

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

**Makkah Market LLC/Makkah Halal
Market,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0213929

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a six month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Makkah Market LLC/Makkah Halal Market (hereinafter Appellant or Makkah Halal Market) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a six month period of disqualification against Makkah Halal Market on October 10, 2019.

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

The Department of Agriculture conducted an investigation of the compliance of Makkah Halal Market with Federal SNAP law and regulations during the period June 25, 2019 through July 24, 2019. In a letter dated September 11, 2019, the Retailer Operations Division charged the Appellant with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three out of

five compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

In a verbal response to the Retailer Operations Division of September 12, 2019, the Appellant replied to the charges therein stating that the owner checked store receipts and determined that the ineligible items described in the investigation report were not sold to the investigator.

After considering the Appellant's reply and the evidence of this case, the Retailer Operations Division issued a Determination Letter dated October 10, 2019. The Determination Letter informed the Appellant that it was disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The Determination Letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a hardship civil money penalty under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six month disqualification 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 October 17, 2019, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated December 3, 2019. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this review.

In a letter dated December 20, 2019, the Appellant, through counsel, provided additional information in support of its request for administrative review. The record indicates that in the response, the Appellant's counsel also requested information and documents from FNS with regard to the agency's case against Makkah Halal Market pursuant to the Freedom of Information Act (FOIA). The record reflects that FNS provided a response to counsel's FOIA request in a letter dated January 23, 2020. In a letter dated February 3, 2020, the Appellant, through counsel, provided additional information in support of its request for administrative review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulations under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e) establish the authority upon which a disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, inter alia:

Coupons 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.

7 CFR § 278.6(e)(5) states, inter alia:

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's disqualification would cause hardship to Food Stamp [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 THE CHARGES

During an investigation conducted from June 25, 2019 through July 24, 2019, USDA conducted five compliance visits at Makkah Halal Market. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated September 11, 2019. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during three of the five compliance visits and involved the sale of a variety of items best described in regulatory terms as "common nonfood items" and a "major ineligible item". The misuse of SNAP benefits noted in Exhibits A, C, and D warrant a disqualification as a SNAP retail food store for a period of six months. The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the reply to the Charge Letter, in the administrative review request, and in subsequent correspondences, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The owner checked store receipts and determined that the ineligible items described in the investigation report were not sold to the investigator. None of the store employees remember selling either soap or the warmer pot to any customer utilizing an EBT card.
- The cash register receipt examples provided for review indicate that the computer separates out food and non-food items on its own.
- The investigator noted in the Charge Letter appears to be a regular customer and not a USDA official. The owner is sure that it is the same person that has routinely come into the store for nearly two years asking employees to violate the SNAP rules by asking for cash repeatedly.
- Besides the owner, there are two other store employees. One is the owner's brother and the other a friend of the family. The owner and his brother provide most of the coverage and the family friend covers occasional shifts when the owner needs to be home with his wife who has a medical condition. Store employees were repeatedly approached to violate the SNAP regulations by the investigator. Each time the employees were asked to violate the SNAP regulations by the investigator who asked to exchange cash for SNAP benefits or to purchase ineligible items with SNAP benefits and they refused, the investigator became angry with them. The refusal of purchases of ineligible items with SNAP benefits in Exhibits B and E and the refusal to exchange SNAP benefits for cash in Exhibit E clearly show that the owner understands the regulations and takes them seriously.
- The investigation report details situations in which the clerk, the owner, or his brother refused to allow the purchase of non-food items. The pattern of the alleged official repeatedly setting up the store for violations is unnerving and appears to be unfair. The investigator appears to have targeted the Appellant firm when the owner had an employee fill in for him due to his wife's illness. The owner feels that the investigator reported the supposed violations in retaliation for the owner not agreeing to violate the SNAP rules.
- These allegations are a first for this establishment.
- The owner's wife's health has improved and his friend no longer helps out at the store so further infractions are unlikely.
- The total of items allegedly sold in violation of the SNAP regulations **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and none involve any cash exchanges for SNAP benefits, an admittedly more serious occurrence. The items alleged to have been purchased in violation of the SNAP regulations were staple items, not luxury items or unnecessary purchases. It seems unjust to remove the right of SNAP recipients to shop at

the Appellant firm for such a long time when the value of the questionable items is assessed.

