

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

**Safa Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0209645**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA) finds that the record supports that Safa Market (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a six month disqualification of Appellant from the SNAP, as imposed by the Retailer Operations Division (Retailer Operations).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action in its administration of the SNAP, consistent with 7 CFR § 278.6(f)(1), 7 CFR § 278.6(a), and 7 CFR § 278.6(e), when it imposed a six month period of disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

**CASE CHRONOLOGY**

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of July 12, 2017 through October 25, 2018. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate occasions that warrant a six month disqualification period. The items sold on multiple dates are best described as common nonfood items, and major items, each exceeding ten dollars in cost.

As a result of evidence compiled during the investigation, by letter dated November 7, 2018, Retailer Operations charged the owners with violating the terms and conditions of the SNAP

regulations. Misuse of SNAP benefits was noted in Exhibits A, B, and C, that warrants a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain conditions FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

The record shows that the owners replied to the Charge letter in writing on November 17, 2018. Retailer Operations informed the owners by Determination letter dated November 30, 2018, that the violations cited in the Charge letter occurred at the firm, and that a six month period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

The owners appealed the determination by letter dated December 10, 2018. The administrative review was granted by letter dated February 4, 2019. Counsel made a FOIA request dated March 11, 2019. The agency provided a FOIA reply dated March 28, 2019. The case was reassigned to this review officer by letter dated May 29, 2019. Counsel provided a brief to this review officer dated April 22, 2019, by email on June 5, 2019.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the 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 not true.

### **CONTROLLING LAW AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(5) establish the authority upon which a six month disqualification may be imposed against a retail food store.

7 CFR § 278.2(a) states: “Coupons may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food.”

7 CFR § 278.6(e)(5) of the SNAP regulations states that 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: “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.”

7 CFR § 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause hardship to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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**

A report of the investigation was provided to the Appellant as Exhibits with the Charge letter. The investigative report provides details on the results of each compliance visit. The investigative report documents that SNAP violations were recorded during three of three store visits, that warrant a six month disqualification. The SNAP violations of 7 CFR § 278.2(a) of the regulations involved the sale of nonfood items for benefits including: foil pans, three pans, three pan tops, a skillet with a top exceeding \$20 in cost, and one small, one medium, and one large pot with lids each exceeding \$10 in cost.

### **APPELLANT’S CONTENTIONS**

Consideration of all contentions was made whether recapitulated here or not.

- It was my strict rule and guidelines to follow in accordance with the SNAP guidelines yet store sales employee made an error in coming non-SNAP items for which I want to apologize. Unfortunately this transaction happened while I was not in the store.
- I will retain the employee to make sure they fully understand SNAP rules and follow accordingly.
- We will explain how serious matter is SNAP for use to accept SNAP at the store.
- I assure you that SNAP irregularities will never happen again in our store.
- We sincerely apologize for the violation that was done by the employee who had not followed through the guidelines.
- As promised we will retrain the employee to satisfy the regulations.
- It will be very challenging financially for us to be on the 6 month suspension.
- We ask consideration of this lengthy suspensions. We will make sure all, new and old employees sign store’s SOP including accepting SNAP benefits.
- It will help us by continue accepting the LINK card.
- The Appellants adamantly deny any intentional violation of SNAP regulations on the part of the Store.
- Unequivocally, the Store has a strict SNAP compliance policy. The violations which occurred at the Store were honest mistakes, made without any malice, by the same clerk who was seemingly confused as to which specific items were eligible verse ineligible items.

