

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

N & A Market,

Appellant,

v.

Case Number: C0206125

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 N & A Market (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 N & A Market.

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, N & A Market, was initially authorized for SNAP participation as a convenience store on December 4, 1998. Between February 12, 2018, and April 23, 2018, FNS investigators conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigative report documented that personnel at N & A Market accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold plastic spoons and

heavy duty scrub sponges in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated May 11, 2018, 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 correspondence dated May 17, 2018, and June 22, 2018, the Appellant replied to the charges, acknowledging that the violations occurred and stating that despite its best oversight and training efforts it was unable to prevent ineligible items from being sold by one of its employees. The Appellant argued against a disqualification for several reasons: the firm has been in business since 1982 and has never had any issues with SNAP; the ineligible items purchased amounted to less than 5 U.S.C. § 552 (b)(6) & (b)(7)(C); a request for cash was denied by the clerk; only one employee committed the violations and he has since been fired; the firm is working on developing a robust training system; the violations were minimal in comparison with the volume of EBT transactions completed by the firm; there was no intention on the part of the employee to violate SNAP; and the disqualification would be devastating to the firm's customers.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated July 2, 2018. This letter informed the Appellant that it was the determination of the Retailer Operations Division that 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 July 16, 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 February 12, 2018, and April 23, 2018, the Food and Nutrition Service completed four compliance visits at N & A Market. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the May 11, 2018, 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 each 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:

- Four packages of plastic spoons (no brand indicated), Exhibits A, B, C, and D
- Six heavy duty scrub sponges (*Chore Boy* brand), Exhibits B, C, and D

The report indicates that in Exhibit D, the investigator attempted to obtain cash in exchange for SNAP benefits, but the request was refused. The charge letter states that the violations that occurred in Exhibits A, 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:

- In addition to the contentions already submitted by the Appellant in its original response to the charge letter, the Appellant wishes to show that the firm had a SNAP training program implemented at the store for all employees, including the employee who committed the violations.
- Appellant would like to find an amicable resolution to this matter to ensure future compliance consistent with all governing regulations.

It is noted that the Appellant did not provide any evidence or documentation in support of its contentions.

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 violations occurred by blaming them on an employee who has since been fired. 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.

No Prior Violations

In its response to the charge letter, the Appellant argued that the firm has been in operation since 1982 and has never been cited for SNAP violations. This contention implies that because of the firm's long and clean record of compliance with SNAP, the disqualification penalty should be reconsidered.

With regard to this contention, the law is clear that when serious violations occur, such as the exchange of ineligible nonfood items for SNAP benefits, a six-month disqualification is the appropriate penalty, even on the first occasion, as noted in 7 CFR § 278.6(e)(5). 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 for this first-time violation is entirely in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. As such, the contention that the firm has a history of program compliance does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Remedial Actions Taken

The Appellant has contended that corrective action was immediately undertaken to prevent program violations from happening in the future. Corrective steps included firing the employee who committed the violation and developing a more robust training and verification system for the store.

With regard to this contention, it should be noted that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review 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.

Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

Penalty Does Not Fit the Crime

The Appellant argues that the ineligible items purchased amounted to less **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. It further claims that the violations were minimal in comparison with the volume of EBT transactions completed by the firm. Additionally, the Appellant contends that there was no intention on the part of the employee to violate SNAP regulations. Finally, the Appellant points out that a request for cash (i.e. trafficking) was denied by the clerk. These contentions imply that a six-month disqualification is disproportionate to the overall circumstances of the investigation.

With regard to these contentions, the regulations at 7 CFR § 278.6(e)(5) do not allow for a modification or a reduction of the disqualification period on the basis that the punishment appears to be excessive in comparison with the violations that were committed. The regulations state that FNS "shall disqualify the firm ... if ... 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" (emphasis added).

As to the element of intent, this review acknowledges that a conclusion regarding one's intention to violate the regulations is difficult to determine. However, it should be noted that the clerk in question never refused to allow an ineligible item to be purchased with SNAP benefits. If not a willful disregard for the rules, the fact that this clerk repeatedly committed program violations over a period of roughly three months strongly suggests that he was either careless or not properly supervised. That he refused to engage in trafficking only strengthens the possibility that the clerk knew the rules but willfully ignored them.

Therefore, the Appellant's contention that the penalty in this case is too severe in comparison with the violations committed does not provide a basis for dismissing or reducing the charges.

Hardship to Households / Civil Money Penalty

The Appellant contends that a six-month suspension from SNAP would be devastating to its customers.

With regard to this contention, 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. Accordingly, regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification. 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 because there are "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 N & A Market, 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 comparable or larger SNAP-authorized retail stores located within a one-mile radius of N & A Market, including a superstore, a supermarket, and a large grocery store, all of which have significantly larger staple food inventory at comparable prices.

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. Because such conditions do not exist in this case, a hardship civil money penalty in lieu of disqualification cannot be assessed.

It is noted that the Appellant, through counsel, contends that the firm had a SNAP training program implemented at the store for all employees, including for the employee who committed the violations. This contention appears to have been borne from a reading of 7 CFR § 278.6(i), which addresses a potential civil money penalty in lieu of disqualification if a firm can prove that it had an effective compliance policy and program in effect at the time the violations were committed. Unfortunately, this section of the regulations is not applicable to this case. Section 278.6(i) pertains only to CMPs given in lieu of permanent disqualification for trafficking. The present case is not a trafficking case and the firm is not subject to permanent disqualification. Therefore, the presence of a training program at the store is not a consideration in this matter.

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 N & A Market 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, N & A Market, 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

February 12, 2019