

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

Marvik 1 Group,

Appellant,

v.

Case Number: C0194782

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the decision by the Retailer Operations Division to impose a six month disqualification against Marvik 1 Group (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5 and 6), and § 278.6(f)(1) in its administration of the SNAP when it imposed a six month period of disqualification against Appellant on August 22, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period November 29, 2016, through December 7, 2016. The investigation determined that personnel at the Appellant business accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. All three transactions were deemed clearly violative and warrant a six month disqualification period. The items sold are best described in

regulatory terms as common nonfood items and included items such as coffee filters and toilet tissue. The investigative report indicates that these violative transactions were handled by two different clerks. The investigative report also noted that the business refused to exchange SNAP benefits for cash on one occasion (Exhibit D).

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated July 26, 2017, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant responded to the charges by letter dated August 17, 2017, explaining that the problem was due to a data entry error by the vendor who programmed their scanning system that erroneously coded some ineligible items as being SNAP eligible. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated August 22, 2017, that it determined that violations had occurred at the establishment, and that a six month period of disqualification from participating as an authorized firm in SNAP was warranted. This determination letter also states that Appellant’s eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

By letter dated August 30, 2017, Appellant appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. No subsequent correspondence has been received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, Sections 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 § 271.2 states in part that, “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 § 278.2(a) specifies in relevant part, “Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food.” Further, the citation specifies that “Coupons may not be accepted in exchange for cash . . . or for any other nonfood use.”

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*, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system” (Emphasis added.)

7 CFR § 278.6(e)(5) of the SNAP regulations states, in part, 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(f)(1) 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.”

APPELLANT’S CONTENTIONS

In the response to the letter of charges and in the request for administrative review, Appellant has stated as its position in the matter the following:

- The owner apologizes for the violation of SNAP rules and requests a second chance to prove her commitment to be a strong partner following USDA regulations;
- The owner tries with regular meetings to keep the employees concentrated on what product selling in the store is eligible and what is ineligible. Unfortunately, one of the employees sold coffee filters as eligible items twice. The owner can’t understand why he made an association between coffee and coffee filters as an eligible product and assures USDA that it won’t happen again. The business is staying strong and every day is turning back a customer’s request to purchase ineligible items using their SNAP benefits card. The owner, as a good tax payer, will not allow SNAP funds to be used to purchase alcohol, tobacco, etc.;
- The clerk sold coffee filters as eligible items on December 1 and December 6, 2017. After an investigation, it was discovered that the vendor who entered all of the merchandise into the store’s scanner system entered a whole section wrongly as being eligible for SNAP, including the abovementioned coffee filters. The scanning system

automatically separates SNAP eligible items every time a product is scanned. Unfortunately, some product was entered incorrectly as eligible;

- The owner has contacted the vendor to come back and fix the issue and double-check all the merchandise entered into the system. The clerk has fault too because he did not pay attention to what kind of product he was scanning; and,
- The employee made a small violation, but it is still a violation and she will accept any decision in that manner. The owner assures USDA that this was an incident [sic] case and not a practice in the store. The business strongly follows and stays behind the USDA rules and regulations. The owner wants USDA to consider the vendor's mistake before making a final determination in the case.

Appellant submitted no documentation or evidence in support of these contentions.

The preceding may represent only a brief summary of Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

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 within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, while the business having contacted the vendor to come back and fix the problem is a positive step, it does not provide any valid basis for dismissing the charges, or for mitigating the penalty imposed. While store ownership may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. Ownership is also responsible for all SNAP transactions at the firm regardless of the amount of time the owner is present at the subject firm.

The FNS retailer application contains a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application or reauthorization process. Store ownership did certify its understanding and agreement to abide by program rules and regulatory provisions when it initially applied for authorization as a SNAP retailer and also when it most recently applied for reauthorization through the FNS retailer web site in 2016. The owner agreed to accept responsibility on behalf

of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The "SNAP Training Guide for Retailers" is provided to all retail store owners upon their authorization/reauthorization and also clearly states that store owners or operators are legally responsible for their own actions as well as the actions of everyone working in their store whether paid or unpaid, new, full-time or part-time and that violations may include being disqualified from SNAP. Regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is liable for all violative transactions handled by store personnel and is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. This guide and the video accompanying it provide detailed information for SNAP retailers regarding compliance with SNAP rules and regulations; both are available in English and Spanish and are also online at the FNS retailer web site. The FNS web site cautions applicants about their responsibilities for training and overseeing store employees.

"You must read the SNAP Retailer Training Guide and watch the instructional video. Store owners accept responsibility for the actions of their employees. You are responsible for the actions of your employees. All of your employees must read the SNAP Retailer Training Guide and watch the instructional video . . . to ensure compliance with SNAP rules and regulations."

The investigative report shows that two clerks working at the Appellant business during the period under review transacted SNAP benefits for ineligible items on three separate occasions indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The transactions from the investigative report have been matched to SNAP transactions posted by the Appellant business on the dates in question with no discrepancies. The acceptance of SNAP benefits for ineligible items is a violation of the SNAP rules and regulations. The regulations state that FNS shall disqualify a store for a six month period 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 SNAP benefits due to carelessness or poor supervision by the firm's ownership or management. There was no indication of involvement by the firm's management or ownership. Additionally, the store owner does not deny the violations occurred.

It is highly improbable, based on the readiness of the two store employees to exchange SNAP benefits for ineligible items, that the only instances of SNAP violations were the three identified as part of the FNS undercover investigation and more likely than not that this represented an ongoing pattern of SNAP violations at the Appellant business. As previously stated, the store owner is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight on the part of the owner to ensure employees are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for a store owner to not be monitoring all transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the business or conducting other activities that would jeopardize the licenses and income that the business is dependent upon. Additionally, the clerk in the fourth exhibit of the Report of Investigation told the USDA special agent that he would ring-up the toilet tissue as a grocery item so that SNAP benefits could be used for the purchase showing that he obviously knew what items were eligible and ineligible, but still made

the decision to intentionally circumvent the store's point of sale system as well as SNAP regulations in order to allow ineligible items to be purchased using SNAP benefits.

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications. A hardship CMP as an optional penalty in lieu of a six month disqualification was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and its disqualification would create a 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. Records show there are six SNAP retailer stores located within a one mile radius of the Appellant business that includes one supermarket and one large grocery store in addition to many smaller stores. The many nearby stores appear readily accessible to SNAP recipients and they offer a variety of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at these stores. Based on the close proximity of the larger stores, it is unlikely that any SNAP households would consider the Appellant business as their primary source of food, beverages, and essential supplies. It is recognized that some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience, however, does not rise to the level of hardship required by the regulations.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA special agent and signed under penalty of perjury. 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, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail. Accordingly, the determination by the Retailer Operations Division to impose a disqualification of six months against the Appellant business from participating as an authorized retailer in SNAP is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations as there are other authorized retail stores in the area selling as large a variety of staple foods, including ethnic foods, at comparable prices.

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

period. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS web site at www.fns.usda.gov/snap/retailer-apply.

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 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.

ROBERT T. DEEGAN
Administrative Review Officer

November 14, 2017