

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

Win Asian Market,

Appellant,

v.

Case Number: C0209562

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, when it imposed a six-month disqualification against Win Asian Market.

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 Win Asian Market with Federal SNAP law and regulations in August 2018 and September 2018. In a letter dated September 28, 2018, 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 three (3) 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). The Appellant was informed it could respond to the charges within ten (10) calendar days following delivery of the charge letter. The charge letter was delivered to the store via UPS on October 1, 2018.

The Appellant, through counsel, responded to the charges in a letter dated October 8, 2018. Among other contentions, the Appellant admitted that the violations occurred but stated that they were too limited to warrant a disqualification and that a warning letter would be the appropriate action in this case.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated October 10, 2018. 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. The determination letter was delivered to the Appellant on October 11, 2018.

In a letter postmarked October 18, 2018, 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 ... and 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) states, in part:

FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ... (5) **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 August 2018 and September 2018, the USDA conducted five (5) compliance visits at Win Asian Market. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated September 28, 2018. 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 three (3) of the five (5) compliance visits as documented by Exhibits B, C and D. The chargeable violations involved the sale of five (5) ineligible non-food items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a). These ineligible items consisted of:

- Two (2) five-packs of Min Zhu wooden chop sticks

- Two (2) six-packs of nine-piece Incense Sticks
- A four-pack of Lux Aqua Sparkle soap 75g per bar

These violations were conducted by two different clerks. A third clerk refused to sell ineligible items for SNAP benefits in Exhibits A and E and also refused to exchange cash for SNAP benefits as documented in Exhibit E.

APPELLANT'S CONTENTIONS

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

- As documented by Exhibits A and E, an owner refused to exchange SNAP benefits for ineligible non-food items. Also, as documented by Exhibit E, an owner refused to exchange SNAP benefits for cash. This evidence demonstrates that the owner knows and obeys the SNAP rules. In light of those facts, if there have been minor violations at other times by store employees in the owners' absence it can be expected that a letter of warning would adequately serve the program's goal of full compliance in this establishment.
- The violations listed in Exhibits B, C and D are too limited to warrant a disqualification and the appropriate action would be a warning letter under 7 CFR § 278.6(e)(7). The dollar amounts are also very small.
- The store has undertaken to retrain its employees and they will scrupulously follow the SNAP rules concerning ineligible items and will come to the owner with any questions in the future.
- The Retailer Operations Division did not properly consider the factors under 7 CFR § 278.6(d) before implementing a six-month disqualification.
- The timing of the October 10, 2018 determination letter suggests that the Retailer Operations Division decision was less than carefully deliberated. It did not reference or provide analysis of the Appellant's request for a warning letter. Instead, the letter indicates that a hardship CMP was considered when no such request was made by the Appellant.

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 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 investigation report documents by a preponderance of the evidence that personnel at the store exchanged ineligible items for SNAP benefits.

Violations Warrant a Six-Month Disqualification

The SNAP regulation at 7 CFR § 278.6(e)(5) states, in part, that “FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ... **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.]

The Appellant states that the violations and dollar amounts are too limited to warrant a disqualification and the appropriate action would be a warning letter under 7 CFR § 278.6(e)(7). Regarding this contention, FNS considers the sale of three (3) or more inexpensive non-food items over one or more 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 five (5) inexpensive non-food items over three (3) transactions and therefore by FNS’s standards equate to carelessness or poor supervision by ownership.

Although the clerk (identified as an owner by the Appellant’s counsel) in Exhibits A and E refused to exchange SNAP benefits for ineligible items or cash, this does not ameliorate or mitigate the penalty for exchanging SNAP benefits for non-food items as documented by Exhibits B, C and D. Therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification.

Owner Responsibility

The Appellant states that the store owner(s) had no knowledge of the violations and did not approve of the violations. However, a store owner signed the SNAP authorization application for Win Asian Market on March 3, 2017 on behalf of all the owners. That application included a signed certification 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 as repayment on credit accounts or in exchange for ineligible non-food items.

