

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

Red Hen Market,

Appellant,

v.

Case Number: C0196195

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 six-month disqualification of Red Hen Market (hereinafter Appellant), from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as initially imposed by the Retailer Operations Division.

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 disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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 USDA conducted an investigation of the compliance of Red Hen Market, with Federal SNAP law and regulations from June 26, 2017 through August 15, 2017. In a letter dated March 20, 2018, Retailer Operations Division charged the Appellant firm with accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on four (4) out of five (5) 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 March 21, 2018, telephone conversation with Retailer Operations Division, ownership stated that the clerk was fired a while ago and admitted that ineligibles were sold on all four exhibits in the investigative report by the same clerk who is no longer employed with the firm. Appellant requested an email address to send its response in writing. Ownership stated that he takes full responsibility and it will not happen again.

In an email correspondence dated March 21, 2018, ownership again stated that he takes full responsibility and will make sure to address the issue with all employees so it doesn't happen again. The employee in question was terminated and going forward he will review all SNAP regulations with employees and take necessary actions if violated. Ownership also stated that he was in business for 15 years and never had a SNAP violation; the employee in question was not responsible. (Sic) Ownership stated he did not want to lose SNAP benefits because it will hurt the business and requested a monetary fine.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated March 21, 2018. The determination letter informed the Appellant 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 Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). 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 dated March 29, 2018, the Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal was accepted and the implementation of the six-month disqualification was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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

The controlling statute in this matter is contained in the Food & 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) establish the authority upon which a period of 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 food 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 1977, 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 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.”

APPELLANT’S CONTENTIONS

The Appellant, through counsel, submitted an FOIA request, dated April 20, 2018, for case information so that it could adequately respond and provide documentation in support of its position. The request was processed and received by counsel in correspondence dated May 9, 2018.

In an attachment to email correspondence dated May 30, 2018, Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

1. The Appellants adamantly deny any intentional violation of SNAP regulations on the part of the store.
2. The two employees involved in the transactions were operating specifically against their training and the store’s regulations and are no longer employed at the store.
3. Prior to the charges the store has had a 15 year history of compliance with SNAP regulations. Given the significant duration of its participation in SNAP such compliance history fairly portrays that the store typically has the appropriate training, oversight and procedures in place to prevent SNAP violations on the part of its employees.
4. The management and owner cannot be considered careless in reviewing the transactions. After being made aware of the violations, the store took the reasonable and appropriate steps to remedy the violation.
5. If the store were to be disqualified from SNAP for six months, the participants would be severely burdened and endure grave hardship. While it would not be impossible for

participants to shop elsewhere, it would be such an inconvenience to them that it would ultimately be a burden.

6. It is highly unlikely that the Department gave the Appellant's a full and fair review in their consideration of the sanction issued as the decision was rendered the same day in which it had received the Appellant's response.

No additional documentation was provided in support of Appellant's position. The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

FNS initially authorized Red Hen Market as a convenience store on May 20, 2003. During an investigation from June 26, 2017 through August 15, 2017, the USDA conducted five (5) compliance visits at Appellant's store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated March 20, 2018. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during four (4) of the five (5) compliance visits and involved the sale of

- (1) roll of Marcal toilet tissue,
- (1) Wiffle ball,
- (1) Eveready red flashlight,
- (1) 10 ounce bottle of Gail laundry detergent,
- (1) 12 count package of Cascade with Dawn dish detergent,
- (1) 15 sheet count box of Bounce 4-in-1 dryer sheets,
- (1) case of Mike's Hard black cherry lemonade 11.2 ounce each with 5 percent alcohol,
- (1) 19 ounce bottle of Downy April Fresh fabric softener and
- (1) 25 ounce bottle of Tide laundry detergent.

Store personnel refused the sale of a bottle of sunscreen in Exhibit A. Additionally, personnel refused to exchange an undisclosed amount of cash for SNAP benefits during Exhibits D and E. In its review request, Appellant did not refute the sale of common ineligible items during the investigation.

