

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

M & F Super Deal Inc,

Appellant,

v.

Case Number: C0208859

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 M & F Super Deal Inc. (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 M & F Super Deal Inc.

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

M & F Super Deal Inc. was initially authorized for SNAP participation as a convenience store on July 5, 2007. Between July 17, 2018, and July 23, 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 M & F Super Deal Inc. accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the

report, the Appellant firm sold rolls of bathroom tissue, packages of aluminum foil, and postage stamps in exchange for SNAP benefits, which may only be used to purchase eligible foods.

In a letter dated August 15, 2018, the Retailer Operations Division charged the Appellant with violating the terms and conditions of 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.

The charge letter gave the Appellant 10 days to respond to the charges, either by phone or in writing. However, the Appellant did not respond and the Retailer Operations Division issued a determination letter, dated September 5, 2018. 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 the Appellant firm was considered for a hardship CMP, but was determined ineligible because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked September 13, 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 an 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 (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 FNS may impose a six-month disqualification against a retail food store or wholesale food concern for program violations.

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...

(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.

SUMMARY OF INVESTIGATION DETAILS

During an undercover investigation conducted between July 17, 2018, and July 23, 2018, FNS completed four compliance visits at M & F Super Deal Inc. A report of the investigation was provided to the Appellant as an attachment to the August 15, 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 each 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 roll of bathroom tissue (*Scott* brand), Exhibit A
- One roll of bathroom tissue (*Scott* brand), Exhibit B
- One 25 square foot package aluminum foil (*Wrap-Away* brand), Exhibit B
- One roll of bathroom tissue (*Scott* brand), Exhibit C
- One 25 square foot package aluminum foil (*Wrap-Away* brand), Exhibit C
- One 20 count book of U.S. Flag Forever Postage Stamps, Exhibit D
- One roll of bathroom tissue (*Scott* brand), Exhibit D

The report indicates that in Exhibit D, the investigator attempted to obtain cash in exchange for SNAP benefits, but this request was rejected by the cashier. According to the report, three different cashiers conducted the four violative transactions.

The charge letter states that the violations that occurred in Exhibits A, B, C, and D 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 the request for administrative review, in relevant part:

- The Appellant was unaware that employees were not following SNAP regulations;
- The Appellant has taken drastic measures to provide proper training and create a list of items eligible for purchase with SNAP;
- The Appellant firm has been SNAP authorized for over 15 years and has never has an issue with the misuse of benefits;
- The majority of the population in the firm's area participate in SNAP, and the disqualifying the firm would cause great financial loss to the company; and
- Although there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices, this store also provides kosher and halal foods which cater to the religious community which makes up most of the population of the area.

The Appellant submitted no evidence in support of these contentions.

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 that the violations did not take place as described in the charge letter. In fact, the Appellant concedes that he was unaware that the firm's employees were not following SNAP regulations. 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.

Remedial Actions Taken

The Appellant asserts that drastic measures have been taken to provide proper training to the firm's employees and to create a list of items eligible to be purchased with SNAP benefits.

With regard to these contentions, 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 subsequent to findings of program violations.

Therefore, the Appellant's contention that corrective action has taken place does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

No Prior Violations

The Appellant argues that the firm has been in business for over 15 years, and has never had an issue with misuse of benefits.

With regard to this contention, 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 a firm's prior compliance with program rules. The purpose of this administrative review is to determine whether or not the Retailer Operations Division took appropriate action, consistent with SNAP regulations, in its imposition of a six-month sanction against the Appellant firm. As long as the administrative action taken by the agency fully conforms to SNAP regulations, this review has no authority to dismiss or reduce a period of disqualification.

In this case, the sanction imposed by the Retailer Operations Division is entirely in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. As such, the firm's compliance history does not provide a valid basis for this review to consider reversing or reducing the agency's disqualification action.

Negative Impact to Business

The Appellant has stated that the authorization disqualification would cause a great financial loss to the firm because so much of the local population participates in SNAP. With regard to this contention, it is recognized that some degree of 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.

Hardship to SNAP Households - Civil Money Penalty

The Appellant says that much of the population in the nearby area of the store participates in SNAP and are part of religious communities that require kosher or halal foods, which the firm sells.

With regard to this contention, regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification when the firm's disqualification would cause hardship to SNAP households. According to this regulation, 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 M & F Super Deal Inc. would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are at least 78 comparable or larger sized SNAP-authorized retail stores located within a one-mile radius of M & F Super Deal Inc., including nine superstores, eight supermarkets, and five large grocery stores. In addition, there are at least five stores selling kosher and/or halal foods within this radius, all of which are larger than Appellant's store. These stores appear readily accessible to SNAP recipients and they offer a variety of staple and ethnic foods comparable to, or better than, those offered by Appellant.

In accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Therefore, pursuant to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be assessed in this case.

CONCLUSION

Based on an analysis of all information in this case this review finds, by a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at M & F Super Deal Inc. during a USDA investigation. All transactions cited in the charge letter 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, M & F Super Deal Inc., 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.

MICHELLE WATERS
Administrative Review Officer

December 17, 2018