- Nevertheless, these minimal violations allegedly occurred within a 15-week period, from July 12, 2018 to October 25, 2018, by the same clerk on three occasions. Importantly, said clerk refused to engage in trafficking SNAP benefits when propositioned by the Investigator during the investigation.
- Immediately upon becoming aware of said violations, all Store personnel were re-trained as to the proper SNAP regulations and procedures.
- Prior to the charges at hand, the Store has had a history of compliance with SNAP regulations. Given the duration of the Appellants' participation in SNAP as an authorized retailer, 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 clerks.
- As set forth in the investigative reports contained in the Attachments to the Charging Letter, the only violation to have allegedly occurred was the sale ineligible items in exchange for SNAP benefits, by the same clerk, within a 15-week period.
- It is crucial to note that during the October 25, 2018 investigation, the clerk outright refused to traffick SNAP benefits when propositioned by the FNS investigator to do so (this was the only time during any of the investigations where a Store clerk was propositioned to traffick in SNAP benefits).
- In light of the short duration in which the violations allegedly took place, coupled with the training and compliance programs of the Store as evidenced during the October 25, 2018 investigation, it is more likely that the three investigations wherein violations were alleged to have occurred demonstrated a short-lived misunderstanding on the part of the clerk concerning the difference between ineligible and eligible items, rather than a store practice of selling ineligible items.
- Additionally, with respect to the standing charges issued by the Department, the ineligible items alleged to have been purchased, all were forms of cooking tools (i.e. skillets and foil pans), all of which would normally be expected to be found in a standard grocery trip.
- Here, the only violations alleged to have occurred was the sale of cooking tools by the same clerk within a 15-week period. This is an extremely narrow scope of violations committed by the Store personnel, with *de minimus* harm, which occurred within a short duration of time. Furthermore, the clerk in the latter investigation specifically refused to traffick in SNAP benefits.
- It is clear that it was not the intent of the Appellants to violate the regulations, as evidenced by the short duration of time in which the violations occurred and the Stores' clerk's refusal to traffick in SNAP benefits.
- The Store has training, as it had in the past, and was under the belief and impression that its personnel, i.e. Clerk A, was operating the register pursuant to Store policies. As such, the Appellant's management acted reasonably prior to the occurrence of the violations.
- The question becomes whether management acted carelessly during and after the transactions. The Store's manager is not expected, in any case or in any store, to directly oversee every transaction that processes on EBT. Managers of other grocery stores are expected to have a broad overview of the operations of the store, but transactions that are **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** more than a completely legitimate transaction do not stand out on their own accord. Furthermore, the Store was not required to maintain a computerized point of sale system to track the transactions. As such, the registers that

were in place at Appellant's Store only identified items in broad categories, rather than individually. With no direct tie-in to the inventory, any review, other than a detailed audit, would not have necessarily shown anything amiss on the surface of the transactions. Thus, the management and owner cannot be considered careless in reviewing the transactions.

- After being made aware of the violations, the Store's owners took the reasonable and appropriate steps to properly educate its' clerks on the specific ineligible and eligible items and re-trained all of the Store's personnel on all of the SNAP regulations and procedures. As such, there are no other reasonable steps that Appellants could have taken under the circumstances. Therefore, the Store's management and owners cannot be categorized broadly as careless.
- Despite the ultimate failure of the Store's attempts to prevent violations resulting from human error, it is not fair to say that the Store did not properly oversee its personnel. There were just no warning signs that management or ownership could have noticed.
- Store's owners maintain a strict set of rules for the operation to be run in compliance with SNAP regulations and have reviewed the regulations and have personal knowledge of the rules. Furthermore, the Store owners attempt to correct any violative activity that occurs within the Store.
- Here, it cannot be found that the Store's management acted with the requisite carelessness and/or poor supervision to support the issuance of a six month disqualification. Therefore, the six month disqualification is improper and, should be withdrawn.
- Appellants ask that a warning letter be issued in lieu of a six month disqualification. The alleged violations which took place within a 15-week time period all consisted of a variety of the same product, i.e. cooking tools, and were conducted by the same clerk each time. Importantly, the same clerk is also the clerk that refused to traffick in SNAP benefits during the investigation. There was a clear misunderstanding on the part of the Store's clerk regarding the difference between eligible verse ineligible items.
- Furthermore, the Store clerk in the October 25th investigation outright refused to traffick SNAP benefits when propositioned by the FNS inspector to do so, clearly evidencing the training effectuated by the Store.
- The violations were minor in nature, and while the Department is tasked with maintaining compliance with the regulations, it should be reluctant to resort to draconian sanctions where a lesser sanction would be more appropriate and equally effective. In circumstances such as this one, where the violations were limited in nature a warning letter appears to be an appropriate first step in insuring compliance before the imposition of a serious sanction.
- It would seem as though the violations are exceptionally minor in nature, and while certainly in need of correction, proper corrective action can be achieved by the issuance of a warning letter.
- While it would not be impossible for the participants to shop elsewhere, it would be of such inconvenience to them that it would ultimately be a burden. These participants depend on the Store for canned goods, meats, and other regular staples.
- The name of the investigator who allegedly conducted the transactions is not disclosed. Accordingly, there can be no meaningful evaluation of bias on the part of the

investigator, or an opportunity to check the allegations against a surveillance tape (should one exist). This absence has an evidentiary impact on a case like this.

