

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

Keshavjivan Corporation,

Appellant,

v.

Case Number: C0209926

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record supports that Keshavjivan Corporation (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a six month disqualification of Appellant as a retail food store 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, consistent with 7 CFR § 278.6(f)(1), 7 CFR § 278.6(a), and 7 CFR § 278.6(e) in its administration of the SNAP, 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 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 June 26, 2018 through July 3 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 are best described as a common nonfood items.

As a result of evidence compiled during this investigation, by letter dated August 15, 2018, Retailer Operations charged the owners with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits was noted in Exhibits A, 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.

Appellant replied to the Charge letter by telephone on August 17, 2018 and in writing by letter dated August 21, 2018. Retailer Operations informed the owners by Determination letter dated August 22, 2018, 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 September 4, 2018. The review was granted by letter dated September 7, 2018. Counsel made a FOIA request September 28, 2018. The agency replied to the FOIA request by information dated November 5, 2018. Counsel provided a brief dated November 27, 2018.

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 evidence which 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 investigation report documents that SNAP violations were recorded during four store visits that warrant a six month disqualification. The violations involved the sale of nonfood items for SNAP benefits in violation of 7 CFR § 278.2(a). Three clearly violative sales of ineligible items during an investigation warrant the sanction imposed, a six-month disqualification, which is the least severe disqualification period allowed by regulation, rather than a warning letter.

APPELLANT’S CONTENTIONS

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

- We found about why and how the product was misread by POS system. The product purchased by investigator was categorized in wrong specification.
- We have removed that product from the shelf. We will verify each product sold under food category. We have inquired the prior owner about this description.
- It is unknown error of POS system and we will make sure it does not happen again.
- If investigator finds discrepancy like this, he or she might let us know on spot so we can fix it on the spot.
- Unequivocally, the Store has a strict compliance policy and has *never* previously been accused of SNAP violations. The violations which occurred at the Store were honest mistakes, made without any malice, by two (2) clerks who were confused as to which specific items were eligible verse ineligible items and in reaction to a technological malfunction.
- Nevertheless, these minimal violations allegedly occurred within a one (1) week period, from June 26, 2018 to July 3, 2018, by two (2) clerks: Clerk A was the clerk present for the investigations that took place on June 26, 2018, June 27, 2018, and July 3, 2018, and Clerk B was the clerk present for the July 2, 2018 investigation. Immediately upon

becoming aware of said violations, all Store personnel were re-trained as to the proper SNAP regulations and procedures and Clerk A's employment at the Store was terminated.

- It was discovered that the Store's POS device had malfunctioned, erroneously categorizing one (1) of the two (2) ineligible items purchased by the Investigator - the plastic cups - as an eligible SNAP item rather than an ineligible item. Importantly, this was the *only* ineligible item purchased by the Investigator during three (3) out of the four (4) investigations. The item was immediately removed from the Store's shelves and a review of the Store's POS device and categorization system was conducted to ensure all items were properly categorized as eligible or ineligible SNAP items.
- The Appellants also contacted the Store's prior owners seeking an explanation for the erroneous categorization. The employment of Clerk A, who was the clerk who engaged in the sale of the paper plates (an item which was not erroneously categorized and was only purchased during one out of the four investigations), was immediately terminated.
- Given the duration of the Appellant's participation in SNAP as an authorized retailer, such compliance history fairly portrays that the Store typically has the appropriate training, oversight and procedures in place to prevent SNAP violations on the part of its clerks.
- It is more likely that the four investigations wherein violations were alleged to have occurred demonstrated a short-lived misunderstanding on the parts of Clerks A and B concerning the difference between ineligible and eligible items, and an unintentional, short-lived technological malfunction on the part of the Store's POS device, rather than a store practice of selling ineligible items.
- The ineligible items alleged to have been purchased were both minor, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and were both common household items, which included plastic cups and plastic plates, both of which would normally be expected to be found in a standard grocery shopping trip.
- There has never been so much as a warning letter sent to the Store about compliance issues, the Store has never been previously sanctioned, nor has it ever even received a warning letter. Accordingly, good compliance history should be given some weight when determining whether a six month disqualification is the appropriate sanction in this matter.
- It is clear that it was not the intent of the Appellants to violate the regulations, as evidenced by the short duration of time in which the violations occurred and the Stores' clerk's refusal to traffick in SNAP benefits.
- Thus, the question is whether management acted carelessly during and after the transactions. The Store's manager is not expected, in any case or in any store, to directly oversee every transaction that processes on EBT. Managers of other grocery stores are expected to have a broad overview of the operations of the store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Unbeknownst to the Appellants, the Store's POS device had erroneously categorized one of the two ineligible items (the paper cups) purchased by the Investigator as an eligible SNAP item rather than an ineligible SNAP item. This error was immediately remedied upon the realization that such a miscategorization existed.
- As such, with no other direct tie-in to the inventory, any review, other than a detailed audit (which occurred immediately upon being notified of the alleged violations), would

not have necessarily shown anything amiss on the surface of the transactions. Thus, the management and owner cannot be considered careless in reviewing the transactions.

