

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

Kings Bridge Market Inc,

Appellant,

v.

Case Number: C0207896

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 the six-month disqualification imposed upon Kings Bridge Market Inc. (hereinafter “Appellant”) by the Retailer Operations Division, Investigations and Analysis Branch, hereinafter “ROD Office,” is hereby sustained.

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6 (e) and 7 CFR § 278.6 (f) in its administration of the SNAP when it imposed a six-month disqualification upon Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 C.F.R. § 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

In a letter dated August 8, 2018, the ROD Office informed Appellant that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282. The record reflects that the ROD Office received and considered Appellant’s replies to the Charge Letter. By a letter dated October 26, 2018, Appellant was informed that it was disqualified for a period of six months from participation as a retail store in the SNAP and was instructed to cease accepting SNAP benefits or, alternatively, request an administrative review of the decision. On November 1, 2018, Appellant requested an administrative review of the ROD Office’s decision. The request was granted and the disqualification action held in abeyance pending the results of the review.

STANDARD OF REVIEW

In appeals of adverse actions an appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means 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

The controlling statute in this matter is contained in the **Food & Nutrition Act of 2008**, as amended, at 7 U.S.C. § 2021 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6 (e) of the Regulations establish the authority upon which a disqualification, or a civil money penalty in lieu thereof, may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to disqualify retail stores from the SNAP.

7 U.S.C. § 2021 states, in part:

- (1) IN GENERAL.—An approved retail food store or wholesale food concern that violates a provision of this Act or a regulation under this Act may be—
 - (A) disqualified for a specified period of time from further participation in the supplemental nutrition assistance program;
 - (B) assessed a civil penalty of up to \$100,000 for each violation; or
 - (C) both.

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 & 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(e)(5) states:

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(e)(6) states:

Double the appropriate period of disqualification prescribed in paragraphs (e)(2) through (5) of this section as warranted by the evidence of violations **if the same firm has once before been assigned a sanction.** (Emphasis added.)

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...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 store in the area selling as large a variety of staple food items... **FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction.** (Emphasis added.)

7 CFR §278.6(f)(2) states, in part:

In the event any retail food store...which has been disqualified is sold or the ownership thereof is otherwise transferred...the person or other legal entity who sells or otherwise transfers ownership...shall be subjected to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at 278.6(g).

SUMMARY OF THE CHARGES

Among other documents, the record contains a Report of Positive Investigation, #LA11766, which indicates that investigative work was undertaken at Appellant's firm from July 17 through 26, 2018 and reflects that four investigative visits were made to Appellant's firm during which store clerks sold common ineligible items (those normally seen in shopping baskets) in exchange for SNAP benefits in combination with eligible food items at a substantive ratio on three separate occasions, indicative of clearly violative activity. When the extent of violative activity was determined, the investigation was halted and a report issued and assigned to the ROD Office for consideration of administrative action.

APPELLANT'S CONTENTIONS

In its reply to the Charge Letter, and in its written request for review dated November 1, 2018, Appellant provided information in which it was argued that:

1. Appellant requests a reduced disqualification because:
 - a) It is the firm's first violation.
 - b) Appellant has taken corrective action; clerks have been trained and Appellant will monitor sales and conduct further training once a month.
2. The Appellant firm was one of the first vendors in the community to offer fresh produce in an underserved area. They sell produce not otherwise available to SNAP customers in the community. Even if there are arguably SNAP substitutes in the area, Appellant is a part of the community fabric. A disqualification will cause hardship to the firm and customers.

ANALYSIS AND FINDINGS

It is noted for the record that Appellant does not contest that the violations occurred as charged. As part of the authorization process, all retailers sign a certification statement attesting and affirming that they received and understood the SNAP training materials made available and that store owners are responsible to ensure that said materials are reviewed by all owners and employees and that they will follow SNAP rules and regulations; Applicants also affirm and attest that they are aware that violations can result in fines, sanctions, withdrawal or disqualification from the SNAP. Moreover Applicants affirm/attest that they accept responsibility on behalf of the firm for SNAP violations committed, including those committed by any firm employee, whether paid or unpaid, new, full-time or part time.

