

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

Moe's Mini Mart & Deli,

Appellant,

v.

Case Number: C0216926

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 one-year disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Moe's Mini Mart & Deli (hereinafter "Appellant") by FNS's 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 one-year disqualification against Moe's Mini Mart & Deli.

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

FNS records show that the Appellant firm, Moe's Mini Mart & Deli, was initially authorized for SNAP participation as a convenience store on July 23, 2015. Between May 6, 2019, and May 21, 2019, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigation report documented that personnel at Moe's Mini Mart & Deli, including the store's owner, accepted SNAP benefits in exchange for ineligible items on three separate occasions. According to the report, the Appellant firm sold plastic cups, aluminum foil, plastic sandwich bags, and fabric softener in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible foods.

In a letter dated August 15, 2019, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the acceptance of SNAP benefits in exchange for ineligible nonfood merchandise warranted a disqualification from SNAP for a period of one year pursuant to 7 CFR § 278.6(e)(4). The letter further stated that under certain conditions and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In a letter dated August 23, 2019, the Appellant, through counsel, responded to the charge letter, acknowledging that errors did occur, but claiming that the mistakes were made inadvertently and without intent to violate the rules. The Appellant further cited the investigation report, which noted that on two occasions, violations were refused by the store clerks, including one instance in which ineligible items were initially sold by the owner, but then he immediately recognized that the nonfood items could not be purchased with SNAP benefits and reversed the transaction. Both occasions in which cash was requested by the investigator (i.e. trafficking), the clerks refused.

The Appellant further stated that after receipt of the charge letter, the owner purchased a new cash register which contains software that automatically separates SNAP-eligible items from ineligible items. This will assist the cashiers when both types of merchandise are presented for purchase at the point of sale. To support this claim, the Appellant submitted an invoice for the new cash register dated August 22, 2019.

The Appellant additionally argued that the firm has been in business in excess of four years without any violations and contended that the store owner is well-educated and well-respected in his community. Finally, the Appellant requested that FNS consider a warning letter or a civil money penalty instead of disqualification based on the heavy concentration of SNAP beneficiaries who live in the surrounding neighborhood.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated September 27, 2019. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the charge letter and that a one-year disqualification penalty would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that consideration for a hardship CMP was given, but the Appellant was not eligible for a CMP because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked October 7, 2019, the Appellant, through counsel, appealed the agency's determination by requesting an administrative review. The request was granted and implementation of the disqualification has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of 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, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(4) establish the authority upon which a one-year disqualification may be imposed against a retail food store or wholesale food concern.

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...The FNS regional office shall:
(4)(i) Disqualify the firm for 1 year if it is to be the first sanction for the firm and the ownership or management personnel of the firm have committed violations such as the sale of common nonfood items in amounts normally found in a shopping basket, and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations.

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.

INVESTIGATION DETAILS

During an undercover investigation conducted between May 6, 2019, and May 21, 2019, FNS completed five compliance visits at Moe's Mini Mart & Deli. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the August 15, 2019, charge letter. The investigation report includes Exhibits A through E, and provides full details on the results of each compliance visit. SNAP violations were documented during three of the five 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 12-count package of plastic cups (*Solo* brand), Exhibit A
- One 15 square-foot roll of aluminum foil (*Reynolds Wrap* brand), Exhibit B
- One 12-count package of plastic cups (*Solo* brand), Exhibit B
- One 180-count package of sandwich bags (*Glad* brand), Exhibit C
- One 10-ounce bottle of fabric softener (*Downy* brand), Exhibit C

The report indicates that in Exhibit D, the clerk on duty initially allowed the SNAP purchase of ineligible items, including aluminum foil and deodorant. The investigator then asked for cash (i.e. trafficking) and the clerk said, "No." At that point, the clerk told the investigator that he needed to refund the part of the transaction that included nonfood items, which he did. In Exhibit E, the clerk on duty refused to allow the purchase of nonfood items and refused to engage in trafficking.

The report indicates that two different clerks conducted the three violative transactions, including the store owner in Exhibits A and B. The charge letter states that the violations that occurred in Exhibits A, B, and C warrant a disqualification period of one year pursuant to regulations at 7 CFR § 278.6(e)(4).

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant believes there are substantive reasons to support the imposition of a warning letter or lesser suspension.
- On three visits by the investigator, errors did occur, but these were mistakes and were inadvertent.
- On two occasions, there were no violations. During one of these instances, the Appellant owner allowed the sale of two ineligible items, but immediately recognized his error and reversed the transaction. During that same visit, the owner refused to give cash back when asked and refused to accept merchandise purchased with SNAP benefits. All of this was noted in the investigation report. Given the fact that the Appellant refused any request for

cash or the purchase of other non-qualifying items, it is clear that the previous errors were the result of inadvertence and were not intentional violations.

- The Appellant has taken remedial actions to ensure that mistakes through inadvertence do not happen again. Most significantly, the Appellant purchased a new cash register on August 22, 2019. This new register contains software that automatically separates SNAP-eligible items from ineligible items. When a customer purchases items at the store and an EBT card is presented as a form of payment, the clerk presses the touch screen and the computer separates legitimate EBT items from non-EBT items. The Appellant has now coded all food items in the store. Therefore, the Appellant has demonstrated good faith in order to continue qualification for the program.
- The Appellant has owned the store since 2015 without any violations. The owner has a bachelor's degree in finance and is well-respected in the community.
- Appellant requests that FNS consider a warning letter or a lesser suspension as an appropriate remedy given the nature of the violations and the action taken subsequent to being notified of the mistakes that were made.

