

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

Indus Food Center,

Appellant,

v.

Case Number: C0197882

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the decision by the Retailer Operations Division to impose a one year disqualification against Indus Food Center (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5 and 6), and § 278.6(f)(1) in its administration of the SNAP when it imposed a one year period of disqualification against Appellant on August 24, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period March 20, 2017, through July 24, 2017. The investigation determined that personnel at the Appellant business accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. The items sold are best described in

regulatory terms as common nonfood items and include items such as bar soap, antiseptic, and incense. The investigative report indicates that these violative transactions were handled by four different clerks and also notes that the business refused to exchange SNAP benefits for cash on one occasion (Exhibit D). All four transactions were deemed clearly violative and would normally warrant a six month disqualification. However, SNAP regulations at 7 CFR 278.6(e)(6) require the sanction period be doubled for a second disqualification sanction and the business previously received a hardship CMP in lieu of a six month disqualification in 2010 for the sale of ineligible items using SNAP benefits, therefore a one year disqualification period is the appropriate sanction for this business.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated August 1, 2017, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of 1 year (Section 278.6(e)(5 and 6)). The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant responded via fax on August 21, 2017, admitting to the violations and explaining the types of ethnic foods offered by the business. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated August 24, 2017, that it determined that violations had occurred at the establishment, and that a one year period of disqualification from participating as an authorized firm in SNAP was warranted. This determination letter also states that Appellant’s eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

By letter postmarked August 29, 2017, Appellant appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. Subsequent correspondence postmarked September 27, 2017, was received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In

particular, Sections 278.6(a) and 278.6(e)(5 and 6) establish the authority upon which a one year disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 271.2 states in part that, “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 § 278.2(a) specifies in relevant part, “Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food.” Further, the citation specifies that “Coupons may not be accepted in exchange for cash . . . or for any other nonfood use.”

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*, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system” (Emphasis added.)

7 CFR § 278.6(e)(5) of the SNAP regulations states, in part, 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(e)(6) of the SNAP regulations states, “Double the appropriate period of disqualification prescribed in paragraphs (e) (2) through (5) of this section as warranted by the evidence of violations if the same firm has once before been assigned a sanction.”

7 CFR § 278.6(f)(1) reads, in part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification when . . . 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.”

APPELLANT’S CONTENTIONS

In the response to the letter of charges, in the request for administrative review, and in the subsequent correspondence, Appellant has stated as its position in the matter the following:

- The business apologizes for the incidents that have occurred at Indus Food. It was an honest mistake and a review is requested. The management knows it is their responsibility to ensure whoever is at the register knows what is acceptable to be charged, but the business has been short staffed several times that led to employees from other departments talking care of the register which led to this situation;
- The owner has been in business for over 30 years and has repeat customers some from when

the business first opened. Having been a family run store for that long has allowed us to build trust with our customers and ensure they are well satisfied by giving them the best prices and excellent quality fresh/frozen Halal meat and many types of ethnic groceries. Many customers who have been shopping here for years depend on the business for all their grocery essentials from Halal meat to a variety of different types of ethnic groceries. Two pages of customer signatures are attached showing it is necessary for the business to continue accepting EBT;

- The meat department offers a variety of fresh Halal chicken, goat, lamb, and beef. There are two types of slaughtered chicken, one being machine slaughtered and the other being hand slaughtered which many Muslims prefer. We also carry Halal all beef hot dogs, hot links, chicken hot dogs, turkey, beef bacon and also deli meat among other Halal frozen meat;
- The grocery side offers a full range of Pakistani, Indian, and Middle Eastern groceries in a very reasonable price. Many customers come from Turkey because we have many items from Turkey. We have a variety of cheeses that all Middle Easterners enjoy. We offer all types of cookies, snacks, lentils, tea, sweets, frozen groceries, rice, oil (including multiple types of Middle Eastern), Pakistani breads, and many essential items that our customers from all over the Middle East, Pakistan, and India need to make their home-cooked meals. We also have many customers from West Africa who come to us because we have many essentials for their meals also; and,
- The family run business has built relationships with people coming all the way from Santa Rosa, San Jose, and many other cities further away. People trust us to give them the best meat and groceries while giving them the best prices we can offer. The business has now ensured that every employee is aware of the guidelines by conducting the proper training needed to ensure there are no more incidents and apologizes for the incidents that have happened. This will not happen again.