- The Appellants argue that the Department has not met its burden in proving that such SNAP violations occurred nor that such violations were the result of management's carelessness or poor supervision. Mere statements, without any corroboration, are not sufficient to satisfy the evidentiary standard before this Division.
- The Store and its management have acted reasonably under the circumstances and are not properly described as failing to oversee the operations or otherwise acting carelessly. These transactions were the result of the human error on the part of a singular clerk who, although had been properly trained, was confused as to the specific ineligible and eligible SNAP items within a 15-week time period.
- In the alternate, the Appellants request that this Division issue a Hardship Civil Money penalty. The Store stocks a considerable amount of staple items to provide for the needs of the local SNAP participants who walk or bike to the Store. Without access to these foods at the Appellants' Store, the participants would be unduly burdened.

## **ANALYSIS AND FINDINGS**

This review is to either validate or to invalidate the determination made by Retailer Operations; it is limited to the facts at the basis of Retailer Operations' determination at the time it was made. Upon review, the evidence supports that Appellant established a record of selling nonfood items as defined by Section 271.2 of the regulations, on multiple occasions. The Exhibits furnished with the Charge letter warrant a disqualification period of six months. The regulations at 7 CFR § 278.6(e)(5) specify 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 nonfood items due to carelessness or poor supervision by the firm's ownership or management." Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification.

Regardless of who the store owner(s) utilizes to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in SNAP when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The owner(s) signed the FNS retailer application to become a SNAP authorized retailer, which included a certification and confirmation 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." By signing this document ownership confirmed that "I am aware that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal or disqualification from Supplemental Nutrition Assistance Program; "It is my responsibility to ensure that the training materials are reviewed by all firm owners and all employees..."; "I accept responsibility on behalf of the firm for violations of the Supplemental Nutrition Assistance Program regulations, including those committed by any of the firm employees." The

violations listed on this certification include accepting SNAP benefits as payment for ineligible items, a violation of the SNAP rules and regulations.

A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations. There is no provision in the Act, or regulations, that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees. Further, the regulations stipulate that FNS 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 as the sale of common nonfood items due to carelessness and poor supervision by the firm's ownership or management.

This review is limited to what circumstances were at the basis of Retailer Operations' action at the time such action occurred. It is not the authority of this review to consider what subsequent remedial actions may be undertaken so that Appellant might begin to comply with program requirements. The responding owners contend that they provided SNAP training to the employees. No evidence of initial SNAP training was advanced. If Appellant had a strict compliance policy in place as contended, it is more likely than not that Appellant would not have sold clearly nonfood items on three different occasions. There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective actions implemented subsequent to findings of program violations. Therefore, the contention that corrective action such as employee training has been given, does not provide a valid basis for dismissing the charges or the penalty imposed. Furthermore, no evidence of subsequent SNAP training was presented.

Ownership contends that the total cash amount involved in the violations is small. Regardless of cost, Appellant established a record of selling nonfood items as defined by Section 271.2 on three occasions. No mention of minimum cost is cited in Section 278.6(e)(5) of the SNAP regulations, which states that FNS shall disqualify a store 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 the sale of common nonfood items in exchange for FSP benefits due to carelessness or poor supervision by the firm's ownership or management.

The charges of violations are based on the findings of a formal U.S. Department of Agriculture investigation. All such transactions are fully documented and a review of this documentation has yielded no indication of error or discrepancy in the reported findings. The investigative record is specific and thorough with regard to the dates of the violations, the specific facts related to the sales of nonfood items, and in all other critically pertinent detail. In their initial reply, the owners apologized for the employee's errors and asked for forgiveness. The preponderance of the evidence in this matter supports that Appellant sold nonfood items on multiple store visits in exchange for SNAP benefits, a program violation. The regulations stipulate FNS shall disqualify a 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 the sale of nonfood items due to carelessness and poor supervision by the firm's ownership or management.

## **CIVIL MONEY PENALTY**

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six month period of disqualification from SNAP. The record documents that there are other authorized stores within a nearby radius of Appellant that stock a variety of comparable staple foods at comparable prices. The evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified. Therefore, Appellant is not eligible for a hardship CMP.

## **CONCLUSION**

The preponderance of the evidence in the record supports that the program violations charged did occur at Appellant. The responding owners did not dispute that violations occurred, and apologized for these in response to the Charge letter. The record documents that Retailer Operations considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations, and properly denied it. Therefore, the six month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained.

## **RIGHTS AND REMEDIES**

This penalty shall become effective thirty (30) days after receipt of this decision. A new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the six month period of disqualification. Please contact the Retailer Center at 877-823-4369 with general questions regarding the SNAP application process.

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023), and to the regulations at 7 CFR § 279.7, with respect to your right to judicial review of this decision. 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 owners 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, 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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

June 25, 2019