

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

| | | |
|-------------------------------|---|------------------------------|
| Kelso Ranch Market, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | Case Number: C0186541 |
| |) | |
| 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 Kelso Ranch Market by the Retailer Operations Division. It is also USDA’s final decision that a civil money penalty in lieu of disqualification is not appropriate in this case.

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 Kelso Ranch 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, Kelso Ranch Market, was initially authorized for SNAP participation as a convenience store on August 11, 2010. Between January 12, 2016 and February 10, 2016, the USDA conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigative report documented that personnel at Kelso Ranch Market accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold plastic forks, foam bowls, trash bags, dishwashing soap, plastic spoons, plastic cups, and

a can of bleach in exchange for SNAP benefits, which benefits are permitted to be used only in exchange for eligible foods.

In a letter sent to the firm on July 5, 2016, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The 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 submitted a faxed letter dated July 14, 2016. In its reply, the owner apologized for the violations and claimed full responsibility for the mistakes. The owner stated that this was the first time an incident like this had ever happened at the store, and that the firm had always been honest and had followed the rules and regulations in the past. The Appellant requested leniency as Kelso Ranch Market is the owner's only business and an incident like this could greatly affect his income.

After considering the Appellant's reply to the charges as well as the evidence in the case, the Retailer Operations Division issued a letter of determination dated August 10, 2016. 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 civil money penalty was given, but that the Appellant was not eligible for a CMP because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked August 15, 2016, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the sanction was 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 & 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, *inter alia*:

[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, *inter alia*:

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, *inter alia*:

*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, *inter alia*:

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, *inter alia*:

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, *inter alia*:

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 January 12, 2016 and February 10, 2016, the USDA completed five compliance visits at Kelso Ranch Market. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the charge letter. The investigation report included Exhibits A through E, which provided full details on the results of each compliance visit. SNAP violations were documented during four of the five visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report noted that the following nonfood items were purchased by a confidential informant using SNAP benefits:

- One 24-count package of plastic forks (*Diamond* brand), Exhibit A
- One 20-count package of foam bowls (*Kordite* brand), Exhibit B
- One 7-count package of trash bags (*Ri-Pac* brand), Exhibit B
- One 24-count package of plastic forks (*Diamond* brand), Exhibit B
- One 24-count package of plastic forks (*Diamond* brand), Exhibit C
- One 14-ounce can of bleach (*Ajax* brand), Exhibit C
- One 12.6 fluid ounce bottle of dish liquid (*Ajax* brand), Exhibit C
- One 20-count package of foam bowls (*Kordite* brand), Exhibit D
- One 24-count package of plastic spoons (*Diamond* brand), Exhibit D
- One 15-count package of plastic cups (*Imperial* brand), Exhibit D

The investigation report noted that in Exhibit E, the confidential informant did not try to purchase ineligible items, but rather attempted to exchange SNAP benefits for cash (i.e. trafficking). However, this request was refused by the store clerk. The charge letter stated that the violations that occurred in Exhibits B, C, and D warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). According to the report, two separate clerks conducted the four violative transactions during the investigation.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant owner takes full responsibility for the violations that occurred.
- Appellant has been operating the firm since July 2010 and has never done anything against the Program. Prior to this incident it has never sold any ineligible or nonfood items. The Appellant has been honest and has followed all the rules and regulations of USDA.
- The violation was a small mistake made by an employee who did not realize that there was a small box of forks with all other food items that the investigator bought. The Appellant does not want to be punished for a mistake unknowingly made by the employee.
- The firm is installing a point-of-sale system to insure that clerks are unable to sell any goods that are not eligible for purchase with SNAP benefits.
- Appellant would like USDA to consider a reprieve this time because Kelso Ranch Market is the Appellant's only business and an incident like this can make a lot of difference in the owner's income. The owner has a big loan with a bank, a lot of bills

to pay, and has five families depending solely on this business. Appellant would like a final opportunity to comply rather than be disqualified.

- Appellant would be willing to pay a fine instead of the disqualification.

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

As best as can be determined, the Appellant did not, at any time, dispute that the violations outlined in the charge letter took place. Rather, the Appellant acknowledged that an employee of the firm committed a violation. The Appellant also apologized for the mistake and accepts responsibility. Because the violations themselves do not appear to be in dispute, this review will focus on the Appellant's remaining contentions.

No Prior Violations

The Appellant contends that it has been operating the firm since July 2010 and has never done anything against the Program. It claims that prior to this incident it has never sold any ineligible or nonfood items. The Appellant also claims that it has always been honest and has followed all the rules and regulations of USDA. Additionally, the Appellant claims that the violation was a small mistake made by an employee who did not realize that there was a small box of forks with all other food items that the investigator bought. The Appellant does not want to be punished for a mistake unknowingly made by the employee.

