

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

TJ's Market and Deli,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0192924

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the six-month disqualification imposed upon TJ's Market and Deli (hereinafter "Appellant") by the Retailer Operations Division, Investigations and Analysis Branch, hereinafter "ROD Office," is hereby sustained.

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6 (e) and 7 CFR § 278.6 (f) in its administration of the SNAP when it imposed a six-month disqualification upon Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 C.F.R. § 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."

CASE CHRONOLOGY

In a letter dated March 28, 2017, the ROD Office informed Appellant that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR

§ 271 – 282. The record reflects that the ROD Office received and considered Appellant’s reply to the Charge Letter. By a letter dated May 9, 2017, Appellant was informed that it was disqualified for a period of six months from participation as a retail store in the SNAP and was instructed to cease accepting SNAP benefits or, alternatively, request an administrative review of the decision. On May 11, 2017, Appellant requested an administrative review of the ROD Office’s decision. The request was granted and the disqualification action held in abeyance pending the results of the 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, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, at 7 U.S.C. § 2021 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6 (e) of the Regulations establish the authority upon which a disqualification, or a civil money penalty in lieu thereof, may be imposed upon a retail food store or wholesale food concern. **5 U.S.C. § 552 (b)(7)(E)**.

7 U.S.C. § 2021 states, *inter alia*:

- (1) IN GENERAL.—An approved retail food store or wholesale food concern that violates a provision of this Act or a regulation under this Act may be—
- (A) disqualified for a specified period of time from further participation in the supplemental nutrition assistance program;
 - (B) assessed a civil penalty of up to \$100,000 for each violation; or
 - (C) both.

7 CFR § 278.6(a) states, *inter alia*:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food & 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(e)(5) states:

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)(6) states:

Double the appropriate period of disqualification prescribed in paragraphs (e)(2) through (5) of this section as warranted by the evidence of violations *if the same firm has once before been assigned a sanction.* (Emphasis added.)

7 CFR § 278.6(f)(1) states, *inter alia*:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm...is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to SNAP households because there is no other store in the area selling as large a variety of staple food items... *FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction.* (Emphasis added.)

7 CFR §278.6(f)(2) states, *inter alia*:

In the event any retail food store...which has been disqualified is sold or the ownership thereof is otherwise transferred...the person or other legal entity who sells or otherwise transfers ownership...shall be subjected to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at 278.6(g).

7 CFR §278.1(b)(4) states, *inter alia*:

If the applicant firm has been sanctioned for violations of this part, by withdrawal or disqualification, for a period of more than six months, or by a civil money penalty in lieu of a disqualification period of more than six months, or if the applicant firm has been previously sanctioned for violations and incurs a subsequent sanction, regardless of the disqualification period, FNS shall, as a condition of future authorization,

require the applicant to present a collateral bond or irrevocable letter of credit...

7 CFR §278.6(h)(1),(2) and (3) state, *inter alia*:

1. Disqualify the firm for the period determined to be appropriate under paragraph (e) of this section if the firm refuses to pay any of the civil money penalty.
2. Disqualify the firm for a period corresponding to the unpaid part of the civil money penalty if the firm does not pay the civil money penalty in full or in installments as specified by the regional office.
3. Disqualify the firm for the prescribed period if the firm does not present a collateral bond or irrevocable letter of credit within the required 15 days. If the firm presents the required bond during the disqualification period, the civil money penalty may be reinstated for the duration of the disqualification period.

SUMMARY OF THE CHARGES

Among other documents, the record contains a Report of Positive Investigation, #HO00389, which indicates that investigative work was undertaken at Appellant's firm from November 1, 2016 through February 7, 2017 and reflects that five investigative visits were made to Appellant's firm during which a store clerk sold common ineligible items (those normally seen in shopping baskets) in exchange for SNAP benefits in combination with eligible food items in a substantive ratio on three separate occasions, indicative of clearly violative activity. When the extent of violative activity was determined, the investigation was halted and a report issued and assigned to the ROD Office for consideration of administrative action.

APPELLANT'S CONTENTIONS

In its reply to the ROD Office's Charge Letter, and in its written request for review dated May 11, 2017, Appellant provided information in which it was argued that:

1. Appellant notes that there were heavy floods in the Lafayette, Louisiana area; Appellant received an email from FNS which Appellant understood to allow many previously ineligible items (such as toilet paper, paper towels, cleaning supplies, trash bags, anything to help with flood cleanup in homes) to be purchased/sold with SNAP benefits. The violations were unintentional.
2. Appellant refused to sell other ineligible items

3. All employees will be better trained, informed and more knowledgeable.
4. Appellant apologizes for the violations and assures future compliance.
5. Appellant requests another opportunity to participate in the SNAP.

