

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

S & M Bronx Inc,

Appellant,

v.

Case Number: C0216726

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 from the Supplemental Nutrition Assistance Program (SNAP) as 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, when it imposed a six-month disqualification against S & M Bronx Inc.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulation 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 S & M Bronx Inc. with Federal SNAP law and regulations from November 2019 through January 2020. In a letter dated July 9, 2020, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for merchandise which included ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred during four (4) out of six (6) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a six-month

disqualification period as provided in 7 CFR § 278.6(e)(5). The Appellant was informed it could respond to the charges within ten (10) calendar days following delivery of the charge letter. The charge letter was delivered to the store by UPS on May 29, 2020.

The Appellant responded to the charges in a faxed letter dated June 4, 2020. The Appellant among other contentions stated that the clerks who committed the violations did not understand that the non-food items could not be exchanged for SNAP benefits. As a result, the store manager retrained all store employees on the SNAP rules and regulations.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated July 9, 2020. The determination letter informed the Appellant it was disqualified from the SNAP for a six-month period in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a hardship civil money penalty (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 other authorized retail stores in the area selling as large a variety of staple foods at comparable prices. The determination letter was delivered by UPS on July 10, 2020.

In a letter postmarked July 18, 2020, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The request for review was granted. Upon acceptance of the administrative review request, 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, might 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 covered 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 disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

Coupons may be accepted by an authorized retail food store only from eligible households ... and only in exchange for eligible food.

7 CFR § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the “Food and Nutrition Act of 2008, as amended, for the purchase of 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....

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 ... (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 non-food items** due to carelessness or poor supervision by the firm’s ownership or management. [Emphasis added.]

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’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.

SUMMARY OF THE CHARGES

During an investigation conducted from November 2019 through January 2020, the USDA conducted six (6) compliance visits at S & M Bronx Inc. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated July 9, 2020. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during four (4) of the six (6) compliance visits as documented by Exhibits A, C, D and E. The chargeable violations in Exhibits A, C, D and E involved the sale of the following non-food items in exchange for SNAP benefits:

- Two (2) 16-count packages of Daily Ware brand 16 ounce plastic cups;

- A 24-count package of Diamond brand plastic spoons;
- A 20-count package of Solo brand 18 ounce plastic cups;
- A 100-count package of Eilat brand 9-inch paper plates;
- A 36-sheet roll of Bounty brand paper towels.

The violations were conducted by two (2) different clerks. In Exhibit F, one of these clerks refused to exchange SNAP benefits for cash and non-food items, but this does not negate or mitigate the other violations documented in Exhibits A, C, D and E.

APPELLANT'S CONTENTIONS

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

- The Appellant store owners deny any wrongdoing. Since the time for tape recording lapsed, it cannot be determined which employee may have sold ineligible merchandise in exchange for SNAP benefits. The two (2) store owners are the sole principal and shareholders of the corporate entity S&M Bronx Inc. Both individually are actively involved in the business and operation of the gasoline station. Both individuals are fully aware of the regulations of SNAP and the eligible merchandise that qualifies under SNAP. However, at the time of the visits, both were not present. Also, if they were present, it is unlikely that they would be behind the counter.
- Store employees were properly advised and informed on the merchandise that is eligible and ineligible under SNAP; however, the transactions cited in the charge letter may have been an oversight. As documented in Exhibit F, the clerk separated the nonfood and food items and advised the investigator that nonfood items cannot be sold. On the same visit, the clerk refused to exchange SNAP benefits for cash. None of the other visits involved the exchange of SNAP benefits for cash.
- During the six (6) compliance visits, the Appellant store failed **only** four (4) visits and accepted ineligible merchandise under SNAP. All six (6) visits to the premises were unannounced. Instead of announcing after each visit, the investigator continued to visit the store multiple times. Thus, S&M Bronx Inc. never received an opportunity to take any corrective action.
- Upon receipt of charge letter, all the employees were retrained and were advised to only sell food items in exchange for SNAP benefits. As a result of the alleged violations, the store has developed and instituted an effective SNAP training program. On a weekly basis, an owner meets with the employees and advises them on the SNAP rules and regulations.
- The store has had no prior violations. Therefore, the Appellant requests another chance and a civil penalty, if any, of \$1,000 or any other reasonable amount. Participation in SNAP is critical for the survival of S&M Bronx Inc. due to the economics of operating the business due to its high rent and payroll.
- It is also essential to the local SNAP community that S&M Bronx Inc. not be disqualified for a six-month period. There are "projects" behind the store with 1,500 apartments whose residents rely upon the store's ability to accept SNAP benefits.