Appellant, through counsel, contends that management and the owner cannot be considered careless in reviewing the transaction. After being made aware of the violations, the store took the reasonable and appropriate steps to remedy the violation. With regard to this contention, it is important to clarify for the record that the purpose of this review is to determine if the earlier decision of the Retailer Operations Division, to disqualify Appellant from participation in the SNAP for a period of six months, was in fact a correct one. It is not within the scope of this review to consider what subsequent actions Appellant may have taken so that its store may begin to comply with program requirements.

Appellant, through counsel, contends that the two employees involved in the transactions were operating specifically against their training and the store's regulations are no longer employed at the store. As owner of the store, Appellant is liable for all violative transactions handled by either paid or unpaid store personnel. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. 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 Stamp Act and the enforcement efforts of the USDA.

Appellant, through counsel, contends that the store has had a 15 year history of compliance with SNAP regulations and given the significant duration of its participation of SNAP such compliance history fairly portrays that the store typically has the appropriate training, oversight and procedures in place to prevent SNAP violations on the part of its employees. With regard to this contention, it is important to expound that a record of participation in 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.

The Appellant, through counsel, contends that it is highly unlikely that the Department gave the Appellant's a full and fair review in their consideration of the sanction issued as the decision was rendered the same day in which it had received the Appellant's response. With regard to this contention, the record reflects that the Appellant called Retailer Operations Division on March 21, 2018, and indicated that it had received the charge letter dated March 21, 2018 and gave a verbal response in support of its position. Appellant indicated that it took full responsibility and that the violations would not reoccur. Appellant then asked for an email address in which to submit its response in writing. In an email correspondence dated March 21, 2018, ownership reiterated its verbal response to Retailer Operations Division and did not provide any additional documentation in support of its position. Therefore, it is the determination of this review that, as Appellant admitted to the charges as cited in the March 21, 2018, charge letter and did not refute the transactions, Retailer Operations Division properly considered the information provided and the available evidence in which to render its determination.

CIVIL MONEY PENALTY

Appellant, through counsel, contends that if the store were to be disqualified from SNAP for six months, the participants would be severely burdened and endure grave hardship. While it would not be impossible for participants to shop elsewhere, it would be such an inconvenience to them that it would ultimately be a burden. With regard to this contention, FNS considered Appellant's eligibility for a hardship civil money penalty (CMP) according to the terms of Section 278.6(f)(1) of the SNAP regulations. The regulations states that for a determination of hardship, as opposed to inconvenience, there must be an absence of any other authorized retail food stores(s) comparable to Appellant's stores, in the area of consideration (i.e. no other store selling as large a variety of staple food items at comparable prices).

The Retailer Operations Division considered Appellant's eligibility for a hardship CMP 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 at least 29 other SNAP authorized retail stores, within less than a one mile radius of Appellant, including 12 other convenience stores, one (1) superstore, one (1) medium grocery store, six (6) small grocery stores, one (1) community dining facility, one (1) group living arrangement, and seven (7) combination grocery/other store types.

Although it is recognized that some degree of inconvenience to SNAP households is inherent with the firm's disqualification from the SNAP or by any participating food store, as the normal shopping pattern of such SNAP customers may be temporarily altered during the period of disqualification, the earlier determination that the disqualification of Red Hen Market would not create a hardship to customers, as differentiated from potential inconvenience, is sustained, and a civil money penalty in lieu of disqualification is not appropriate in this case.

CONCLUSION

The documentation presented by Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm. 7 CFR § 278.6(e)(5) specifies that FNS shall "disqualify the firm 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, 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 were determined by Retailer Operations Division to represent the first sanction for the firm and evidence carelessness and poor supervision. Therefore, the imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

It is therefore established that the violations as described in the letter of charges did in fact occur at the Appellant firm warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). Based on the discussion herein, the decision to impose a six-month disqualification against Red Hen Market is appropriate and the action is sustained. In accordance with the Act and regulations, the six-month period of disqualification shall become effective thirty (30) days after receipt of this letter. The Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

July 26, 2018