

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Shogys Market LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0194143

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 finding that a six (6) month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program¹ (SNAP) was properly imposed against Shogys Market LLC (hereinafter, “Shogys Market LLC” and/or “Appellant”) and its owners/corporate officers of record by the FNS Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a) and (e) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a six (6) month disqualification against Shogys Market LLC in a letter dated July 13, 2017.

AUTHORITY

7 U.S.C. 2023 and its implementing regulations at 7 CFR § 279.1 provide 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.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Shogys Market LLC with Federal SNAP law and regulations which consisted of four (4) visits completed between January 10, 2017 and June 5, 2017.

The *USDA-FNS Report of Positive Investigation* (hereinafter, "Investigative Report") number LA09387 dated June 7, 2017 disclosed that on four (4) separate occasions Shogys Market LLC personnel accepted SNAP benefits for merchandise that was ineligible for purchase with such benefits from a USDA Investigator. Identification information ascertained from the Investigative Report indicated that these SNAP violations were handled at Appellant firm by two (2) unidentified clerks.

As a result of the evidence compiled during the USDA investigation, in a letter dated June 21, 2017, the Retailer Operations Division, charged Appellant with violating 7 CFR § 278.2(a) of the SNAP regulations. A copy of the redacted Investigative Report was provided for consideration.

The Retailer Operations Division's record documents that a facsimile response was received from Appellant's ownership on June 29, 2017 indicating that the mistakes identified in the Investigative Report were likely the result of a misunderstanding of the training offered to newly hired employees. Appellant ownership indicated that a new training plan had been developed and implemented and that the SNAP processor would be integrated into Appellant's two (2) point of sale systems allowing for automated identification of SNAP eligible and ineligible items.

Following documented consideration of Appellant responses the Retailer Operations Division issued a final determination letter, dated July 13, 2017, assessing a six (6) month disqualification from participation as an authorized retailer in the SNAP against Shogys Market LLC.

Appellant, through counsel, requested an administrative review of this action appealing the Retailer Operations Division's determination via letter dated July 20, 2017 that was received by the Chief of the Administrative Review Branch on August 1, 2017.

The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review in accordance with 7 CFR § 279.4(a).

In an e-mail dated August 25, 2017 Appellant, through counsel, requested materials used by FNS in the development of the penalty in review through the filing of a Freedom of Information Act (FOIA) request. The FOIA request was fulfilled on September 27, 2017 with materials (redacted as appropriate) provided for consideration to Appellant, through counsel.

Appellant, through counsel, provided a supplemental brief dated November 21, 2017 for consideration.

STANDARD OF REVIEW

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

The controlling statute in this matter is contained in the *Food and Nutrition Act of 2008*, as amended (the “Act”)², 7 USC 2023 and 278 of Title 7 of the Code of Federal Regulations (CFR).³

7 CFR § 278.2(a) “Use of Coupons”, states, in relevant 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 defines **Eligible foods**” in relative part as “**Any food and food product** intended for human consumption **except** alcoholic beverages, tobacco and **hot foods and hot food products prepared for immediate consumption...**” (Emphasis Added)

7 CFR § 278.6 establishes the authority upon which a period of disqualification may be imposed against an authorized food store or wholesale food concern in the event that it has failed to comply with the Act.

7 CFR § 278.6(e) provides the following, in relevant part, with respect to penalties that may be assessed against firms determined to have violated the Act or regulations:

“...For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. A civil money penalty and a disqualification shall be considered sanctions for such purposes...”

7 CFR § 278.6(e)(5) applies to the period of disqualification under review, and specifies 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 nonfood items due to carelessness or poor supervision by the firm’s ownership or management.”

7 CFR § 278.6(e)(7), states, that FNS shall,

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment through P.L. 113-79, enacted February 7, 2014.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

“Send the firm a warning letter if violations are too limited to warrant a disqualification.”

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 households because of the unavailability of a comparable participating food store in the area to meet their shopping needs.

7 CFR §278.6(f)(1) 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 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.”

SUMMARY OF THE CHARGES

USDA conducts investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of SNAP violations that may be occurring. In the instant case the Investigative Report dated June 7, 2017, reveals that a USDA Investigator completed four (4) total investigative visits at Shogys Market LLC between January 10, 2017 and June 5, 2017.