With regard to these contentions, SNAP regulations at 7 CFR § 278.6(e)(5) require that when serious violations occur, such as the exchange of common nonfood items for SNAP benefits, a six-month disqualification is the necessary penalty, even on the first occasion, regardless of the firm's prior compliance with Program rules. Furthermore, the Appellant grossly understates the violations that occurred during the investigation. On the investigator's first visit to the store, the only ineligible item purchased was plastic forks. However, the Appellant seems to disregard the nine other ineligible items that were purchased in subsequent visits to the store. Additionally, the fact that two separate clerks permitted the sale of nonfood items with SNAP benefits gives a strong indication of rampant carelessness by the store's clerks or consistently poor supervision by the firm's ownership or management. Based on the results of the investigation and the ease with which a confidential informant purchased ineligible items with SNAP benefits, this review has significant doubts regarding the Appellant's claim that it had never committed a violation prior to USDA's investigation.

Therefore, the Appellant's contention that this is its first violation does not provide a valid basis for dismissing the charges or for modifying or reducing the penalty imposed.

Remedial Actions Taken

The Appellant contends that it is installing a point-of-sale system to ensure that clerks are unable to sell any goods that are not eligible for purchase with SNAP benefits.

Regarding this contention, it is important to clarify for the record 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 what circumstances existed at the time the Appellant was charged with committing program violations, and at the time that the Retailer Operations Division made its determination. It is not the authority of this review to consider what subsequent remedial actions may have been taken or will take place so that a store may enhance or begin to comply with program requirements. **7 USC 2018 (b)(7)(e)**.

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

Civil Money Penalty

The Appellant contends that it would be willing to pay a fine rather than suffer through a period of disqualification.

As noted earlier, the August 10, 2016 determination letter stated that the Retailer Operations Division considered a hardship civil money penalty in lieu of disqualification pursuant to regulations found at 7 CFR § 278.6(f)(1), but determined that the Appellant firm was not eligible for this alternative sanction.

A review of the case record confirms that the Appellant is not eligible for a CMP. The regulations at § 278.6(f)(1) allow for the imposition of a CMP 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." (Emphasis added.)

7 USC 2018 (b)(7)(e). Agency data shows that there are currently 37 SNAP-authorized retail stores of equal or greater size located within a one-mile radius of Kelso Ranch Market, including one superstore, one supermarket, one medium grocery store, three small grocery stores and more than two dozen convenience stores and combination grocery/other stores.

It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified and a household is forced to use its SNAP benefits elsewhere. However, because there are, within a one-mile radius of Kelso Ranch Market, other authorized retail food stores selling as wide a variety of staple foods at comparable prices, it is the determination of this review that the Appellant does not meet the criteria for a civil money penalty in lieu of disqualification.

Hardship to Appellant

The Appellant has requested that USDA consider leniency in this case because Kelso Ranch Market is the Appellant's only business and an incident like this can make a lot of difference in the owner's income. The Appellant owner claims that it has a substantial loan with a bank, a lot of bills to pay, and five families depending solely on the business. The Appellant would like a final opportunity to comply with the rules rather than be disqualified.

With regard to this contention, hardship to the firm itself or to its owners is not a factor when determining whether or not a lesser penalty, such as a civil money penalty, can be applied. As noted earlier, a CMP in lieu of disqualification may only be considered only when SNAP recipients themselves will experience hardship due a lack of authorized stores in the area. As described previously, such a situation does not exist in this case, as there are many shopping options in the vicinity.

It is recognized that some degree of economic hardship to the firm is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible financial hardship to either the firm or the firm's ownership 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 firm would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of 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 regulations, but also to those retailers who have been disqualified from the Program in the past for similar violations. Therefore, the Appellant's contention that it may incur economic hardship based on the assessment of an administrative penalty does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

CONCLUSION

Based on a review of the evidence in this case, there is no question that program violations of 7 CFR § 278.2(a) did occur 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 items, 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, Kelso Ranch Market, is sustained.

Further, the decision by the Retailer Operations Division to not impose a civil money penalty in lieu of disqualification is also sustained. Pursuant to 7 CFR § 278.6(f)(1) it is the determination of this review that SNAP households will not incur hardship as a result of the Appellant's disqualification because there are other authorized stores in the area selling as large a variety of staple foods at comparable prices.

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 (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.

JON YORGASON
ADMINISTRATIVE REVIEW OFFICER

February 13, 2017
DATE