

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

**Mia Supermarket Inc d/b/a Mia
Supermarket,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0187631

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 (6) month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program¹ (SNAP) was properly imposed against Mia Supermarket Inc d/b/a Mia Supermarket (hereinafter, “Mia Supermarket” and/or “Appellant”) and its owners/ corporate officers of record by the FNS Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a) and (e) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a six (6) month disqualification against Mia Supermarket in a letter dated August 24, 2017.

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.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Mia Supermarket with Federal SNAP law and regulations which consisted of six (6) visits completed between August 29, 2016 and January 23, 2017.

The *USDA-FNS Report of Positive Investigation* (hereinafter, "Investigative Report") number ME40219 dated February 21, 2017 disclosed that on three (3) separate occasions Mia Supermarket personnel accepted SNAP benefits for merchandise that was ineligible for purchase with such benefits from a Confidential Informant working under the direct supervision and oversight of a USDA Investigator. Identification information ascertained from the Investigative Report indicated that these SNAP violations were handled at Appellant firm by three (3) unidentified male clerks.

As a result of the evidence compiled during the USDA investigation, in a letter dated July 18, 2017, the Retailer Operations Division, charged Appellant with violating 7 CFR § 278.2(a) of the SNAP regulations. A copy of the redacted Investigative Report was provided for consideration.

The Retailer Operations Division's record documents that a response was received to the letter of charges, and following consideration of that reply a final determination letter dated August 24, 2017 was issued, assessing a six (6) month disqualification from participation as an authorized retailer in the SNAP against Mia Supermarket.

Appellant requested an administrative review of this action appealing the Retailer Operations Division's determination via letter dated August 31, 2017 that was received by the Chief of the Administrative Review Branch on September 5, 2017.

The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review in accordance with 7 CFR § 279.4(a).

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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 statute in this matter is contained in the *Food and Nutrition Act of 2008*, as amended (the “Act”)², 7 USC 2023 and 278 of Title 7 of the Code of Federal Regulations (CFR).³

7 CFR § 278.2(a) “Use of Coupons”, states, in relevant part, “Coupons may be accepted by an authorized retail food store only from eligible households... only in exchange for eligible food.”

7 CFR § 271.2 defines **Eligible foods**” in relative part as “**Any food and food product** intended for human consumption **except** alcoholic beverages, tobacco and **hot foods and hot food products prepared for immediate consumption...**” (Emphasis Added)

7 CFR § 278.6 establishes the authority upon which a period of disqualification may be imposed against an authorized food store or wholesale food concern in the event that it has failed to comply with the Act.

7 CFR § 278.6(e) provides the following, in relevant part, with respect to penalties that may be assessed against firms determined to have violated the Act or regulations:

“...For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. A civil money penalty and a disqualification shall be considered sanctions for such purposes...”

7 CFR § 278.6(e)(5) applies to the period of disqualification under review, and specifies 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.”

7 CFR § 278.6(e)(7), states, that FNS shall,

“Send the firm a warning letter if violations are too limited to warrant a disqualification.”

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 households because of the unavailability of a comparable participating food store in the area to meet their shopping needs.

7 CFR §278.6(f)(1) reads, in part,

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment through P.L. 113-79, enacted February 7, 2014.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

“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

USDA conducts investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of SNAP violations that may be occurring. In the instant case the Investigative Report dated February 21, 2017, reveals that a USDA Investigator and a Confidential Informant working under the direct supervision and oversight of that USDA Investigator completed six (6) total investigative visits at Mia Supermarket between August 29, 2016 and January 23, 2017.

The report materials were provided to Appellant as attachments to the charge letter dated July 18, 2017 and included exhibits A through F that provide detail of the investigative results. The report reveals SNAP violations were recorded during three (3) of the six (6) reported visits, included as exhibits C, D, and E of the Investigative Report wherein the exchange of SNAP benefits for non-food items was recorded. The record shows that in each of the exhibits SNAP was exchanged for what is referred to in FNS terms as “common ineligible items” including laundry detergent, laundry softener, and dishwashing liquid. The violations are documented to have involved three (3) unidentified male clerks. The Investigative Report further discloses that exchange of cash was refused in exhibits D, E and F by two (2) of the same unidentified male clerks that exchanged ineligible items and by another unidentified male clerk.

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.

APPELLANT’S CONTENTIONS

The request for appeal dated August 31, 2017 conveys that:

- the SNAP violations as reported were beyond the control of ownership; and,
- the disqualification of six (6) months will result in the loss of revenues and SNAP clientele which may lead to Appellant going out of business.

The preceding may represent only a brief summary of the contentions presented in this matter. Please be assured, however, that, 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

That SNAP benefits are not for the purchase of non-food items is clear in the “Act” and in the SNAP regulations, with noted exceptions, such as seeds used to grow food, and hunting equipment in remote areas of Alaska. This and other rules governing SNAP were provided to Appellant upon initial SNAP authorization in March 2015 upon initial SNAP authorization.

7 CFR § 278.6(e)(5) of the SNAP regulations states that FNS shall disqualify a store for six (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 the sale of hot foods or common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management.