In support of its contentions, the Appellant submitted a copy of the receipt for the purchase of a new cash register.

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 in this document.

ANALYSIS AND FINDINGS

The Appellant has not provided any information or evidence to counter FNS's investigation report. In fact, the Appellant appears to acknowledge that violations occurred, stating that they were simply mistakes and were not done intentionally. Because the violations do not appear to be in dispute, it is the determination of this review that SNAP violations did occur as charged and a penalty is warranted.

Nature of the Violations / Warning Letter

The Appellant has claimed that the violations that occurred were mistakes and were the result of inadvertence rather than an intent to violate program rules. The Appellant points to refusals to commit violations in Exhibits D and E as evidence that the earlier violations in Exhibits A, B, and C were merely mistakes. The Appellant believes that the nature of the violations should result in the imposition of a warning letter or a lesser suspension rather than a one-year disqualification.

With regard to these contentions, the regulations at 7 CFR § 278.6(e)(4) do not allow for a warning letter or a reduction of a disqualification period on the basis that the violations were inadvertent or that the punishment appears to be excessive in comparison with the violations that were committed. The regulation states that FNS shall disqualify the firm for one year if it is the firm's first sanction and ownership or management "have committed violations such as the sale of common nonfood items in amounts normally found in a shopping basket..." The firm's

personnel, including the owner himself, committed program violations on three consecutive occasions. FNS finds such carelessness or disregard for program rules to be a serious offense that warrants a temporary suspension from program participation. Regulations at 7 CFR § 278.6(e)(7) state that a warning letter should only be sent if the violations are too limited to warrant a disqualification. In this case, the violations meet the regulatory and agency criteria for a one-year disqualification, even on the first occasion, as noted in § 278.6(e)(4).

Further, the record shows that the Appellant owner signed an application to participate as a SNAP retailer on June 15, 2015. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time. With his signature, the owner further acknowledged that violations of program rules can result in administrative actions, such as fines, sanctions, withdrawal or disqualification from SNAP.

Accordingly, it is the finding of this review that the one-year disqualification in this case is appropriate and wholly in line with regulations at 7 CFR § 278.6(e)(4).

Remedial Actions Taken

The Appellant contends that after it received the charge letter, it took remedial actions to ensure that mistakes through inadvertence do not happen again. According to the Appellant, it purchased a new cash register on August 22, 2019. This new register contains software that automatically separates SNAP-eligible items from ineligible items. The Appellant claims that it has now coded all food items in the store so that they will register as eligible or ineligible when a customer presents an EBT card as a form of payment. According to the Appellant, this remedial action demonstrates good faith in order to remain authorized as a SNAP retailer.

With regard to this contention, it must be made clear that this review is limited to the facts that existed at the time the violations were committed. This review has no authority 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 after the discovery of program violations.

No Prior Violations

The Appellant contends that it has owned the store since 2015 without any violations and states that the owner has a bachelor's degree in finance and is well-respected in the community. This contention implies that because of the firm's history of compliance with SNAP rules, the disqualification penalty should be reconsidered or reduced.

With regard to this contention, the law is clear that when program violations occur, specifically the exchange of ineligible nonfood items for SNAP benefits by the firm's ownership or management, a one-year disqualification is the required penalty, even on the first occasion. In

this case, firm personnel, including the owner, committed violations on three consecutive visits by an investigator. As such, a one-year disqualification penalty is appropriate and is entirely in line with SNAP regulations. This penalty is also consistent with sanctions imposed upon other retailers that have committed similar violations.

Civil Money Penalty

Both the Retailer Operations Division and this review considered the firm's eligibility for a civil money penalty (CMP) in lieu of a one-year disqualification. To address potential difficulties that SNAP households might face when a firm is disqualified, regulations at 7 CFR § 278.6(f)(1) allow for a CMP to be imposed instead of disqualification when the firm's disqualification would cause "hardship" to SNAP households. According to this regulation, hardship occurs when there is "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 both the agency and this review that a disqualification of Moe's Mini Mart & Deli, a convenience store, would not cause hardship to SNAP households because there are many other shopping options in the area. According to agency records, there are more than 30 similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of Moe's Mini Mart & Deli, including a supermarket and two superstores. There is also no evidence that the Appellant sells its inventory at unusually low prices in comparison to nearby stores. Because hardship conditions do not exist in this case, a civil money penalty in lieu of disqualification is not an available option.

CONCLUSION

Based on a review of all information in this case, this administrative review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Moe's Mini Mart & Deli during a USDA investigation. All transactions cited in the letter of charges 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. Furthermore, the Appellant has not offered any compelling evidence that would persuade this review to dismiss or modify the penalty. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(4), the decision to impose a one-year disqualification against the Appellant, Moe's Mini Mart & Deli, 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 authorization may be submitted 10 days prior to the expiration of the one-year 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.

JON YORGASON
Administrative Review Officer

March 4, 2020