Regardless of whom the owner of a store may utilize to handle store business, the owner is accountable for the training of staff and the monitoring and handling of SNAP benefit transactions. To allow store owners to disclaim accountability for the acts of persons whom the owners choose to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Corrective Action

The Appellant states that an owner has already undertaken to retrain store employees on the SNAP rules and regulations. Regarding this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time of the violations which form the basis of the Retailer Operations Division's action. It is not the authority of this review to consider what remedial actions may have been taken so that a store may begin to comply with program requirements.

In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations. Therefore, the Appellant's contention that corrective action will take place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Basis of Determination

The Appellant contends that Retailer Operations Division did not properly apply the three factors under 7 CFR § 278.6(d) before imposing a six- month disqualification on the firm. 7 CFR § 278.6(d) states, in part, that in making a disqualification determination FNS shall consider:

- (1) The nature and scope of the violations committed by personnel of the firm,
- (2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and
- (3) Any other evidence that shows the firm's intent to violate the regulations.

With regard to the nature and scope of the violations, the case record documents that the Retailer Operations Division did examine the number of chargeable violations in this case and properly determined that they consisted of five (5) inexpensive non-food items exchanged for SNAP benefits during three (3) out of five (5) transactions; therefore, the Retailer Operations Division correctly determined that the violations equated to carelessness or poor supervision by the firm's ownership or management and warranted a six-month disqualification.

Regarding prior warnings, 7 CFR § 278.6(d) simply requires FNS to consider any prior warnings when determining a sanction. However, 7 CFR §278.6(d) does not **require** the Retailer

Operations Division to give prior warnings or to show the firm's intent to violate when chargeable violations have been conducted. The Respondent only has to consider, when rendering a final determination, any prior warnings or intent to violate that might be evident.

Although the Appellant contends that the store owner and employees did not intend to violate any SNAP regulations, please note that the violation of exchanging ineligible items for SNAP benefits as described in the SNAP regulations at 7 CFR § 278.2(a) and 7 CFR § 278.6(e)(5) does not require an element of intent on the part of the violator. Therefore, whether or not the Appellant store owners or its employees intended to violate SNAP regulations or benefit from such violations is irrelevant in this case.

Hardship to Firm

The Appellant contends that a six-month disqualification will create a hardship for the store as it relies on the SNAP and will likely go out of business. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the owners personally or the firm resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Determination Letter

The Appellant states that the timing of the October 10, 2018 determination letter suggests that the Retailer Operations Division decision was less than carefully deliberated. Specifically, the letter did not reference or provide analysis of the Appellant's request for a warning letter. Instead, the letter states that a hardship CMP was considered when no such request was made by the Appellant.

It should be noted that the determination letter is a form letter and there is no requirement that the Retailer Operations Division provide its analysis of the store's reply to the charge letter to the Appellant. However, a review of the case record does reveal that the Retailer Operations Division did give full attention to the Appellant's contentions and properly analyzed those contentions before issuing the determination letter. Regarding the observation that the Appellant did not request a hardship CMP, the Retailer Operations Division is always required to analyze the Appellant store's eligibility for a hardship CMP in a less than permanent disqualification. This is done for the benefit of the local SNAP community to determine if the disqualification will be a hardship to the SNAP community.

HARDSHIP 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 Win Asian Market would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores in the area. The Retailer Operations Division determined there were nine (9) comparable or larger SNAP authorized stores located within a one-mile radius of Win Asian Market. These SNAP authorized stores included two supermarkets located .05 and .25 miles away. In addition, there were three (3) stores that sold a comparable quantity and variety of specialty Asian food located less than a mile away from Win Asian Market. Based on this evidence, a six-month disqualification of Win Asian Market 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 Win Asian Market 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 Win Asian Market, 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 26, 2019