

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

Mokkamodina LLC,

Appellant,

v.

Case Number: C0191350

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 six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Mokkamodina LLC, (hereinafter “Appellant”) by the 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 six-month disqualification against Mokkamodina LLC.

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, Mokkamodina LLC, was initially authorized for SNAP participation as a small grocery store on April 23, 2014. Between July 25, 2017, and August 4, 2017, FNS conducted an undercover

investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigative report documented that personnel at MokkaModina LLC accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. According to the report, the Appellant firm sold aluminum foil plates, sandwich bags, aluminum wrap, plastic spoons, trash bags, and a metal foil tray in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated November 7, 2017, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The charge letter states that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further states that under certain conditions and in accordance with 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In a letter faxed on December 1, 2017, the Appellant, through counsel, replied to the charges. In its response, the Appellant acknowledged the SNAP violations, stating that they were committed by an inexperienced new employee, who has since been relieved of his employment. The Appellant argued that this was the first violation committed by the firm and that it would be its last. In lieu of disqualification, the Appellant requested a six-month period of probation due to negligence by an employee who is no longer employed at the store. The Appellant further claimed that the store owner has significant medical issues, and as the only income earner in the family, a SNAP disqualification would have irreparable harm on his family.

In support of these contentions, the Appellant provided a sworn affidavit from the owner attesting to extreme hardship that would occur should the firm be disqualified, and 25 handwritten statements from SNAP customers who claim to frequently shop at the store and wish for the store to remain authorized to accept SNAP benefits. The Appellant also provided medical records to substantiate the owner's medical condition.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated December 28, 2017. This letter informed the Appellant that it was the determination of the Retailer Operations Division that the violations did occur as outlined in the letter of charges and that a six-month 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 that 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 January 9, 2018, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative

review. The request was granted and implementation of the sanction 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)(5) establish the authority upon which a six-month 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:

(5) 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, 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 July 25, 2017, and August 4, 2017, the Food and Nutrition Service completed four compliance visits at MokkaModina LLC. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the November 7, 2017, charge letter. The investigation report includes Exhibits A through D, and provides full details on the results of each compliance visit. SNAP violations were documented during three of the four 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 package of 7-inch plates and lids (*USA Foil Inc.* brand), Exhibit B
- One 50-count package of sandwich bags (*Home Select* brand), Exhibit B
- One box of extra heavy aluminum wrap (*American Wrap* brand), Exhibit C
- One metal foil tray (no brand indicated), Exhibit C
- One package of plastic spoons (no brand indicated), Exhibit D
- One package of extra large trash bags (*Home Select* brand), Exhibit D

The report indicates that the investigator did not attempt to commit any violations in Exhibit A. According to the report, the same clerk conducted all three violative transactions.

The charge letter states that the violations that occurred in Exhibits B, C, and D warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

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

- Appellant requests that due to extreme hardship, instead of disqualifying the store for six months, FNS should impose a penalty of six months' probation.
- The Appellant has been in business for several years and this is the first and, hopefully, last violation.
- The Appellant owner has a medical condition impeding his ability to any alternative employment.
- The store is located within a designated school zone. Because of this, the firm application for a tobacco license has been rejected. The store is also in close proximity to a religious establishment which strongly opposes the lottery. As such, the Appellant's livelihood completely and solely depends on SNAP-related earnings.

To support its contentions the Appellant has provided the following documentation:

- A document from the City of Philadelphia showing that the store is located in a tobacco- free school zone.
- Documentation from 5 U.S.C. § 552 (b)(6) & (b)(7)(C), showing that the Appellant owner suffers from hypertension, dyslipidemia, diabetes, and coronary artery disease. The doctor recommends light duty only.
- A copy of the affidavit, dated November 29, 2017, which was submitted earlier to the Retailer Operations Division.
- Copies of the 25 handwritten customer statements, mentioned earlier.
- Copies of the Appellant owner's medical records, also mentioned earlier.

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 herein.

ANALYSIS AND FINDINGS

The Appellant has not provided any evidence or documentation to counter FNS's investigation report. In fact, the Appellant appears to acknowledge that the violations occurred, though it contends that they were the fault of an inexperienced

employee. Because the violations themselves do not appear to be in dispute, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division and a six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Violations Committed by Inexperienced Employee

The Appellant contends that the violations were committed by an inexperienced new employee and argues that this, among other reasons, is grounds for a lesser penalty, such as six months of probation.

With regard to this contention, the record shows that the Appellant owner signed an application to participate as a retailer in SNAP on February 1, 2014. 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. An owner or manager is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations. Regardless of which clerks are operating the cash register at a given time or whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of its employees would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA.

Therefore, the Appellant's claim that the violations were the fault of a new employee does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed. It should also be noted that the fact that the violating employee is no longer employed by the firm has no bearing on this case. 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 subsequent to findings of program violations.

No Prior Violations

The Appellant, through counsel, argues that the firm has been in business for several years and this is its first violation.

With regard to this contention, SNAP regulations at 7 CFR § 278.6(e)(5) require that when serious violations occur, such as the exchange of common nonfood items for SNAP benefits, a six-month disqualification is the necessary penalty, even on the first occasion, regardless of a firm's prior compliance with program rules. The purpose of this administrative review is to determine whether or not the Retailer Operations Division took appropriate action, consistent with SNAP regulations, in its imposition of a six-month sanction against MokkaModina LLC. As long as the administrative action taken by the agency fully conforms to SNAP regulations, this review has no authority to dismiss or reduce a period of disqualification.

In this case, the sanction imposed by the Retailer Operations Division is entirely in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. As such, the firm's compliance history does not provide a valid basis for this review to consider reversing or reducing the agency's disqualification action.

Hardship to Appellant

The Appellant has stated that a six-month disqualification would cause extreme hardship to the Appellant owner and his family, and has provided a number of documents to support this argument. For example, the Appellant claims that due to the store's location, it is unable to profit from the sale of tobacco products or lottery tickets. As such, SNAP customers are substantially responsible for the firm's revenue. Additionally, the Appellant has provided a large amount of evidence to show that the owner suffers from serious medical conditions that prevent him from engaging in other kinds of employment. As the sole breadwinner in his household, the owner and his family are dependent on the firm's SNAP authorization and related earnings in order to maintain his livelihood.

With regard to these contentions, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship to the store's ownership or to the firm itself would render virtually meaningless the 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 requirements, 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 as a result of its six-month disqualification from SNAP does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Hardship to SNAP Households / Civil Money Penalty

As noted earlier, the Appellant submitted 25 handwritten statements from customers who claim to shop at the store regularly and who want the firm to retain its SNAP authorization. Several of the statements refer to the firm's sale of halal foods, its reasonable prices, good customer service, and convenient location. These written statements imply that a disqualification of MokkaModina LLC would cause hardship to SNAP households.

With regard to these statements, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized stores in the area. Paragraph (f)(1) of this regulation states that a CMP in lieu of temporary disqualification is allowable when the firm's disqualification would cause hardship to SNAP households. According to this regulation, hardship is defined as "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 this review that a disqualification of MokkaModina LLC, a small grocery store, would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are at least 40 comparable or larger SNAP-authorized retail stores located within a one-mile radius of MokkaModina LLC, including two superstores, two supermarkets, and at least two other firms selling halal foods.

In accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Therefore, pursuant to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be assessed in this case.

CONCLUSION

Based on an analysis of all information in this case, this review finds, through a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at MokkaModina LLC 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. Pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, MokkaModina LLC, 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 participation may be submitted 10 days prior to the expiration of the six-month 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

June 29, 2018