

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

Juan Supermarket,

Appellant,

v.

Case Number: C0208324

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 Juan Supermarket (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 Juan Supermarket.

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, Juan Supermarket, was initially authorized for SNAP participation as a small grocery store on December 29, 2014. Between May 15, 2018, and May 24, 2018, 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 Juan Supermarket accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. According to the report, the Appellant firm sold candles, household cleaners, and trash bags in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated June 18, 2018, 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 states that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further states 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.

On June 20, 2018 the Appellant replied to the charges by telephone, acknowledging that violations were committed by one of its employees and asking how best to respond to the charges. The Retailer Operations Division advised the Appellant to submit a written explanation outlining its contentions related to the violations listed in the investigator's report. On June 22, 2018, the Appellant submitted a short letter indicating that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was authorized to discuss the case on behalf of the firm, but no additional response or contentions, written or otherwise, were submitted.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated August 6, 2018. This letter informed the Appellant that it was the determination of the Retailer Operations Division that 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 August 15, 2018, 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 May 15, 2018, and May 24, 2018, the Food and Nutrition Service completed four compliance visits at Juan Supermarket. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the June 18, 2018, charge letter. The investigation report includes Exhibits A through D, and provides full details on the results of each compliance visit. SNAP violations were documented during three of the four visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the following nonfood items were purchased by an investigator using SNAP benefits:

- One 3-ounce scented candle (*Star Lytes* brand), Exhibit A
- One 8-fluid-ounce bottle of multi-surface cleaner (*King Pine* brand), Exhibit B
- One 3-ounce scented candle (*Star Lytes* brand), Exhibit B
- One 8-fluid-ounce bottle of multi-surface cleaner (*King Pine* brand), Exhibit C
- One 10-count box of trash bags (*Red & White* brand), Exhibit C

The report indicates that in Exhibit D, the investigator once again attempted to purchase ineligible items with SNAP benefits, but this attempt was refused by the cashier on duty. In Exhibit D, the investigator also attempted to obtain cash in exchange for SNAP benefits (i.e. trafficking), but this was also refused. According to the report, the same cashier conducted all three violative transactions.

The charge letter states that the violations that occurred in Exhibits A, B, and C 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 protests the determination that the store is not eligible for a civil money penalty.
- Appellant depends on EBT in order to compete with other stores. A six-month disqualification would be a devastating loss not only to the business but to the community as well.
- Appellant has always implemented a zero tolerance policy in its store and is aware that SNAP violations are serious issues.
- The Appellant has been in business for three years and has never received prior notification or warning that such violations were occurring in the store.
- Appellant owner dedicates 75 percent of his time to the store. Unfortunately, the violations appear to have occurred during the short periods of time in which he was not at the store.
- Appellant has taken every action possible to avoid these violations from arising in the future.

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. In fact, in its initial response to the charges, the Appellant appeared to acknowledge that one of its employees had committed the violations. 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 and a six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Civil Money Penalty

In its request for review, the Appellant stated that it protests the determination that the firm is not eligible for a civil money penalty in lieu of disqualification. The Appellant further argues that a disqualification would be devastating to the community.

Unfortunately, there is no basis to grant a CMP in this case. SNAP regulations at 7 CFR § 278.6(f)(1) permit a CMP in lieu of a temporary disqualification only when the firm's disqualification would cause hardship to SNAP households. According to this regulation and for SNAP purposes, 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 Juan Supermarket, a small grocery store, would not cause hardship to SNAP households because there are many other shopping options in the area. According to agency records, there are at least four dozen comparable or larger SNAP-authorized retail stores located within a one-mile radius of Juan Supermarket, including a full-service supermarket just a few hundred feet from the Appellant firm. A few hundred feet in the opposite direction is a medium-sized grocery store. Both of these SNAP-authorized stores have staple food inventory that is similar or greater than Juan Supermarket at comparable prices.

Section 278.6(f)(1) of the SNAP regulations clearly indicates that hardship exists *only* when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Such conditions are not present in this case. It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified for a period of time and households are temporarily forced to use their SNAP benefits elsewhere. However, based on the regulation cited above, a hardship civil money penalty in lieu of disqualification cannot be granted.

Hardship to Appellant

The Appellant has argued that it depends on EBT in order to compete with other stores and claims that a six-month disqualification would be a devastating loss to the business.

With regard to this contention, it is recognized that some degree of financial or economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship to the store's ownership or to the firm itself would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program requirements, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellant's contention that the firm may incur financial hardship as a result of a six-month disqualification from SNAP does not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

No Prior Warning

The Appellant contends that it has been in business for three years and has never received prior notification or warning that such violations were occurring in the store. The Appellant further claims that it has always had a zero tolerance policy regarding SNAP violations.

With regard to this contention, it should be noted that USDA is under no obligation to warn retailers when SNAP violations are occurring. A warning letter is generally issued only when the violations that are committed are too limited to warrant a period of disqualification. This is in accordance with 7 CFR § 278.6(e)(7). In this case, the firm committed SNAP violations on three consecutive visits the investigator made to the store. While it may be true that the firm does not have a history of program violations and while the firm may have developed internal policies regarding SNAP usage, the repeated violations in this case demonstrate either a willful disregard of the rules or poor supervision by the firm's ownership or management. Such repetitive misuse of SNAP is serious enough to warrant a six-month disqualification pursuant to 7 CFR § 278.6(e)(5). Therefore, a warning is not an appropriate sanction in this case.

Owner Not Involved in Violations

The Appellant owner contends that he dedicates 75 percent of his time to the store, and claims that the violations occurred during periods of time in which he was not at the store. This contention implies that because the owner was not present when the violations occurred, the disqualification penalty should be dismissed or reduced.

With regard to this contention, the record shows that the Appellant owner signed an application to participate as a SNAP retailer on September 8, 2014. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes

that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time. An owner or manager is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations. Regardless of which clerks are operating the cash register at a given time or whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions.

Therefore, the Appellant's insinuation that the violations were not the fault of the owner does not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

Remedial Actions Taken

The Appellant contends that it has taken every action possible to prevent these violations from arising in the future.

With regard to this contention, it should be noted that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or that will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented after the discovery of program violations.

Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

CONCLUSION

Based on an analysis of all information in this case, this review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Juan Supermarket 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 appears to be 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, Juan Supermarket, 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

February 26, 2019