

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review
Alexandria, VA 22302**

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| Ankeel LLC d/b/a JP Market, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | Case Number: C0179154 |
| |) | |
| FNS Retailer Operations Division, |) | |
| |) | |
| Respondent. |) | |
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FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a six (6) month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program¹ (SNAP) was properly imposed against Ankeel LLC d/b/a JP Market (hereinafter, “JP Market” and/or “Appellant”) by the FNS Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.2(a) and 7 CFR § 278.6(e)(5) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a six (6) month disqualification against JP Market in a letter dated August 29, 2016.

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

The USDA conducted an investigation of the compliance of JP Market with Federal SNAP law and regulations which consisted of five (5) visits conducted between September 22, 2015 and January 13, 2016.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

The *USDA-FNS Report of Positive Investigation* (hereinafter, “Investigative Report”) number ME38935 dated January 25, 2016 disclosed that on four (4) separate occasions JP Market personnel accepted SNAP benefits for merchandise that was ineligible for purchase with such benefits from a USDA Investigator. Identification information ascertained from the investigative report indicated that these SNAP violations were handled at Appellant firm by two (2) unidentified clerks, one (1) male and one (1) female.

As a result of the evidence compiled during the USDA investigation, the Retailer Operations Division, in a letter dated July 28, 2016, charged Appellant with violating 7 CFR § 278.2(a) of the SNAP regulations; providing a copy of the redacted Investigative Report for consideration.

The Retailer Operations Division’ record documents receiving a written response to the letter of charges from one of Appellant’s owners [7 U.S.C. 2018 (b)(6) & (b)(7)(c)]. The record further documents that following consideration of Appellant reply a final determination letter was routed to Appellant dated August 29, 2016, assessing a six (6) month disqualification from participation as an authorized retailer in the SNAP.

Appellant, through its reported owner [7 U.S.C. 2018 (b)(6) & (b)(7)(c)], requested an administrative review of this action appealing the Retailer Operations Division’ determination via letter dated September 8, 2016 that was received by the Chief of the Administrative Review Branch on September 12, 2016. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review in accordance with 7 CFR § 279.4(a).

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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 statute in this matter is contained in the *Food and Nutrition Act of 2008*, as amended (the “Act”)², 7 USC 2023 and 278 of Title 7 of the Code of Federal Regulations (CFR).³ There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to disqualify retail stores.

7 CFR § 278.2(a) “Use of Coupons”, states, in relevant part, “Coupons may be accepted by an authorized retail food store only from eligible households... only in exchange for eligible food.”

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment through P.L. 113-79, enacted February 7, 2014.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at www.access.gpo.gov/cgi-bin/cfrassemble.cgi?title=200307.

7 CFR § 278.6 establishes the authority upon which a period of disqualification may be imposed against an authorized food store or wholesale food concern in the event that it has failed to comply with the Act.

7 CFR § 278.6(e) provides the following, in relevant part, with respect to penalties that may be assessed against firms determined to have violated the Act or regulations:

“...For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. A civil money penalty and a disqualification shall be considered sanctions for such purposes...”

7 CFR § 278.6(e)(5) applies to the period of disqualification under review, and specifies that FNS shall:

“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) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. 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 Food Stamp [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.”

SUMMARY OF THE CHARGES

USDA conducts investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of violations that may be occurring. In the instant case the Investigative Report dated January 25, 2016, reveals that a USDA Investigator completed five (5) total investigative visits at JP Market between September 22, 2015 and January 13, 2016.

The report materials were provided to Appellant as attachments to the charge letter dated July 28, 2016 and included Exhibits A through E that provide full detail of the investigative results.

The report reveals SNAP violations were recorded during four (4) of the reported visits, included as exhibits B, C, D and E of the Investigative Report with the exchange of SNAP benefits for what is referred to in FNS terms as “common ineligible items” consisting of cigarette lighters, sandwich bags, tall kitchen garbage bags, and plastic zipper bags. The report also describes one (1) instance, detailed in exhibit E where there was refusal to exchange SNAP benefits for cash. The violations recounted in Exhibits B, D and E are countable violations of SNAP rules.