The record includes evidentiary materials, i.e. photographs of the items listed as purchased (eligible and ineligible); and, the “EBT Food Stamp Sale” receipts from Mia Supermarket; that directly correspond to the information presented in each of the Investigative Report exhibits. The evidence, coupled with the Certification of the Investigator as included on page 1 of the Investigative Report which is an official government accounting of the events support a conclusion that the violations as charged occurred at Appellant firm.

Violations Beyond Control:

Appellant contends that the SNAP violations identified in the Investigative report were “beyond our control” without expanding on what circumstances support that conclusion. The record indicates that in response to the initial letter of charges Appellant indicated that the employee at fault was in training at the time of the violations.

At the time of initial SNAP authorization in March of 2015 Appellant, through its owner/corporate officer affirmed, through signature, a responsibility to ensure appropriate training was provided to all its employees. The specific language included on Appellant’s SNAP application states, in part,

- I will receive Supplemental Nutrition Assistance Program training materials upon authorization. It is my responsibility to ensure that the training materials are reviewed by all firm's owners and all employees (whether paid or unpaid, new, full-time or part-time); and that all employees will follow Supplemental Nutrition Assistance Program regulations. If I do not receive these materials I must contact the Food and Nutrition Service to request them;

That affirmation evidences an accepted responsibility, at the time of SNAP authorization, for training of Appellant employees. No allowance is made for the time period during which an employee is in initial training. Therefore, that the violations were out of Appellant’s control is not accepted as a valid basis to mitigate the charges of SNAP violations as evidenced in the Investigative Report.

Further, it is noted that the Investigative Report recounts the involvement of six (6) different clerks, by description, in the SNAP transactions conducted at Appellant and three

(3) of those unidentified male clerks are reported to have exchanged SNAP benefits for common ineligible items. That one (1) of those employees may have been new and, as reported is no longer employed at Appellant is not supported with the evidence in the record.

Similarly, in Appellant's reply to the Retailer Operations Division it is stated that repeat violations will not occur. It would appear that Appellant's ownership is suggesting that the fact that one (1) of the unidentified male clerks is no longer working at Appellant will suffice to avert future SNAP Violations; however, corrective actions do not serve to mitigate or reverse the charges of SNAP Violations recounted in the Investigative Report.

Economic Impact:

To Appellant's contention that the six (6) month disqualification of Appellant will result in a loss of revenue as well as SNAP clientele and could lead to Appellant closure; it is noted that an economic impact is expected to result from the disqualification of any SNAP authorized retailer. The economic impact is likely to be evident to not only Appellant's operation but to that of competitor firms. Similarly, the shopping patterns of frequent customers may be subject to impact; and, the income of families dependent on Appellant revenue will likely be impacted.

Notwithstanding the recognized economic impact consideration must be given to the interests of the program and the fairness and equity, not only to competing stores but also to those other participating retailers who are complying fully with program regulations. In addition, fairness must be afforded to those other retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contentions do not provide a basis for mitigating or reversing the current penalty as assessed by the Retailer Operations Division.

Civil Money Penalty:

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 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." The record reflects that the Retailer Operations Division has rendered a finding that pursuant to 7 CFR § 278.6(f)(1), it would not be appropriate to impose a civil money penalty in lieu of a period of disqualification on Appellant firm.

The Retailer Operations Division record reflects that Mia Supermarket is classified within FNS definitions as a small grocery store; and, that there are six (6) SNAP authorized firms within a one (1) mile radius of Appellant including two (2) superstores and four (4) medium grocery stores. Retailer Operations Division documented having reviewed the surrounding area and finding no indication that the alternative SNAP authorized firms would not provide a variety of staple foods at comparable prices to those of Appellant.

Based on the availability of the alternative SNAP authorized retailers the Retailer Operations Division has determined that the temporary disqualification of Appellant would not create a hardship to customers.

It is recognized that some degree of inconvenience to SNAP customers is inherent from the temporary disqualification of any participating food store. Although the normal shopping pattern of such SNAP customers may be temporarily altered during the period of disqualification, the determination that the disqualification of Mia Supermarket would not create a hardship to customers, as differentiated from potential inconvenience is sustained and a civil money penalty in lieu of disqualification is found not to be appropriate in this case.

CONCLUSION

The charges of violations are based on the findings of a formal USDA investigation in which all transactions cited in the letter of charges were fully documented. A complete review of this documentation has yielded no swaying error or discrepancy. The Investigative Report is specific and thorough with regard to the dates of the violations and the specific related facts.

The documentation presented by the Retailer Operations Division clearly provides a preponderance of the evidence that the violations as reported occurred at Appellant firm and, 7 CFR §278.6(e)(5) specifies 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.”

The violations as described in the subject case were determined by the Retailer Operations Division to represent the first sanction for the firm and evidence of carelessness and poor supervision therefore the imposition of a six (6) month disqualification, the least severe penalty allowed by regulation, has been imposed. It is established that the violations as described in the letter of charges dated July 18, 2017, did in fact occur at Appellant’s firm, warranting a disqualification of six (6) months in accordance with 7 CFR §278.6(e)(5).

Based on the discussion above, the decision to impose a six (6) month disqualification against Mia Supermarket is proper and the action is sustained.

In accordance with the Act and regulations, **the six (6) month period of disqualification shall become effective thirty (30) days after receipt of this letter.** Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six (6) 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 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.

NANCY BACA-STEPAN
Administrative Review Officer

October 26, 2017