

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

Richmond Hill Market,

Appellant,

v.

Case Number: C0200603

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a six-month disqualification against Richmond Hill Market (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(5) in its administration of SNAP when it imposed a six-month period of disqualification against Appellant on April 23, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of Appellant’s compliance with federal SNAP law and regulations during the period of July 12, 2017 through July 26, 2017. The investigation reported that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. These items sold during these impermissible transactions are best described in regulatory terms as “common ineligible nonfood items.” The investigation revealed that two unidentified male clerks were involved in the impermissible transactions. As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated November 7, 2017, that the firm was charged with violating the terms and

conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant, through counsel, replied to the Retailer Operations Division’s charges in writing. The Retailer Operations Division notified Appellant in a letter dated April 23, 2018 that the firm was being disqualified for six months from participation as an authorized retailer in SNAP. This determination letter also stated that Appellant’s eligibility for a hardship civil money penalty (CMP) according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated to Appellant that “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

On April 27, 2018, Appellant, through counsel, appealed the Retailer Operations Division’s decision to impose a six-month disqualification, and requested an administrative review of the action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

Although Appellant argued the charges should be reversed because the evidence supplied by Appellant was not discussed in the determination letter, the record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination. In addition, the contentions raised by Appellant in response to the charge letter are addressed in this administrative review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented 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.

Section 278.6(e)(5) of the SNAP regulations states, in part, when a firm is to be disqualified 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.

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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- The investigator entrapped the clerks into selling ineligible items;
- A clerk rejected a request to purchase an ineligible item and a request to traffic;
- The clerks mentioned in the investigation are no longer employed at Appellant;
- Appellant's new employees have received rigorous training; and,
- Appellant's situation is similar to the retailer cited in United States v. Tucker.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

This review is limited to considering the circumstances at the time the Retailer Operations Division's decision was made. It is not within this review's scope to consider actions that Appellant may have taken subsequent to this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's staff training and separation of the offending employees, while positive steps, do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant argued that its situation is similar to the retailer cited in United States v. Tucker. Appellant's letter included an excerpt from a magistrate judge who stated the efforts by the government in that case amounted to unconstitutional conduct. The facts in Tucker differed greatly from the facts of this case. In addition, the decision based on the findings of the magistrate judge cited by Appellant was later reversed by the 6th Circuit Court of Appeals.

Appellant's stated a clerk rejected a request to purchase an ineligible item and a request to traffic. While true, the investigation report shows that of the five times that nonfood violations were attempted, store personnel permitted them four times. The Retailer Operations Division attributed violations to "carelessness, or poor supervision by the firm's ownership or management," pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations, which results in a

disqualification of six months. Further, this penalty is only permitted if the firm has not been previously sanctioned. Therefore, a six-month disqualification for the violations committed, the minimum, is the appropriate sanction in this case.

No Entrapment

With regards to Appellant's contention that the investigator attempted to entrap the cashiers into trafficking, the investigative report shows that the investigator asked to purchase ineligible items and the clerk said yes. (When asked to commit trafficking, the clerk said no). Mere solicitation to commit a crime is not inducement which is required to establish entrapment. Nor does the government's use of artifice, stratagem, pretense or deceit (although there is no indication of same in the present case) establish inducement. Courts have found that inducement is shown only if the investigator's behavior was such that a law-abiding citizen's will to obey the law could have been overborne. The investigator's request, "can you hook me up?" certainly does not meet this standard. If investigators merely provide an opportunity for a suspected violator to continue on a course of improper conduct, such activity does not constitute entrapment. Moreover, even if inducement has been shown, a finding of defendant's predisposition to violate is fatal to an entrapment defense. Predisposition may be said to exist even without prior violations: the ready commission of an offense, such as a person's prompt acceptance of an undercover agent's offer of an opportunity to commit violations, may itself establish predisposition.

Investigative Record

Based on a review of the evidence, it appears that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted under the supervision of a USDA investigator and all are fully documented. The investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail.

CIVIL MONEY PENALTY

Appellant inquired about receiving a CMP. A CMP as an optional penalty in lieu of a six-month disqualification was considered in this case. Such a finding is appropriate only if: 1) a store sells a substantial variety of staple food items, and; 2) its disqualification would create a 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.

In this regard, some degree of inconvenience to SNAP benefit users is inherent in the disqualification from the SNAP of any participating food store, since the normal shopping pattern of such SNAP benefit holders may temporarily be altered during that period. In this case, however, the Retailer Operations Division has rendered a finding pursuant to 7 CFR § 278.6(f) that it would not be appropriate to impose a CMP in lieu of a period of disqualification. The Retailer Operations Division has determined that Appellant is not the only authorized retail food store in the area "selling as large a variety of staple food items at comparable prices." In addition,

the Retailer Operations Division notes that the subject store is classified in the FNS SNAP retailer database as a medium grocery store. That database also shows two large grocery stores, one supermarket, and three superstores located within a one-mile radius. All of these stores are easily accessible to customers and offer a variety and quality of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at other stores. Therefore, the earlier determination that Appellant's disqualification would not create a hardship to customers, as differentiated from potential inconvenience, is sustained, and a CMP in lieu of disqualification is not appropriate in this case.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to impose a disqualification of six months against Richmond Hill Market from participating as an authorized retailer in SNAP is sustained.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. A new application for participation in SNAP may be submitted ten (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 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (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.

RICH PROULX
Administrative Review Officer

June 11, 2018