Appellant submitted two pages (front and back) with signatures and telephone numbers of customers in support of these contentions.

The preceding may represent only a brief summary of Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, while the business having now conducted the proper training of employees to ensure there will be no more incidents in the

future is a positive step, it does not provide any valid basis for dismissing the charges, or for mitigating the penalty imposed. While store ownership may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. Ownership is also responsible for all SNAP transactions at the firm regardless of the amount of time the owner is present at the subject firm.

The FNS retailer application contains a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application or reauthorization process. Store ownership did certify its understanding and agreement to abide by program rules and regulatory provisions when it initially applied for authorization as a SNAP retailer and also when it most recently applied for reauthorization through the FNS retailer web site in 2015. The owner agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The "SNAP Training Guide for Retailers" is provided to all retail store owners upon their authorization/reauthorization and also clearly states that store owners or operators are legally responsible for their own actions as well as the actions of everyone working in their store whether paid or unpaid, new, full-time or part-time and that violations may include being disqualified from SNAP. Regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is liable for all violative transactions handled by store personnel and is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. This guide and the video accompanying it provide detailed information for SNAP retailers regarding compliance with SNAP rules and regulations; both are available in English and Spanish and are also online at the FNS retailer web site. The FNS web site cautions applicants about their responsibilities for training and overseeing store employees.

"You must read the SNAP Retailer Training Guide and watch the instructional video. Store owners accept responsibility for the actions of their employees. You are responsible for the actions of your employees. All of your employees must read the SNAP Retailer Training Guide and watch the instructional video . . . to ensure compliance with SNAP rules and regulations."

The investigative report shows that four different clerks working at the Appellant business during the more than four month period under review transacted SNAP benefits for ineligible items on four separate occasions indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The transactions from the investigative report have been matched to SNAP transactions posted by the Appellant business on the dates in question with no discrepancies. The acceptance of SNAP benefits for ineligible items is a violation of the SNAP rules and regulations. The regulations state that FNS shall disqualify a store for a one year period if it is to be the second disqualification sanction for the firm, and the evidence shows that personnel of the firm have committed violations such as the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or

management. There was no indication of involvement by the firm's management or ownership. Lastly, Appellant has admitted to the violations by allowing untrained store employees to operate the store's cash register.

It is highly improbable, based on the readiness of the four store employees to exchange SNAP benefits for ineligible items, that the only instances of SNAP violations were the four identified as part of the FNS undercover investigation and more likely than not that this represented an ongoing pattern of SNAP violations at the Appellant business. As previously stated, the store owner is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight on the part of the owner to ensure employees are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for a store owner to not be monitoring all transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the business or conducting other activities that would jeopardize the licenses and income that the business is dependent upon.

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications. A hardship CMP as an optional penalty in lieu of a one year disqualification was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and its disqualification would create a 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. Records show there are 22 SNAP retailers located within one mile of Appellant's store that includes one super store, one supermarket, and four medium grocery stores. There is a Middle Eastern medium grocery store located just steps away on the same block offering Halal meats, an Indian medium grocery store located 0.23 miles away, and another Indian medium grocery store located 0.26 miles away. These nearby stores are easily accessible to customers and offer a comparable selection of staple and ethnic foods. Additionally, the zabihah.com guide to Halal markets shows that several Safeway Supermarkets located near the Appellant business offer Halal meats and groceries. It is also noted that AC Transit operates fixed route local bus service in Berkeley. The Appellant business is located on San Pablo Avenue and less than one block from University Avenue both of which have scheduled bus service. Some level of inconvenience to SNAP benefit users is inherent in the temporary disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience, however, does not rise to the level of hardship required by the regulations.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged. As noted previously, the charges of violations are based on the findings of a formal

USDA investigation. All transactions cited in the letter of charges were conducted by a USDA special agent and signed under penalty of perjury. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate 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. Accordingly, the determination by the Retailer Operations Division to impose a disqualification of one year against the Appellant business from participating as an authorized retailer in SNAP is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations as there are other authorized retail stores in the area selling as large a variety of staple foods, including ethnic foods, at comparable prices.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. A new application for participation in SNAP may be submitted ten (10) days prior to the expiration of the one year disqualification period. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS web site at www.fns.usda.gov/snap/retailer-apply.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

ROBERT T. DEEGAN
Administrative Review Officer

November 6, 2017