

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

International Food Market,

Appellant,

v.

Case Number: C0192769

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 International Food 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 International Food 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, International Food Market, was initially authorized for SNAP participation as a small grocery store on March 20, 2012. Between October 12, 2016, and February 1, 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 International Food Market accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. According to the report, the Appellant firm sold laundry detergent, dishwashing liquid, and liquid bleach in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated September 26, 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 stated that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated 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 response to the charge letter, the Appellant owner contacted the Retailer Operations Division by telephone on October 5, 2017, and stated that he is not physically in the store, but has removed the individuals who were working at the store at the time of the investigation. The Appellant further acknowledged that he is responsible for the violations and would accept whatever decision is made by the Retailer Operations Division.

After considering the Appellant's response and further reviewing the evidence in the case, the Retailer Operations Division issued a determination letter dated October 12, 2017. 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 October 20, 2017, 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 October 12, 2016, and February 1, 2017, the USDA completed five compliance visits at International Food Market. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the September 26, 2017, charge letter. The investigation report includes Exhibits A through E, and provides full details on the results of each compliance visit. SNAP violations were documented during three of the five visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report notes that the following nonfood items were purchased by an investigator using SNAP benefits:

- One 40 fluid ounce bottle of laundry detergent (*Oxi Clean* brand), Exhibit C
- One 12 fluid ounce bottle of dish soap (*Dawn* brand), Exhibit C
- One 18 fluid ounce bottle of dishwashing liquid (*Dawn* brand), Exhibit D
- One 40 fluid ounce bottle of laundry detergent (*Oxi Clean* brand), Exhibit D
- One 3.78 quart bottle of bleach (*Clorox* brand), Exhibit E
- One 75 fluid ounce bottle of laundry detergent (*Xtra* brand), Exhibit E

The report indicates that in Exhibit A, the investigator did not attempt to commit any violations. In Exhibit B, the investigator attempted to purchase a t-shirt with SNAP benefits, but the clerk on duty would not allow the purchase. In Exhibit E, the investigator attempted to exchange SNAP benefits for cash (i.e. trafficking), but this attempt was also refused. According to the report, two different clerks conducted the three violative transactions.

The charge letter states that the violations that occurred in Exhibits C, D and E 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 would like to be considered for a hardship civil money penalty according to the terms of Section 278.6(f)(1) of the SNAP regulations.

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. 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. The balance of this review will address the Appellant's remaining contentions.

Civil Money Penalty

The only contention submitted by the Appellant is a request for consideration of a hardship civil money penalty in lieu of disqualification.

After reviewing all evidence in this case, it is the determination of this review that a civil money penalty in lieu of a six-month disqualification is not appropriate. SNAP regulations at 7 CFR § 278.6(f)(1) state that a CMP in lieu of a temporary disqualification is allowable only 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 International Food Market, a small grocery store, would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are at least eight comparable or larger SNAP authorized stores located within a one-mile radius of International Food Market, including three superstores, four supermarkets, and a medium grocery store.

It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their SNAP benefits elsewhere. However, 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 granted in this case.

CONCLUSION

Based on a review of the evidence in this case, there is no question that program violations of 7 CFR § 278.2(a) occurred 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 is 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, International Food 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

April 30, 2018