

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

Hondu Mex Butcher Shop,

Appellant,

v.

Case Number: C0207882

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record supports that Hondu Mex Butcher Shop (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain the hardship civil money penalty (CMP) in lieu of a six month disqualification of Appellant from the SNAP as a retail food store 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(a), 7 CFR § 278.6(e)(5), and 7 CFR § 278.6(f)(1) in its administration of the SNAP, when it imposed a CMP six month period of disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023 and the 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 the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of April 26, 2018 through March 27, 2019. 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 as common nonfood items.

As a result of evidence compiled during this investigation, by letter dated June 4, 2019, Retailer Operations charged the owners with violating the terms and conditions of the SNAP regulations.

Misuse of SNAP benefits was noted in Exhibits B, C, and D, 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 ownership replied to the Charge letter June 7, 2019. Retailer Operations informed the owners by Determination letter dated June 20, 2019, that the violations cited in the Charge letter occurred at the firm and that Appellant's disqualification would cause hardship for SNAP households. Therefore, in accordance with 7 CFR Part 278.6(f)(1) of the SNAP regulations, Retailer Operation's imposed a hardship CMP in the amount of \$5,220.00 in lieu of a six month period of disqualification.

The owners appealed the determination by letter dated June 24, 2019. The administrative review was granted by letter dated July 12, 2019.

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.

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) of the SNAP regulations 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."

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

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 three store visits that warrant a six month disqualification. The violations involved the repeated sale of nonfood items including: Tylenol, Advil, wood sticks, and a plastic bag, 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.

- I understand the importance of this matter and I wanted to let you know that these violations occurred without our knowledge and/or consent. Unfortunately these violations occurred due to the lack of commitment of one of our employees, they all receive training and explanations of our business rules and policies.
- This action resulted in the dismissal of that particular employee.
- As business owners we understand the importance of following the regulations of the SNAP program but AGAIN these violations were out of our hands, we would like to apologize for these violations and would like to ask you to please DO NOT disqualify us from using SNAP program (food stamps) because this will have a negative financial impact in our business.
- I would also like to request if these penalty violations can be waived or considered for a reduction since this was caused by an employee that had been trained but didn’t follow not only SNAP regulations but also our business policy rules.
- We as business owners commit ourselves to follow these SNAP regulations and to keep providing the best customer service.
- Again our apologies to you and I assure that this will not happen again.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the earlier determination made by Retailer Operations, and is limited to the facts at the basis of Retailer Operations’ determination at the time such action was taken. Upon review, the evidence supports that Appellant established a record of selling nonfood items as defined by Section 271.2 of the regulations on multiple occasions. The Exhibits furnished with the Charge letter warrant a disqualification period of six months.

There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of claims that repeated sales of ineligible items were mistakes made by an uncommitted employee. The acceptance of SNAP benefits for ineligible items is a violation of the SNAP rules and regulations. 7 CFR Section 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.

Regardless of who the store owner(s) utilizes to handle store business, the owner(s) 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.

The investigation supports that different clerks sold the nonfood items at Appellant. Different clerks were responsible for the three violative passes conducted at Appellant. The regulations stipulate “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 as the sale of common nonfood items due to carelessness and poor supervision by the firm’s ownership or management.”

There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective actions implemented subsequent to findings of program violations. Therefore, Appellant’s contention that one employee was terminated does not provide any valid basis for dismissing the charges or mitigate the penalty imposed.

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that it was appropriate to impose a hardship CMP in lieu of a six month period of disqualification on Appellant. It assessed a CMP because Appellant is selling a substantial variety of staple food items, and the firm’s disqualification would cause hardship to SNAP households. A hardship CMP in the amount of \$5,220.00 was imposed. Review was made of the calculation of the CMP, and the amount is deemed to have been correctly computed per the applicable regulations.

CONCLUSION

Based on a review of the evidence, the record by a preponderance of the evidence supports that the program violations charged did occur at Appellant. The USDA 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 properly considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) and Section 278.6(g).. Retailer Operations granted a hardship CMP in the amount of \$5,220.00 in lieu of the six month disqualification of Appellant from participation as an authorized retailer in the SNAP. This determination is sustained.

Please review the June 20, 2019, Determination letter with the enclosed Bill for Collection for payment information previously provided to you by Retailer Operations. Please take action as described. If the owners chose not to, or are unable to pay the hardship CMP for the total amount as specified on the Bill for Collection, Appellant will be disqualified for a period of six months. The owners should promptly contact Rayan Raymond at (212) 520-7623, if they choose to have the six month period of disqualification imposed rather than pay the total amount of the CMP.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to the regulations at 7 CFR § 279.7 with respect to your right to 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 the owners 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, 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

August 13, 2019