- Despite the ultimate failure of the Store's attempts to prevent violations resulting from human error and/or minor technological error, it is not fair to say that the Store did not properly oversee its' personnel. There were just no warning signs that management or ownership could have noticed. It cannot be found that the Store's management acted with the requisite carelessness and/or poor supervision to support the issuance of a six month disqualification.
- Appellant asks that a warning letter be issued in lieu of a six month disqualification. There were only two minimal ineligible items purchased by the investigator, both of which were reasonably related to food preparation and/or common household products.
- The participants would be severely burdened and endure grave hardship. While it would not be impossible for the participants to shop elsewhere, it would be of such inconvenience to them that it would ultimately be a burden.
- The Department has not met its burden in proving that such SNAP violations occurred nor that such violations were the result of management's carelessness or poor supervision. Mere statements, without any corroboration, are not sufficient to satisfy the evidentiary standard before this Division.
- These transactions were the result of the human error of two clerks who, although had been properly trained, as a result of confusion regarding ineligible and eligible SNAP items combined with a technological error, operated the transactions improperly within a one week time period.
- In the alternate, the Appellants request that this Division issue a Hardship Civil Money penalty. The Appellants' Store, as is evident from the pictures from the on-site reviewer, stocks a considerable amount of staple items to provide for the needs of the local SNAP participants who walk or bike to the Store. Without access to these foods at the Store, the participants would be unduly burdened.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the determination made by Retailer Operations, and is limited to the facts at the basis of the 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. Exhibits A, B, C, and D, furnished with the Charge letter warrant a disqualification period of six months. Section 278.6(e)(5) of the regulations specifies 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.

The owners are 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 owners were provided multiple and redundant resources through which a thorough knowledge of Program rules and requirements could readily be obtained. These materials are also readily available on the internet.

Plastic cups and plates were sold at Appellant in exchange for SNAP benefits. These are clearly not food items and they are ineligible for exchange for SNAP benefits. That the nonfood items sold might not have been properly designated in Appellant's POS device does not mitigate that the nonfood items were sold in exchange for SNAP benefits on multiple occasions. The owners are responsible for their systems and devices and should take such responsibility for their systems. The failure of the owners to properly program their systems is careless. The previous store owner is not relevant to this case. Although the retailer claimed the POS machine misread the products; the cashiers allowed the sale of ineligible items; therefore, a six month disqualification is warranted

The owners are responsible for the training of staff on the SNAP regulations and guidelines, and for violations committed by their employees. Although one employee was reportedly terminated, it does not relieve the owners from their responsibility for their staff and violative actions. It appears that the owners did not develop or implement an effective SNAP training program if at no time management and staff did not question the sale of nonfood items. No evidence or documentation was submitted that supports that Appellant adheres to the SNAP rules and compliance policies. The regulations stipulate "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 as the sale of common nonfood items due to carelessness and poor supervision by the firm's ownership or management." The Exhibits support that during four of four visits to Appellant, ineligible items were exchanged in violation of the regulations.

It must be impressed upon Appellant that SNAP authorization is an administratively-granted privilege subject to the terms and conditions for participation detailed in the Act and the regulations. Thus, if a firm does not conform to the applicable statutes and regulations, the same provide for the firm's removal from the program in accordance with the provisions detailed therein. SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation and subsequently abides by the statute and implementing regulations. A record of participation in the SNAP with no previously documented instance(s) of violations does not constitute valid grounds for dismissal of the current charges of violations or mitigate the impact of the violations upon which they are based. 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.

Counsel contends that the dollar amount involved in the violations is trivial. 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 four 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.

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. The record documents other authorized stores within the applicable 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

Based on a review of the evidence, the record supports that the Program violations charged did occur at Appellant. The USDA investigative record is specific, thorough, and fully documented with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail. The record documents that Retailer Operations considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) 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 days prior to the expiration of the six month period of disqualification. Please contact the Retailer Center at 877-823-4369 with any general questions regarding the SNAP application process.

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 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

December 21, 2018