

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

Jonathan Grocery, LLP,

Appellant,

v.

Case Number: C0203218

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record supports that Jonathan Grocery, LLP (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a six month disqualification of Appellant from the SNAP as imposed by the Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action in its administration of the SNAP, consistent with 7 CFR § 278.6(f)(1), 7 CFR § 278.6(a), and 7 CFR § 278.6(e), when it imposed a 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 August 14, 2018 through November 1, 2018. 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 on multiple dates are best described as common nonfood items.

As a result of evidence compiled during the investigation, by letter dated April 25, 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 record includes a reply to the Charge letter dated May 7, 2019. Retailer Operations informed the owners by Determination letter dated July 23, 2019, that the violations cited in the Charge letter occurred at the firm, and that a six month period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

Counsel appealed the determination by letter dated July 31, 2019. The administrative review was granted by letter dated August 8, 2019. Counsel provided additional information by email dated August 26, 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, credible 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 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 investigative report documents that SNAP violations were recorded during three store visits that warrant a six month disqualification. The SNAP violations of 7 CFR § 278.2(a) involved the sale of nonfood items for benefits including: dish detergent and Ladi forks.

APPELLANT’S CONTENTIONS

Consideration of all contentions was made whether recapitulated here or not.

- The owner has owned and operated the grocery store for approximately twelve years without ever receiving any warnings of violations in the past.
- He denies any knowledge that any of his employees were accepting SNAP benefits in exchange for ineligible non-food items.
- He accepts any and all responsibility for his employees and is disappointed by the allegations because many of his loyal customers depend upon SNAP benefits and he would lose customers and potentially the business.
- There were three visits where the cashier accepted SNAP benefits in exchange for ineligible non-food items. There was a total of four ineligible non-food items sold, which consisted of dishwashing liquid and forks. The dishwashing costs \$0 .99 cents and the forks approximately \$1.59. The cashier refused to accept SNAP benefits for any ineligible non-food items. Therefore, the total amount of ineligible items sold was approximately \$5.00 throughout the entire investigation period.
- Upon receipt of the charging letter, the owner took proactive measures to ensure that no employee ever accepts SNAP benefits in exchange for ineligible non-food items. The owner installed a new software/scanner system, which differentiates between EBT SNAP eligible and ineligible non-food items and provides a description of the item being scanned. A sample copy of a receipt from this new scanner system is

attached. The new scanner software system cost approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and copy of the sales receipt is attached.

- The owner immediately conducted an EBT training session in with all employees on the correct procedure for processing EBT transactions and what to do if customers attempt to purchase ineligible non-food items. Employees were also informed of the consequences if they do not adhere to the EBT rules and guidelines. All employees agreed that they will adhere to all EBT rules and regulations and was posted up in store in a visible area for all employees to see alongside the USDA's SNAP warning on not buying or selling SNAP-EBT benefits.
- The owner installed a new camera/surveillance system in his store, which cost approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The owner has never received any violations or issues with the USDA. The store is well-known throughout the community and appreciated by his customers. If the owner is disqualified from the SNAP program for a period of 6 months it would cause a financial hardship upon him and his family. The EBT transactions constitute approximately 18-25% of his store's total gross revenue. Therefore, a 6-month disqualification will likely cause a loss of customers and potentially to the business would be devastating.
- The agency should reverse its initial consideration for disqualifying the owner from SNAP for a period of six (6) months, and consider a warning letter in lieu of a disqualification period of 6 months. There is authority to suggest that a sanction of a warning letter is appropriate in instances where violations are limited and where a proprietor has never previously been warned of the possibility of violations.
- My client would seem to fit the description as set forth in the case law cited since he has never received any warnings of violations in the past twelve years. The violations are minimal considering the total amount of ineligible items sold. Alternatively, my client requests that a shorter period of disqualification such as a period of one month be considered as is permitted under 7 CFR §279.5(c).
- The owner established and implement a compliance policy and program to prevent SNAP violations. He implemented a refresher training prior to receiving the charge letter. See the topics discuss that the SNAP training and training material. All notices and training materials were in Spanish.
- The letter dated February 10, 2018 gave notice to employees that a mandatory training would take place February 20, 2018.

Exhibit B included: 1) the original notice of SNAP training; 2) documentation of topics discussed at the SNAP training; and 3) training material. The February 20, 2018 document evidences the various topics that were discussed, including the examples of eligible items to be processed with SNAP benefits, and items that households cannot use SNAP benefits to buy. The document was signed by ownership and employees.

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by Retailer Operations; it is limited to the facts at the basis of Retailer Operations' determination at the time it was made.

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. The regulations at 7 CFR § 278.6(e)(5) specify 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 owners utilize to handle store business, ownership 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 regulations stipulate that FNS 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.

A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations. There is no provision in the Act, or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees. The evidence supports that violations did occur and Appellant is subject to a six month disqualification. The responding owner admitted that his employees did make mistakes accepting SNAP benefits. Consideration of legal precedent through case law is beyond the scope of administrative review.

The responses advanced on behalf of the business contend that SNAP training has been given to employees, a sign was posted, and a camera and scanner were purchased. This review is limited to what circumstances were at the basis of Retailer Operations’ action at the time such action occurred. It is not the authority of this review to consider what subsequent remedial actions may be undertaken so that an authorized store might begin to comply with program regulations. 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 contentions that corrective actions have been given, do not provide a valid basis for dismissing the charges or the penalty imposed.

Ownership contends, through counsel, that the total cash amount involved in the alleged violations is small. As to the dollar value of the ineligible items sold, regardless of cost, Appellant established a record of selling non-food items as defined by Section 271.2 on multiple occasions. No mention of minimum cost is cited in Section 278.6(e)(5) of the SNAP regulations, which states that FNS shall disqualify a store 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 the sale of common nonfood items in exchange for FSP benefits due to carelessness or poor supervision by the firm’s ownership or management.

The charges of violations are based on the findings of a formal U.S. Department of Agriculture investigation. All such transactions are fully documented and a review of this documentation has yielded no indication of error or discrepancy in the reported findings. The investigative record is specific and thorough with regard to the dates of the violations, the specific facts related to the sales of nonfood items, and in all other critically pertinent detail. The preponderance of the evidence supports that Appellant sold nonfood items on multiple store visits in exchange for SNAP benefits, a program violation.

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six month period of disqualification from SNAP. The record documents that there are other authorized stores within a nearby radius of Appellant that stock a variety of comparable staple foods at comparable prices. The evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified. Therefore, Appellant is not eligible for a hardship CMP.

CONCLUSION

The preponderance of the evidence in the record supports that the program violations charged did occur at Appellant. The responding letters did not dispute that violations occurred. The record documents that Retailer Operations considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations, and properly denied it. Therefore, the six month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained.

RIGHTS AND REMEDIES

This penalty shall become effective thirty (30) days after receipt of this decision. A new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the six month period of disqualification. Please contact the Retailer Center at 877-823-4369 with general questions regarding the SNAP application process. Please contact Angelia Bass at (615) 768-1168 if you have operations questions.

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 clients' right to judicial review of this decision. 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

September 18, 2019