ANALYSIS AND FINDINGS

In regard to contention 1 above, as the ROD Office notes in the record, in 2017 the agency issued notices indicating disaster SNAP provisions applying to SNAP recipients and also allowed hot food to be sold in exchange for SNAP benefits in certain affected counties only. Thus, the notice did not allow the sale of any non-foods in exchange for SNAP benefits and the hot-food exception did not apply to the county in which Appellant's store was located. The contention, therefore, cannot be accepted as compelling.

Appellant implies that mistakes made in handling transactions, as opposed to violations intentionally committed, may provide a compelling rationale to reduce or reverse the sanction imposed in the present case. Lack of intent to violate is contemplated by the regulations and reprinted above on page 2; as noted above, violations due to carelessness or poor supervision warrant a six-month disqualification or a hardship civil money penalty in lieu thereof, provided the firm is qualified for such alternate sanction.

Moreover, it is acknowledged that the agency issues warning letters for some cases involving violations; however, this is done in accordance with 7 CFR 278.6(e)(7), which states, "Send the firm a warning letter if violations are too limited to warrant a disqualification." As the violations in the present case (three clearly violative sales of ineligible items) exceeded the standard for warranting a warning letter only, the SNAP Office was afforded no latitude to issue a warning letter and, therefore, properly assigned a six-month disqualification.

Regarding contention 2 above, Appellant's refusals to commit violations, as noted in the investigative report, are duly acknowledged; such refusals tend to indicate that violations were not store practice. The record reflects that the ROD Office carefully weighed such factors in the present case; had the SNAP Office determined that violations were seen as store practice, a more severe sanction would have been imposed. It should be noted that a six-month disqualification is the least severe sanction allowed by regulation given the violations in this case.

With regard to contention 3 above, it is important to clarify for the record that there is no provision in the statute or regulations for waiver or reduction of an administrative penalty on the basis of corrective action implemented subsequent to findings of program violations. The purpose of this review is to determine if the earlier decision of the SNAP Office was proper and in compliance with pertinent laws and regulations. Accordingly, this review is limited to

considerations relevant at the time such decision was made. It is beyond the scope of this review to consider what subsequent remedial actions, such as changes in store management, procedures, internal controls, employee discipline/training or facility and/or inventory changes and improvements Appellant may propose to take or may have taken in order to comply with program requirements. Therefore, to the extent Appellant implies that it will, or has, implement(ed) corrective and/or remedial actions, though this would likely have been valuable in preventing program violations at an earlier time, such cannot now apply retroactively and does not provide a valid basis for dismissing the charges or for mitigating the serious impact of the violations upon which they are based. It is further added for the record that, although Appellant claims corrective action has been taken, it offers no documentary evidence of same. As such, the claim carries little weight, and as noted above, corrective action following findings of violations is not relevant in ROD Office sanction decisions.

In regard to contention 4 above, assurances that no further violations would occur if Appellant were allowed to remain on the program do not constitute valid grounds for dismissal of the charges or for mitigating the impact of the violations upon which they are based. **5 U.S.C. § 552 (b)(7)(E)**.

Regarding contention 5 above, there is no provision in the statute and/or regulations allowing/requiring a probationary period in lieu of a disqualification for program violations. Likewise, no provision exists for providing additional opportunities to participate in the SNAP due to assurances of future compliance. 7 CFR § 278.6(e)(5) states that FNS shall (emphasis added) disqualify a firm for six months, with the exception of a hardship civil money penalty (which will be discussed below), 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 and poor supervision by the firm's ownership or management. Such accurately describes the nature and extent of violations in the present case.

Lastly, the record reflects that the SNAP Office duly considered the firm's eligibility for a hardship civil money penalty and correctly found the firm ineligible. The ROD Office noted that, at the time of the sanction decision, there were three similarly or better- stocked stores within a one-mile radius. Agency information reflects that there are currently four other SNAP-authorized firms within a one-mile radius including one supermarket and two combination grocery/other stores. The regulations stipulate the conditions upon which this alternative penalty may be imposed in lieu of a disqualification: if a store is selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households because there is no other store in the area selling as large a variety of staple food items, a hardship civil money penalty is to be assessed. In the present case there is no indication that the disqualification would work a hardship upon SNAP customers due to the impending closure of a

nearby comparable firm, due to loss of access to ethnic foods or due to physical barriers or conditions that would make travel difficult or would restrict normal travel to comparable firms. It should be reiterated that hardship worked upon retailers is not a consideration in decisions to disqualify firms due to SNAP violations or in decisions to impose civil money penalties in the event disqualified firms are subsequently sold or the ownership thereof otherwise transferred; there are no provisions in the Act or the regulations allowing for hardship worked upon a firm, due to a disqualification, to warrant a civil money penalty.
5 U.S.C. § 552 (b)(7)(E).

CONCLUSION

In view of the above, the decision of the ROD Office to disqualify TJ's Market and Delifor a period of six months from participation in the SNAP is hereby sustained and will become effective upon the 30th day following your firm's receipt of this document. Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end 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 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 provisions of the Freedom of Information Act (FOIA), 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.

DANIEL S. LAY
Administrative Review Officer

December 9, 2017