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

Investigation Report

The investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The investigation report documents by a preponderance of the evidence that personnel at the store exchanged ineligible items for SNAP benefits.

The Appellant complains that the investigator did not announce their results after each visit so the store could take corrective action. However, that is not the purpose of an undercover investigation. The investigation report and narrative does not reveal any evidence that the investigator did not follow acceptable procedures for an undercover compliance visit.

Owner Accountability

The Appellant states that the store owners were not present and were not involved in any of the violations cited in the charge letter. The Appellant also states that the violations may have been an "oversight" on the part of store employees. However, these contentions cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Store owners are accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store owners to disclaim accountability for the acts of persons chosen to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

In addition, a store owner signed the most recent SNAP recertification application for S & M Bronx Inc. on November 14, 2018. That recertification application included a signed certification that the owner(s) would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations including accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible non-food items.

Violations Warrant a Six-Month Disqualification

The Appellant states that the store has had no prior SNAP violations. However, a six-month disqualification is the proper penalty for a first time violation of this nature. SNAP regulation 7 CFR § 278.6(e)(5) states, in part, that “FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ... **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 non-food items due to carelessness or poor supervision** by the firm’s ownership or management.” [Emphasis added.]

The investigation report documents that the number of chargeable violations over multiple transactions in this case equate to carelessness or poor supervision by ownership. Therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification, the least severe penalty allowed by regulation for a first time violation under these circumstances.

Corrective Action

The Appellant states the store has taken corrective action by providing store employees with additional ongoing training on the SNAP rules and regulations. Regarding this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is **limited** to what circumstances existed at the time of the violations that was the basis of the Retailer Operations Division’s action. It is not within the authority of this review to consider what subsequent corrective actions may have been taken so that a store may 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 assessment on the basis of alleged or planned corrective actions implemented **after** findings of program violations. Therefore, the Appellant’s contention that corrective action has now taken place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Hardship to the Business

The Appellant states that the store relies upon its participation in the SNAP in order to remain in business. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the owners personally or the firm resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

HARDSHIP CIVIL MONEY PENALTY

The Appellant states that the local SNAP community will suffer a hardship if S & M Bronx Inc. is disqualified for a six-month period. Regarding this contention, the Retailer Operations Division determined that the Appellant was not eligible for a hardship CMP under 7 CFR § 278.6(f)(1). That regulation reads, in part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification when...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.” [Emphasis added.]

The case record documents that the Retailer Operations Division determined that a six-month disqualification of S & M Bronx Inc., a convenience store, would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores in the area. The Retailer Operations Division determined through agency mapping systems that there are 116 SNAP authorized stores within a one-mile radius of the Appellant firm. These SNAP authorized stores include ten (10) supermarkets and seven (7) superstores. These larger stores all likely have a greater depth and breadth of staple food at likely comparable or better prices. Also, there is a similarly stocked competitor convenience store located only 0.22 miles away. In addition, there is no evidence that S & M Bronx Inc. carries any specialty or international foods that cannot be obtained at these other stores.

Based on the analysis above, a six-month disqualification of S & M Bronx Inc. would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division decision not to assess a hardship CMP in lieu of a six-month disqualification is **sustained** as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is established that the violations as described in the letter of charges did in fact occur at S & M Bronx Inc. warranting a disqualification of six (6) months in accordance with 7 CFR § 278.6(e)(5). That regulation states that FNS **shall** “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 non-food items due to carelessness or poor supervision by the firm’s ownership or management.” Therefore, the decision to impose a six-month disqualification, **the least severe penalty** allowed by regulation, against S & M Bronx Inc., Appellant, 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 authorization ten (10) days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

Under the Freedom of Information Act, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

October 22, 2020