The report materials were provided to Appellant as attachments to the charge letter dated June 21, 2017 and included exhibits A through D that provide detail of the investigative results. In response to the August 25, 2017 FOIA request materials, including photos of the items identified in each investigative visit and Appellant provided receipts were provided for consideration.

The Investigative Report reveals SNAP violations were recorded during each of the four (4) reported visits, included as exhibits A, B, C, and D of the Investigative Report with the exchange of SNAP benefits for non-food items. The non-food items identified in the Investigative Report exhibits are referred to in FNS terms as “common ineligible items” and include, in the instant case, disposable cutlery, garbage bags, a chore boy scrubber, and matchbooks. The violations are documented to have involved two (2) unidentified clerks, one (1) male and one (1) female. The Investigative Report further discloses that exchange of cash was refused in exhibit D, by the unidentified female clerk. .

The regulations establish that an authorized food store may be disqualified from participating in the program 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.

APPELLANT’S CONTENTIONS

The request for appeal dated June 7, 2017 conveys that Appellant seeks to challenge the penalty based upon the evidence.

In the supplemental brief dated November 21, 2017 Appellant, through counsel, contends that:

- The geographic area surrounding Appellant includes 30.1 percent of the population living below the poverty line⁴ with almost all receiving SNAP benefits.
- Customers conform to traditional transactions patterns of SNAP participants as noted in the Analysis of EBT Redemption Patterns: Methods and Detailed Tables (issued February of 2011 by USDA).
- In response to charge letter ownership reported having provided thorough employee training, with an emphasis on prohibition to exchange major items such as cigarettes and beer. Revised training plan provided.
- Appellant's good compliance history of 10 years without previous sanctions or warning letters should be given weight in consideration of the penalty being imposed.
- A request is made for the issuance of a warning letter in lieu of disqualification in consideration that only four (4) different non-food items involved were involved with each being reasonably related to food preparation.
- The violations were exceptionally minor and the draconian penalty being imposed is unreasonable when a lesser sanction would be equally effective with proper corrective action.
- Ownership was unaware of the violations and had taken reasonable and fiscally practical steps to prevent SNAP violations. The actions of ownership cannot be considered careless or neglectful as required for the imposition of a six-month disqualification.

The preceding may represent only a brief summary of the contentions presented in this matter. Please be assured, however, that, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

That SNAP benefits are not for the purchase of non-food items is clear in the "Act" and in the SNAP regulations, with noted exceptions, such as seeds used to grow food, and hunting equipment in remote areas of Alaska. This and other rules governing SNAP were provided to Appellant upon initial SNAP authorization in August 2007 upon initial SNAP authorization; and, have been regularly provided as part of the periodic SNAP reauthorization process.

⁴ Appellant reference American Fact Finder as source

Geographic Area and Shopping Patterns:

The significant percentage of local geographic area residents living below the poverty line; and, that customers conform to traditional transactions patterns of SNAP participants are both contentions that are general and not directly related to the issue under review. Therefore, no findings are rendered with regard to these specific contentions.

Training:

In response to letter of charges ownership reported having provided thorough employee training, with an emphasis on prohibition to exchange major items such as cigarettes and beer; and, provided a revised training plan for consideration as a measure of corrective action to avert further SNAP violations.

The June 29, 2017 facsimile materials provided by Appellant's ownership describe having explained to newly hired staff that "only non-hot food related items could be purchased". It is notable that the statement as recounted is incorrect; only food items, not food related items can be exchanged for SNAP. 7 CFR § 271.2 defines Eligible foods" in relative part as "Any food and food product intended for human consumption except alcoholic beverages, tobacco and hot foods and hot food products prepared for immediate consumption..." While it is understood that ownership believed that the training provided was thorough, the seemingly insignificant use of the term food related conveys an incorrect message and represents carelessness or negligence on behalf of ownership. Notably, no reference to the use of the standard SNAP Retailer Training materials is made.

Corrective Action:

The newly revised training program documented to include closer supervision of SNAP transactions by employees early in the month; employee studying stock and being tested on SNAP eligibility of the various items; ownership internal investigations; and, the integration of the SNAP processor with the point of sale systems are all legitimate methods that can serve to supplement the required provision of the training materials received in the Standard Retailer Authorization Package issued upon initial authorization; and meet the training responsibilities as provided at periodic reauthorization. However, a plan for corrective action, no matter how comprehensive does not serve to mitigate the violations recorded in the Investigative Report number LA09387 dated June 7, 2017.