The regulations establish that an authorized food store may be disqualified from participating in the program 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.

Appellant has affirmed that the SNAP violations described in the Investigative Report occurred at Appellant firm, albeit characterizing the violations as mistakes by employees who have been fired. Neither the Food and Nutrition Act of 2008 nor the pursuant SNAP regulations support the exclusion of a first time mistake in SNAP penalty determinations.

APPELLANT'S CONTENTIONS

The request for appeal indicates that Appellant does not want to lose SNAP authorization because of employee mistakes, requesting a second chance to comply.

The preceding may represent only a brief summary of the contentions presented in this matter. Please be assured, however, that, 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

That SNAP benefits are not for the purchase of nonfood items is clear in the "Act" and in the SNAP regulations, with noted exceptions, such as seeds used to grow food, and hunting equipment in remote areas of Alaska. This and other rules governing SNAP were provided to Appellant upon initial SNAP authorization in June 2013 upon initial SNAP authorization.

Regardless of whether or not the SNAP violations in review were committed by employees who have been fired the information cannot be used as a basis to mitigate penalty assessment. 7 CFR § 278.6(e)(5) of the SNAP regulations states that FNS shall disqualify a store for six (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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management.

The official agency record provides evidence that two (2) unidentified clerks, fully described in the Investigative Report, committed the SNAP violations described in exhibits B, C, D and E. The Retailer Operations Division determination that the Investigative Report recounts evidence of usual sales of easily recognizable common ineligible items resulting in a determination that a six (6) month disqualification is appropriate in the instant case is sustained. Appellant's request for a second change is denied.

CIVIL MONEY PENALTY

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 Food Stamp [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."

The record reflects that the Retailer Operations Division has rendered a finding that pursuant to 7 CFR § 278.6(f)(1), it would not be appropriate to impose a civil money penalty in lieu of a period of disqualification on Appellant firm.

The Retailer Operations Division record reflects that JP Market is classified within FNS definitions as a convenience store and that there are at least seven (7) SNAP authorized stores within a within a one (1) mile radius of Appellant firm, including one (1) superstore located at 0.18 miles from Appellant and six (6) alternative convenience stores. These firms are reported by Retailer Operations Division to be “selling as large a variety of staple food items at comparable prices”. Therefore the Retailer Operations Division determined that SNAP customers would not endure a hardship from the temporary disqualification of Appellant firm.

It is recognized that some degree of inconvenience to SNAP customers is inherent from the temporary disqualification of any participating food store. Although the normal shopping pattern of such SNAP customers may be temporarily altered during the period of disqualification, the earlier determination that the disqualification of JP Market would not create a hardship to customers, as differentiated from potential inconvenience, is sustained and a civil money penalty in lieu of disqualification is not appropriate in this case.

CONCLUSION

The charges of violations are based on the findings of a formal USDA investigation in which all transactions cited in the letter of charges were fully documented. A complete review of this documentation has yielded no swaying error or discrepancy. The Investigative Report is specific and thorough with regard to the dates of the violations, the specific related facts, and is supported by documentation that confirms specific details of the transactions.

The documentation presented by the Retailer Operations Division clearly provides a preponderance of the evidence that the violations as reported occurred at Appellant firm and, 7 CFR §278.6(e)(5) specifies that FNS **shall** “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.”

The violations as described in the subject case were determined by the Retailer Operations Division to represent the first sanction for the firm and evidence of carelessness and poor supervision therefore the imposition of a six (6) month disqualification, the least severe penalty allowed by regulation, has been imposed.

It is established that the violations as described in the letter of charges dated July 28, 2016, did in fact occur at Appellant’s firm, warranting a disqualification of six (6) months in accordance with 7 CFR §278.6(e)(5).

Based on the discussion above, the decision to impose a six (6) month disqualification against JP Market is proper.

The action is sustained. In accordance with the Act and regulations, the six (6) month period of disqualification shall become effective thirty (30) days after receipt of this letter. Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six (6) month disqualification period.

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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

/s/ _____
NANCY BACA-STEPAN
ADMINISTRATIVE REVIEW OFFICER

October 31, 2016

DATE