- A SNAP disqualification will impose a financial hardship to the owner and his family.
- A SNAP disqualification will impose a hardship on the surrounding community. The Appellant requests consideration of a civil money penalty in lieu of a SNAP disqualification. While there may be other halal shops in the general area, some patrons would need to travel significant distances, considering public transportation where it is even available. The Appellant's counsel represented another halal market, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which was assessed a CMP because the suspension of the SNAP would cause undue hardship to its customers, many of whom relied on public transportation. This competing store was assessed a CMP solely on the fact that local residents would suffer a hardship in obtaining their halal grocery items when the Appellant firm was in operation 0.14 miles away at the time of the 2016 investigation findings.

In support of these contentions, the Appellant submitted the following documents/information for review:

- Notarized and signed affidavits of the store owner and two employees;
- Examples of six cash register receipts; and
- Photo identifications of the store owner and two employees.

ANALYSIS AND FINDINGS

SNAP Violations

The Appellant contends that the owner checked store receipts and determined that the ineligible items described in the investigation report were not sold to the investigator. None of the store employees remember selling either soap or the warmer pot to any customer utilizing an EBT card. The cash register receipt examples provided for review indicate that the computer separates out food and non-food items on its own. The investigator noted in the Charge Letter appears to be a regular customer and not a USDA official. The owner is sure that it is the same person that has routinely come into the store for nearly two years asking employees to violate the SNAP rules by asking for cash repeatedly. Besides the owner, there are two other store employees. One is the owner's brother and the other a friend of the family. The owner and his brother provide most of the coverage and the family friend covers occasional shifts when the owner needs to be home with his wife who has a medical condition. Store employees were repeatedly approached to violate the SNAP regulations by the investigator. Each time the employees were asked to violate the SNAP regulations by the investigator who asked to exchange cash for SNAP benefits or to purchase ineligible items with SNAP benefits and they refused, the investigator became angry with them. The refusal of purchases of ineligible items with SNAP benefits in Exhibits B and E and the refusal to exchange SNAP benefits for cash in Exhibit E clearly show that the owner understands the regulations and takes them seriously.

This review is to either validate or to invalidate the determination made by the Retailer Operations Divisions; it is limited to the facts at the basis of the Retailer Operations Division's

determination at the time it was made. Upon review, the evidence supports that the Appellant established a record of selling nonfood items as defined by Section 271.2 of the regulations, on three out of the five store visits conducted at the store. Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification.

The Exhibits furnished with the Charge Letter warrant a disqualification period of six months. The owner requests that a SNAP disqualification not be imposed. However, the regulations at 7 CFR 7 CFR § 278.6(e)(5) specify 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 common nonfood items due to carelessness or poor supervision by the firm’s ownership or management”.

Regardless of who the store owner utilizes to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in the program 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 regulations stipulate 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 common nonfood items due to carelessness and poor supervision by the firm’s ownership or management.

The Appellant bears the burden of demonstrating through a preponderance of the evidence that the violations as charged in fact did not occur and that the sanction imposed by the Retailer Operations Division should therefore be reversed. The Appellant offers statements of denial indicating that the firm did not participate in said violations; such does not constitute compelling evidence that the firm accepted SNAP benefits in exchange for eligible foods only. It is acknowledged that demonstrating that violations did *not* occur does indeed place a difficult burden upon the Appellant; however, that the burden is considerable does not render invalid the evidence of SNAP violations existing in the record or the actions taken by the Retailer Operations Division on the basis of that evidence.

The charges of violations are based on the findings of a formal Department of Agriculture investigation; all transactions cited were conducted under the direct supervision of a Department investigator. All such transactions are fully documented and a review of this documentation has yielded no indication of substantial error or discrepancy in the reported findings; the investigative record is specific and thorough with regard to the dates and other specifics of the violations and in all other critically pertinent detail. Additionally, investigative results are routinely supported by documentation that confirms items purchased at a retail firm in the course of an investigation are donated to and signed for by a charitable organization following the transactions. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made and the official’s certification that the items described were in fact received. The record also includes photographs of the items purchased at the store during the investigation, along with the dated receipts clearly showing that they were obtained at the Appellant store. The purchase costs of each of the transactions involved in the investigation are documented on SNAP terminal receipts obtained during each

transaction. Moreover, transaction data generated by each investigative purchase at the Appellant's firm is stored in agency data systems.