In regard to contention 1(a) above, Appellant may imply that a record of no prior SNAP violations at the store, or at other firms now or previously owned, should be taken into consideration. However, such a record does not constitute valid grounds for dismissing the present serious charges or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that precludes, reverses or reduces a sanction based upon a lack of prior SNAP violations by a firm and its owners, managers and/or employees. While the regulations provide for increased sanctions upon firms with prior violations, no provision exists for reducing a sanction in the absence of same. Further, as noted above, the regulations stipulate “FNS *shall* (emphasis added) 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 common nonfood items due to carelessness and poor supervision by the firm’s ownership or management.” As noted in the foregoing, such accurately describes the nature and extent of violations in the present case. It should be added that a six-month disqualification is the least severe disqualification period allowed by regulation.

Regarding contention 1(b) above, it is important to clarify for the record that there is no provision in the statute or regulations for waiver or reduction of an administrative penalty on the basis of corrective action implemented subsequent to findings of program violations. The purpose of this review is to determine if the earlier decision of the SNAP Office was proper and in compliance with pertinent laws and regulations. Accordingly, this review is limited to considerations relevant at the time such decision was made. It is beyond the scope of this review to consider what subsequent remedial actions, such as changes in store management, procedures, internal controls, employee discipline/training or facility and/or inventory changes and improvements Appellant may propose to take or may have taken in order to comply with program requirements. Therefore, to the extent Appellant implies that it will, or has, implement(ed) corrective and/or remedial actions, though this would likely have been valuable in preventing program violations at an earlier time, such cannot now apply retroactively and does not provide a valid basis for dismissing the charges or for mitigating the serious impact of the violations upon which they are based.

With regard to contention 2 above, there is no provision in the statute or regulations allowing or requiring the ROD Office to interpret whether a firm is part of the community fabric (or defining

such term), or the order among other firms in which a store began business, as a consideration in determining hardship worked upon SNAP customers. The record reflects that the ROD Office duly considered the firm's eligibility for a hardship civil money penalty and correctly found the firm ineligible. The ROD Office noted that, at the time of the sanction decision, there were 89 SNAP-authorized firms within a one-mile radius of the Appellant firm, including eight super stores and 19 supermarkets. Moreover, the ROD Office notes that there were at least two similarly stocked medium grocery stores within a one-mile radius (one at just under one-half mile and one at just under one-mile); photographs, among other documentation, of recent visits to these stores reflect a wide variety of fresh fruit and vegetables maintained/offered by both. Both of these stores are currently in business, are SNAP-authorized and are regularly accepting SNAP benefits.

Agency data indicates that there are currently 305 SNAP-authorized stores within a one-mile radius, including eight super stores (three from just under 500 feet to just over one-third mile), 19 supermarkets (four from just under 600 feet to one-half mile), eight large grocery stores (two from just over one-quarter mile to just under one-half mile), 28 other medium grocery stores (six from one-quarter mile to just under one-half mile), 68 small grocery stores (30 from just over 400 feet to one-half mile), three fruit/vegetable specialty stores (two at just under one-half mile), five meat specialty stores (two from just under one-third mile to just under one-half mile), nine seafood specialty stores (five from just under 600 feet to just under one-half mile), one farmers market, three bakery specialty firms (one at just over one-third mile), 31 combination grocery/other stores (nine from just over 400 feet to just under one-half mile) and 133 convenience stores (from just over 300 feet to one-half mile).

The regulations stipulate the conditions upon which this alternative penalty may be imposed in lieu of a disqualification: if a store 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 store in the area selling as large a variety of staple food items, a hardship civil money penalty is to be assessed. In the present case there is no indication that the disqualification would work a hardship upon SNAP customers due to the impending closure of a nearby comparable firm, due to loss of access to ethnic foods or due to physical barriers or conditions that would make travel difficult or would restrict normal travel to comparable firms. It should be reiterated that hardship worked upon retailers is not a consideration in decisions to disqualify firms due to SNAP violations or in decisions to impose civil money penalties in the event disqualified firms are subsequently sold or the ownership thereof otherwise transferred; there are no provisions in the Act or the regulations allowing for hardship worked upon a firm, due to a disqualification, to warrant a civil money penalty. In accordance with the regulatory and policy guidance referenced in the foregoing, therefore, the ROD Office's decision to withhold a civil money penalty in lieu of a six-month disqualification was correct and appropriate. It is reiterated that a six-month disqualification is the least severe suspension provided for by the regulations.

CONCLUSION

In view of the above, the decision of the ROD Office to disqualify Kings Bridge Market Inc. for a period of six months from participation in the SNAP is hereby sustained and will become

effective upon the 30th day following your firm's (or its legal representative's) receipt of this document. Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the six-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 provisions of the Freedom of Information Act (FOIA), FNS is 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.

DANIEL S. LAY
Administrative Review Officer

January 28, 2019