in Exhibit D, the investigator attempted to obtain 5 U.S.C. § 552 (b)(7)(E) cash in exchange for SNAP benefits, but this request was rejected by the cashier. According to the report, three different cashiers conducted the 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 requests that the administrative review officer review the documents that were submitted previously and make a fair determination.
- The community in which the store is located relies heavily on SNAP to be able to purchase staple food products.

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 may have occurred, apologizing for any mistakes, but claiming that they were not done intentionally or knowingly. 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.

Attempted Trafficking Incident

The Appellant claims that in April 2017, an intoxicated man entered the store and asked for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash in exchange for SNAP benefits. According to the Appellant, this request was rejected by the owner, at which point the man became violent.

Unfortunately, this claim has no bearing on this case. The transactions in question occurred in September and October 2017, which is several months after this incident, and there is no evidence that FNS had any knowledge of this event prior to the commission of its undercover investigation.

Remedial Actions Taken

The Appellant has stated that its accountant has given the firm a list of items that are not eligible for purchase with SNAP benefits. This list, which the Appellant claims came from the SNAP website, will be kept close to the cashiers as a reference guide so that they can review it as necessary. The Appellant further states that it values "situations such as this" because it helps the firm know where to make improvements for the future. Finally, the Appellant requests an opportunity to "make things right."

With regard to these contentions, it should be noted that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or that will take place so that a store may enhance or 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 on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations.

Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

Hardship to SNAP Households / Civil Money Penalty

The Appellant contends that the community in which the store is located relies heavily on SNAP to be able to purchase staple food products. This contention implies that a disqualification of Hein Oriental Market would cause hardship to SNAP households.

With regard to this contention, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification 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 Hein Oriental Market would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are at least a dozen comparable or larger SNAP-authorized retail stores located within a one-mile radius of Hein Oriental Market, including one superstore, one supermarket, and at least one other firm specializing in Asian foods.

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. Likewise, hardship to SNAP households does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

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) did occur at Hein Oriental Market 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, Hein Oriental Market, 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

July 19, 2018