Although Appellant indicates that implementation of said training would be equally effective in averting reoccurring SNAP violations the SNAP regulations at 7 CFR § 278.6(e)(5) applies to the period of disqualification under review, and specifies 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 nonfood items due to carelessness or poor supervision by the firm's ownership or management."

Compliance History:

As noted by Appellant, through counsel, the charges in the instant matter represent the first for Appellant as there is no record of previous chargeable SNAP violations. However, the lack of previous violation is not a basis for mitigating or reversing the penalty being assessed. 7 CFR § 278.6(e)(5) clearly requires that FNS impose a penalty of six (6) months for violations as found in the instant case.

Warning Letter:

Appellant, through counsel requests the issuance of a warning letter in lieu of disqualification citing that only four (4) different non-food items were involved, and those items could be reasonably related to food preparation.

The inference that non-food items when reasonably related to food preparation are allowable is incorrect. On review it is noted that beyond the Investigative Report the record includes photographs of the items listed as purchased (eligible and ineligible); and the “Food Stamp Purchase” customer copy receipts from “Shogys Market LLC”; that directly correspond to the information presented in each of the Investigative Report exhibits. The evidence, coupled with the Certification of the Investigator as included on page 1 of the Investigative Report, which is an official government accounting of the events, support a conclusion that the violations as charged occurred at Appellant firm; and, affirms that FNS has met the burden of proof as cited in 7 CFR § 278.6(e)(5).

Civil Money Penalty:

7 CFR § 278.6(f)(1) 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 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.” The record reflects that the Retailer Operations Division has rendered a finding that pursuant to 7 CFR § 278.6(f)(1), it would not be appropriate to impose a civil money penalty in lieu of a period of disqualification on Appellant firm.

The Retailer Operations Division record reflects that Shogys Market LLC is classified within FNS definitions as a convenience store; and, that there are at least seven (7) SNAP authorized firms within a one (1) mile radius of Appellant including a supermarket and a small grocery store. The availability of alternative SNAP Authorized venues is verified with a review of the SNAP Retailer Locator tool located at <https://www.fns.usda.gov/snap/retailerlocator>. Retailer Operations Division documented having reviewed the surrounding area and finding no indication that the alternative SNAP authorized firms would not provide a variety of staple foods at comparable prices to those of Appellant.

Based on the availability of the alternative SNAP authorized retailers the Retailer Operations Division has determined that the temporary disqualification of Appellant would not create a hardship to customers.

It is recognized that some degree of inconvenience to SNAP customers is inherent from the temporary disqualification of any participating food store. Although the normal shopping pattern of such SNAP customers may be temporarily altered during the period of disqualification, the determination that the disqualification of Shogys Market LLC would not create a hardship to customers, as differentiated from potential inconvenience is sustained and a civil money penalty in lieu of disqualification is found not to be appropriate in this case.

CONCLUSION

The charges of violations are based on the findings of a formal USDA investigation in which all transactions cited in the letter of charges were fully documented and evidentiary materials are included in the record that validate the report as provided. A complete review of this documentation has yielded no swaying error or discrepancy. The Investigative Report is specific and thorough with regard to the dates of the violations and the specific related facts.

The documentation presented by the Retailer Operations Division clearly provides a preponderance of the evidence that the violations as reported occurred at Appellant firm and, 7 CFR §278.6(e)(5) specifies 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 nonfood items due to carelessness or poor supervision by the firm’s ownership or management.”

The SNAP regulations do not provide for consideration of the either the value of the non-food items purchased in the reported violations or the relationship of those items to the preparation of food. It is established that the violations as described in the letter of charges dated June 21, 2017, did in fact occur at Appellant’s firm, warranting a disqualification of six (6) months in accordance with 7 CFR §278.6(e)(5) notwithstanding Appellant’s reference to the penalty as draconian.

Based on the discussion above, the decision to impose a six (6) month disqualification against Shogys Market LLC is proper and the action is sustained.

In accordance with the Act and regulations, **the six (6) month period of disqualification shall become effective thirty (30) days after receipt of this letter.** Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six (6) 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 a judicial review is desired, 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.

NANCY BACA-STEPAN
Administrative Review Officer

November 28, 2017