

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

United Supermarket,

Appellant,

v.

Case Number: C0205247

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 finding that a six month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against United Supermarket by the Retailer Operations Division of FNS.

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 period of disqualification against United Supermarket on April 9, 2018.

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.

CASE CHRONOLOGY

The Department of Agriculture conducted an investigation of the compliance of United Supermarket with Federal SNAP law and regulations during the period February 14, 2018 through March 6, 2018. In a letter dated March 22, 2018, the Retailer Operations Division charged the Appellant with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three out of four compliance visits. The letter further informed the Appellant that

the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

In a written correspondence to the Retailer Operations Division dated April 2, 2018, the Appellant, through counsel, replied to the charges therein indicating that the violative SNAP transactions were committed by a newly hired part-time employee who was in training with the manager of the store at the time of the violations. The Appellant also requested that a civil money penalty (CMP) be imposed in lieu of a six month SNAP disqualification as a disqualification would pose a hardship on the store's SNAP customers as there is at least a full one mile radius before another grocery store exists that provides as many grocery goods at comparable prices as United Supermarket.

After considering the Appellant's reply and the evidence of this case, the Retailer Operations Division issued a Determination Letter dated April 9, 2018. The Determination Letter informed the Appellant that he 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 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 records reflects that in a letter dated April 10, 2018, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against United Supermarket pursuant to the Freedom of Information Act (FOIA). FNS provided a response to counsel's FOIA request, dated April 18, 2018, and received no further communication from the Appellant or counsel with regard to the agency's response.

In a letter postmarked April 19, 2018, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated May 3, 2018. 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, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulations 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, inter alia:

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, inter alia:

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, inter alia:

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, inter alia:

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(f)(1) states, inter alia:

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

During an investigation conducted from February 14, 2018 through March 6, 2018, USDA conducted four compliance visits at United Supermarket. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated March 22, 2018. The investigation report included Exhibits A through D which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during three of the four compliance visits and involved the sale of a variety of items best described in regulatory terms as "common nonfood items". The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the Appellant's April 2, 2018 and April 10, 2018 replies to the Charge Letter and in the review request postmarked April 19, 2018, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The violative SNAP transactions were committed by a newly hired part-time employee who was in training with the manager of the store at the time of the violations. The newly hired employee started working at United Supermarket on February 15, 2018. United Supermarket did not willfully or with malice abuse its use of the SNAP. Though the store employee was training under the supervision of the Appellant, it cannot be said that the manager was careless or provided poor supervision as stated in Section 278.6(e)(5) of the SNAP regulations. The manager did provide the employee with adequate training and it would be unreasonable for the manager to oversee every transaction.
- United Supermarket does not have any prior history of SNAP violations.
- To ensure that these types of SNAP violations do not occur in the future, the Appellant has terminated the employee responsible for the SNAP violations and he is working to put together a better system for the store clerks so that these types of mistakes do not occur again.
- The Appellant requests that FNS impose a civil money penalty in lieu of a six month SNAP disqualification as a disqualification would pose a hardship on the store's SNAP customers as there is at least a full one mile radius before another grocery store exists that provides as many grocery goods at comparable prices as United Supermarket.

ANALYSIS AND FINDINGS

SNAP Violations Were Inadvertent Mistakes

The Appellant contends that the violative SNAP transactions were committed by a newly hired part-time employee who was in training with the manager of the store at the time of the violations. The newly hired employee started working at United Supermarket on February 15, 2018. United Supermarket did not willfully or with malice abuse its use of the SNAP. Though the store employee was training under the supervision of the Appellant, it cannot be said that the manager was careless or provided poor supervision as stated in Section 278.6(e)(5) of the SNAP regulations. The manager did provide the employee with adequate training and it would be unreasonable for the manager to oversee every transaction.

The Appellant's contentions cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at United Supermarket. Regardless of whom the

ownership of a store may utilize to handle store business (i.e., regardless of whether a store owner, store manager, store clerk, friend, family member, etc. was involved in the violative transactions), ownership is accountable for the proper handling of SNAP benefit transactions. Prior to becoming authorized to participate in the SNAP on March 2, 2017, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store's employees---paid, unpaid, new, temporary, full-time, part-time, etc. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

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. In this case, the individual who committed the SNAP violations was not specifically identified during the investigation. A six month disqualification is the appropriate sanction for violations which result from employees not being fully aware of the SNAP rules, the carelessness of employees, or due to inadequate supervision by the store owner. As 7 CFR § 278.6(e)(5) of the SNAP regulations states, "Disqualify the firm for six months if ... the evidence shows that personnel of the firm have committed violations ... due to the carelessness or poor supervision by the firm's ownership or management". While the Appellant contends that the responsible store employee was training under the supervision of the Appellant and, therefore, it cannot be said that the manager was careless or provided poor supervision, as stated in Section 278.6(e)(5) of the SNAP regulations, a six month disqualification is the appropriate sanction for violations which result from employees not being fully aware of the SNAP rules, the carelessness of employees, or due to inadequate supervision by the store owner.

The Appellant's implied contention that the SNAP violations were committed by a newly hired part-time employee who was in training with the manager of the store at the time of the violations cannot be accepted as a valid basis for diminishing the penalty. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA.

First Time Violator

The Appellant contends that United Supermarket does not have any prior history of SNAP violations. However, 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 or for mitigating the impact of those charges.

Corrective Action Implemented

The Appellant contends that in order to ensure that these types of SNAP violations do not occur in the future, he has terminated the employee responsible for the SNAP violations and he is working to put together a better system for the store clerks so that these types of mistakes do not occur again. It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that he has taken corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

The Appellant requests that FNS impose a civil money penalty in lieu of a six month SNAP disqualification as a disqualification would pose a hardship on the store's SNAP customers as there is at least a full one mile radius before another grocery store exists that provides as many grocery goods at comparable prices as United Supermarket.

The Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty (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]. **5 U.S.C. § 552 (b)(7)(E)**

Based on the evidence, the disqualification of United Supermarket would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division's 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 therefore established that the violations as described in the letter of charges did in fact occur at United Supermarket 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 nonfood 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 United Supermarket, the Appellant firm, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six month period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this six month period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to 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, 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.

LORIE L. CONNEEN
Administrative Review Officer

July 19, 2018