

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

Sam's Market and Gas,

Appellant,

v.

Case Number: C0191577

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 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 Sam's Market and Gas.

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 Sam's Market and Gas with Federal SNAP law and regulations in April 2017. In a letter dated June 1, 2017, 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 on four (4) out of five (5) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

In response to the charge letter, the Appellant, through counsel, requested information under the Freedom of Information Act (FOIA). As a result, the case was held in abeyance pending the agency's official FOIA response.

The Appellant, through counsel, responded to the charges in a letter dated October 2, 2017. The Appellant generally stated that the sale of ineligible items was the action of a single clerk, that the transactions were not intentional, that the ownership was not careless in its oversight, and that a warning letter should be issued instead of assessing a six-month disqualification.

After reviewing the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated October 30, 2017. 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 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.

In a letter postmarked November 9, 2017, 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... 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)(5) states, in part:

*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 in April 2017, the USDA conducted five (5) compliance visits at Sam's Market and Gas. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated June 1, 2017. 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 recorded during four (4) of the five (5) compliance visits. The chargeable violations involved the sale of the following ineligible items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a):

- 25 sq. ft. roll Special Value aluminum foil;
- 50 count box Super Seal food storage bags;
- 2 count box Reynolds Turkey Size oven bags;
- 51 count pack Plastic World Party Cutlery plastic forks;
- 2 count box Reynolds Turkey Size oven bags;
- 24 count box Diamond Daily plastic spoons;
- 51 count pack Plastic World Party Cutlery plastic forks;
- 300 count box H.K. Trading LTD flexible straws;
- 24 count box Springfield plastic spoons.

The above violations were conducted by a single clerk. The same clerk in Exhibit D refused to exchange cash for SNAP benefits. A second clerk refused to exchange ineligible items and cash in Exhibit E.

APPELLANT'S CONTENTIONS

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

- The store adamantly maintains that the alleged transactions have not occurred as described in the investigation reports.
- Should these transactions have occurred as indicated in the investigation report, the sales of ineligible items would have been unintentional and would have been corrected as soon as the owner became aware of the violations. The regulation does not cover honest mistakes, inadvertence, or temporary confusion regarding eligible versus ineligible items.
- The regulation does not cover the circumstances that allegedly exist in this case, which is the violation of regulations on the part of a single clerk. The actions of a single clerk are not attributable to the carelessness or poor supervision by the firm's ownership or management, but rather through

the malfeasance of a single clerk who does not represent the store, or even the majority of the personnel or management.

- An arbitrary number of ineligible items over an arbitrary number of transactions is how the USDA sorts stores that have shown carelessness or poor supervision from those who receive a warning letter. Such rule should not be strictly applied where the circumstances indicate that neither the ownership nor management was careless or neglectful.
- The investigator appears to have conducted as many investigations in as short of a period as possible, and functionally surveyed only one employee. This is important because the presence of violations in only one employee, where other employees refuse to conduct transactions for ineligible items, would indicate that the store's ownership and management had properly trained the staff, but that only one clerk was under a mistaken belief about eligibility.

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 Appellant states that the store adamantly maintains that the alleged transactions have not occurred as described in the investigation reports. Regarding this contention, 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 Appellant states that all of the store visits occurred over five days and did not test the long-term compliance of the store over a couple of months. This contention fails to provide any grounds for reversing the six-month disqualification or imposing a lesser penalty. There is nothing in the SNAP statute or regulations that require an undercover compliance visit to be conducted over a couple of months.

Violations Warrant a Six-Month Disqualification

The SNAP regulation at 7 CFR § 278.6(e)(5) states, in part:

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.

The Appellant states that any sales of ineligible items would have been unintentional and would have been corrected as soon as the owner became aware of the violations. The Appellant further contends that the regulation does not cover honest mistakes, inadvertence, or temporary confusion regarding eligible versus ineligible items. Regarding this contention, contrary to the Appellant's assertion, neither SNAP law nor regulations require an element of intent on the part of the violator where ineligible items are exchanged for SNAP benefits. Therefore, whether or not the clerk in this case intended to violate SNAP regulations is not relevant.

The Appellant states that the regulation does not cover the circumstances that allegedly exist in this case, which is the violation of regulations on the part of a single clerk. The actions of a single clerk are not attributable to the carelessness or poor supervision by the firm's ownership or management, but rather through the malfeasance of a single clerk who does not represent the store, or even the majority of the personnel or management.

Regarding this contention, FNS considers the sale of a total of three (3) inexpensive non- food items over one, two or three transactions to equate to carelessness and the lack of thorough supervision on the part of ownership or management. The investigation report documents that the chargeable violations in this case consisted of nine (9) inexpensive non- food items exchanged for SNAP benefits over three (3) transactions; therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification. Two clerks refused to exchange cash for SNAP benefits in Exhibit D end Exhibit E, but this does not ameliorate or mitigate the penalty for exchanging non-food items for SNAP benefits.

Owner Accountability

On behalf of all the store owners, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) signed the SNAP application for Sam's Market and Gas on September 16, 2013 and acknowledged that ownership was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owners 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 in exchange for ineligible non-food items.

CIVIL MONEY PENALTY

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.”

The case record documents that the Retailer Operations Division determined that a six- month disqualification of Sam’s Market and Gas, a convenience store, would not cause a hardship to SNAP households as there are six (6) comparable or larger SNAP authorized stores located within a one-mile radius of Sam’s Market and Gas. These SNAP authorized stores include a small grocery store and a medium grocery store.

Based on this evidence, a six-month disqualification of Sam’s Market and Gas 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 Sam’s Market and Gas warranting a disqualification of six 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 Sam’s Market and Gas, 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.

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.

RONALD C. GWINN
Administrative Review Officer

February 6, 2018