

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

Mikey’s Market & Liquor,

Appellant,

v.

Case Number: C0206484

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 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 Mikey’s Market & Liquor 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 Mikey’s Market & Liquor on November 20, 2018.

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 Mikey’s Market & Liquor with Federal SNAP law and regulations during the period September 21, 2018 through October 11, 2018. In a letter dated November 5, 2018, 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

four out of four 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 response to the Retailer Operations Division of November 14, 2018, the Appellant replied to the charges therein indicating that the SNAP violations were inadvertently committed by store employees which were unintentional mistakes. The firm does not give cash back and normally does not sell ineligible items with SNAP benefits. The Appellant requests that a warning letter or civil money penalty be imposed in lieu of a SNAP disqualification. A SNAP disqualification will impose a hardship on area SNAP customers as there are no big box or chain stores in the surrounding area.

After considering the Appellant's reply and the evidence of this case, the Retailer Operations Division issued a Determination Letter dated November 20, 2018. 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 November 30, 2018, the Appellant 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 19, 2018. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this 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 September 21, 2018 through October 11, 2018, USDA conducted four compliance visits at Mikey's Market & Liquor. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated November 5, 2018. The investigation report included Exhibits A through D which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during four of the four compliance visits and involved the sale of a variety of items best described in regulatory terms as "common nonfood items". 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 and in the administrative review request, the Appellant stated the following summarized contentions, in relevant part:

- The Appellant is a family run business and the family is hands-on in running the business.
- The SNAP violations were inadvertently committed by store employees which were unintentional mistakes. The firm does not give cash back and normally does not sell ineligible items with SNAP benefits. The owner would not jeopardize his family's livelihood by risking the loss of a primary source of income.
- This is the first time in the three years of business that ineligible items were sold that do not follow under the SNAP regulations.
- The ineligible items allowed to be purchased with SNAP benefits were small items like cups and napkins while grocery items were also purchased. Therefore, a six month SNAP disqualification is not merited.
- If allowed to continue to participate in the SNAP, the Appellant promises that these types of mistakes will not happen again. The Appellant will take preventative measures such as putting up a sign at the cash register for employees and customers with a better understanding of which items can and cannot be purchased with SNAP benefits.
- A SNAP disqualification will cause a major strain on the Appellant's sales. The Appellant will risk losing daily customers indefinitely.
- The Appellant requests that a warning letter be imposed in lieu of a SNAP disqualification.
- The Appellant is located in an economically depressed area of San Francisco and depends on SNAP. There are no big box stores or chain stores such as Safeway or Albertsons located in the surrounding area. The Appellant requests that in lieu of a six month disqualification, a civil money penalty be imposed.

ANALYSIS AND FINDINGS

SNAP Violations

The Appellant contends that it is a family run business and the family is hands-on in running the business. The SNAP violations were inadvertently committed by store employees which were unintentional mistakes. The firm does not give cash back and normally does not sell ineligible items with SNAP benefits. The owner would not jeopardize his family's livelihood by risking the loss of a primary source of income.

The Appellant's contentions cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at Mikey's Market & Liquor. Regardless of whom the ownership of a store may utilize to handle store business (i.e., regardless of whether a store owner, store manager, store clerk, friend, family member, etc. was involved in the violative transactions), ownership is accountable for the proper handling of SNAP benefit transactions.

Prior to becoming authorized to participate in the SNAP on December 10, 2015, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application

contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store's employees---paid, unpaid, new, temporary, full-time, part-time, etc. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

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. In this case, the individuals who committed the SNAP violations were not specifically identified during the investigation. A six month disqualification is the appropriate sanction for violations which result from employees not being fully aware of the SNAP rules, the carelessness of employees, or due to inadequate supervision by the store owner. As 7 CFR § 278.6(e)(5) of the SNAP regulations states, "Disqualify the firm for six months if ... the evidence shows that personnel of the firm have committed violations ... due to the carelessness or poor supervision by the firm's ownership or management". The Appellant's implied contention that the SNAP violations were inadvertently committed by store employees and were unintentional mistakes cannot be accepted as a valid basis for diminishing the penalty. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA.

No Prior Violations

The Appellant contends that this is the first time in the three years of business that ineligible items were sold that do not follow under the SNAP regulations. 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.

SNAP Violations Minor

The Appellant contends that the ineligible items allowed to be purchased with SNAP benefits were small items like cups and napkins while grocery items were also purchased. Therefore, a six month SNAP disqualification is not merited.

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 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.

Corrective Action

The Appellant contends that if allowed to continue to participate in the SNAP, it promises that these types of mistakes will not happen again. The Appellant will take preventative measures such as putting up a sign at the cash register for employees and customers with a better understanding of which items can and cannot be purchased with SNAP benefits.

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.

Financial Hardship

The Appellant contends that a SNAP disqualification will cause a major strain on its sales. The Appellant will risk losing daily customers indefinitely. 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 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.

Warning

The Appellant requests that a warning letter be imposed in lieu of a SNAP disqualification. 7 CFR § 278.6(d)(2)&(3) of the SNAP regulations provides that "The FNS office making a disqualification or penalty determination ... shall consider ... any prior action ... to warn the firm about the possibility that violations are occurring..." The citation simply requires FNS to

consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn Mikey's Market & Liquor about the possibility that violations were occurring because there were no prior warnings.

Moreover, USDA conducts investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of violations that may be occurring. As was outlined in the investigative report that was provided to the Appellant as part of the Charge Letter, in the investigation of Mikey's Market & Liquor, the Appellant was charged with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These violations occurred on four out of four compliance visits. 7 CFR § 278.6(e)(5) of the SNAP regulations is specific in 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 by employees or poor supervision by the firm's ownership or management".

As such, the Retailer Operations Division's decision to impose a six month SNAP disqualification for Mikey's Market & Liquor is appropriate for the SNAP violations that occurred during the investigation period.

CIVIL MONEY PENALTY

The Appellant contends that it is located in an economically depressed area of San Francisco and depends on SNAP. There are no big box stores or chain stores such as Safeway or Albertsons located in the surrounding area. The Appellant requests that in lieu of a six month disqualification, a civil money penalty be imposed.

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 Mikey's Market & Liquor 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 Mikey's Market & Liquor 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 Mikey's Market & Liquor, 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

March 11, 2019