With regard to the affidavits provided by two store employees and the owner which purport to establish that they never accepted SNAP benefits in exchange for ineligible nonfood items and that no SNAP violations occurred, the truth of such declarations can neither be confirmed nor denied. Although such affidavits may be sworn to and notarized, that does not mean that they are necessarily truthful. One would not expect a store employee/owner to admit that they were involved in SNAP violations even if it were really so. On the contrary, one would expect that any store employee/owner affidavit provided would attest that they were not involved in nor did SNAP violations occur at the Appellant firm.

Accordingly, the Appellant offers no compelling information or supporting documentation which would constitute evidence that any relevant detail is incorrect in any substantial respect. As such, the Appellant's denial of the charges exerts little force in the context of the considerable information and documentation presented by the Retailer Operations Division, as referenced above, which indicate that the merchandise as described was in fact obtained at the Appellant firm on the dates noted, that the manner in which it was obtained is accurately described and that the clerks in attendance throughout did in fact conduct the transactions described.

Appellant Targeted

The Appellant contends that the investigation report details situations in which the clerk, the owner, or his brother refused to allow the purchase of non-food items. The pattern of the alleged official repeatedly setting up the store for violations is unnerving and appears to be unfair. The investigator appears to have targeted the Appellant firm when the owner had an employee fill in for him due to his wife's illness. The owner feels that the investigator reported the supposed violations in retaliation for the owner not agreeing to violate the SNAP rules.

The Appellant's contention that, rather than just verifying violations, the investigator offered and persuaded (i.e., "targeted") employees to violate seems to imply that the investigator engaged in activity commonly referred to as entrapment. Generally, the entrapment that is forbidden by law depends on whether or not the activity leading up to the violation amounted to putting the activity in the mind of a person who had no prior inclination to violate, and leading him to do so for the first time. The U.S. Department of Agriculture's Office of General Counsel maintains that if investigators merely provide an opportunity for a suspected violator to continue on a course of criminal conduct, such activity would not constitute entrapment. In this regard, the investigation record does not contain any evidence indicating activity characteristic of entrapment, nor has the Appellant provided substantial evidence to support its claim of entrapment.

No Previous Violations

The Appellant contends that these allegations are a first for this establishment. However, a record of participation in the SNAP with no previously documented instance of violations does

not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Corrective Action

The Appellant contends that the owner's wife's health has improved and his friend no longer helps out at the store so further infractions are unlikely.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Amount of Ineligibles Minor

The Appellant contends that the total of items allegedly sold in violation of the SNAP regulations 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and none involve any cash exchanges for SNAP benefits, an admittedly more serious occurrence. The items alleged to have been purchased in violation of the SNAP regulations were staple items, not luxury items or unnecessary purchases. It seems unjust to remove the right of SNAP recipients to shop at the Appellant firm for such a long time when the value of the questionable items is assessed.

However, neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of SNAP benefits for transactions involving the sale of ineligible items to be defined as violative. No mention of minimum cost or types of ineligibles 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, but not limited to, the sale of common nonfood items in exchange for SNAP benefits due to carelessness by store employees or poor supervision by the firm's ownership or management.

Financial Hardship

The Appellant contends that a SNAP disqualification will impose a financial hardship to the owner and his family. However, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on

purported economic hardship to the firm would render virtually meaningless the enforcement 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 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 the firm/owner may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

The Appellant contends that a SNAP disqualification will impose a hardship on the surrounding community. The Appellant requests consideration of a civil money penalty in lieu of a SNAP disqualification. While there may be other halal shops in the general area, some patrons would need to travel significant distances, considering public transportation where it is even available. The Appellant's counsel represented another halal market, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which was assessed a CMP because the suspension of the SNAP would cause undue hardship to its customers, many of whom relied on public transportation. This competing store was assessed a CMP solely on the fact that local residents would suffer a hardship in obtaining their halal grocery items when the Appellant firm was in operation 0.14 miles away at the time of the 2016 investigation findings.

The Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty (CMP) under 7 CFR § 278.6(f)(1). That regulation reads, in part, "FNS may impose a civil money penalty as a sanction in lieu of disqualification when . . . 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]. 5 U.S.C. § 552 (b)(7)(E).

Based on the evidence, the disqualification of Makkah Halal Market would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division's decision not to assess a hardship CMP in lieu of a six month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is therefore established that the violations as described in the letter of charges did in fact occur at Makkah Halal Market warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). That regulation states that 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". Therefore, the decision to impose a six month disqualification, the least severe penalty allowed by regulation, against Makkah Halal Market, the Appellant firm, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six month period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this six month period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you 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, 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

February 10, 2020