

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

Zamzam Groceries & Halal Meat,

Appellant,

v.

Case Number: C0201032

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a six month disqualification against Zamzam Groceries & Halal Meat (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5 and 6), and § 278.6(f)(1) in its administration of the SNAP when it imposed a six month period of disqualification against Appellant on August 6, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period April 19, 2018, through May 30, 2018. The investigation determined that personnel at the Appellant firm accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. All three transactions were deemed clearly

violative and warrant a six month disqualification period. The items sold are best described in regulatory terms as common nonfood items and included items such as shampoo, bath soap, toothpaste, antiseptic, incense, a USB car charger, and an Essence stove. The investigative report indicates that these violative transactions were handled by the same clerk. The investigative report also notes that the firm refused to exchange SNAP benefits for cash on one occasion (Exhibit D).

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated June 29, 2018, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant responded to the charges in a letter dated July 5, 2018. After giving consideration to the evidence, the Retailer Operations Division notified Appellant by letter dated August 6, 2018, that it determined that violations had occurred at the firm, and that a six month period of disqualification from participating as an authorized firm in SNAP was warranted. This determination letter also states that Appellant’s eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

By letter dated August 10, 2018, Appellant appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. Subsequent correspondence dated September 9, 2018, was received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, Sections 278.6(a) and (e)(5) establish the authority upon which a six month disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 271.2 states that: 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 § 278.2(a) states that: Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. Further, the citation specifies that coupons may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states that: 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 that: a firm is to be disqualified for six 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 that: “FNS may impose a CMP 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. FNS may disqualify a store which meets the criteria for a CMP if the store had previously been assigned a sanction. A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- Some of the items mentioned (i.e. USB car charger, Essence stove, and shampoo) have never been offered for sale in the store;
- All of the violations occurred at a time when the owner was not present at the store and had a friend helping out. The friend had been trained on EBT sales last year and the owner assumed he understood EBT sales, but that clearly was not the case;
- The owner has trained all associated personnel who will be dealing with EBT sales and has also posted the guidelines for the use of EBT next to the cash register so these do not happen again. Moving forward, the owner and his staff will be very diligent regarding the use of EBT cards;
- This will be the first and last violations. The business is very small and cannot afford any hefty fines or penalties. The business depends on EBT sales and the owner would like to keep the privilege of offering EBT open to the local community;

- There are other grocery and Halal meat suppliers in the area selling similar food products, but it is critical that the business accept EBT because it sells specialty ethnic “hand slaughtered meat” serving South Asian and Middle Eastern communities. The nearest other store selling this type of hand slaughtered meat is about four miles away and very difficult for customers with no transportation to travel to; and,
- The owner’s honest mistake can affect these communities and he requests another opportunity to serve his local community by pardoning the disqualification period.

Appellant submitted no evidence or other rationales in support of these contentions.

ANALYSIS AND FINDINGS

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 within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, while the owner states he has trained all personnel who will be dealing with EBT sales and has posted the EBT guidelines next to the cash register are both positive steps, they do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed. While store ownership may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. Both the FNS SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application/reauthorization process. Store ownership did certify its understanding and agreement to abide by program rules and regulatory provisions when it initially applied to become a SNAP retailer. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time regardless of the amount of time the owners are present at the subject firm.

Appellant admits that the violations occurred and contends that the violations happened when the owner was not at the store and had a friend who had been trained on EBT sales last year helping out. The investigative report shows that one employee working at the Appellant firm during the period under review transacted SNAP benefits for ineligible items on three separate occasions indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The transactions from the investigative report, including the store EBT POS receipts, have been matched to SNAP transactions posted on the dates in question with no discrepancies and a review of the investigative report shows no errors or discrepancies. There was no indication of involvement by the firm’s ownership or management. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items

sold were obvious nonfood items and would not readily be confused with eligible edible food items. SNAP regulations state that FNS shall disqualify a store for a six month period 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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management. A record of participation in 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. It is more likely than not that the violative transactions were the direct result of poor or no supervision by store ownership and the lack of an effective training program.

It is highly improbable, based on the readiness of the store employee to exchange SNAP benefits for ineligible items, that the only instances of SNAP violations were the three identified as part of the FNS undercover investigation and more likely than not that this represented an ongoing pattern of SNAP violations at the Appellant firm. As previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight and training on the part of ownership to ensure employees, especially new employees, are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store ownership to not have a program of ongoing supervision of employee performance and conduct to ensure store employees were not stealing from the firm or conducting other activities that would jeopardize the licenses and income that the firm is dependent upon.

SNAP benefits, in general, are only authorized to be used for the purchase of foods for the household to eat as well as seeds and plants which produce food for the household to eat. The common nonfood items purchased during the investigation of the Appellant firm are clearly not edible foods and are not plants or seeds, so one has to question the level of training, if any, that store employees received by store ownership and/or management. The basic concept of "if you can't eat it, you can't buy it using SNAP" is not a difficult one for employees to grasp, yet a store employee allowed the purchase of multiple ineligible items using SNAP benefits on four separate occasions. Had an effective compliance policy and program been in effect at the firm, it is unlikely that this employee would have made such obvious mistakes. The more likely explanation is that store ownership failed to properly train and subsequently supervise store employees. Additionally, had store ownership been supervising store employees through occasionally monitoring them using videotape, if available, or in person, it would have readily noticed that employees were accepting SNAP benefits in exchange for ineligible nonfood items. It also would have been immediately evident to store ownership that store employees were deficient in their knowledge of SNAP rules and regulations had it periodically spot checked their knowledge and abilities by asking questions about SNAP eligible/ineligible items and how to correctly process transactions using a SNAP EBT card. Either of these basic supervisory techniques would have provided a no cost method for store ownership to ensure that store employees were not putting the store's SNAP license at risk. These are clear signs of poor or no supervision by store ownership and the lack of an effective training program.

Regarding Appellant's contention that some of the ineligible items purchased (USB car charger, Essence stove, and shampoo) were never offered for sale at the firm, a store visit was conducted at the Appellant firm on June 11, 2017, by a FNS contract reviewer. The store report for this visit includes a detailed report on the firm and its operations, an inventory of staple food items for

sale, and numerous photos of the firm's layout and inventory. A review of the photos from this visit documents that almost all of the ineligible items purchased during the undercover investigation were sold by the firm (antiseptic, shampoo, bath soap, incense, and Essence stoves) thereby clearly refuting Appellant's claim.

Based on this discussion, the decision by the Retailer Operations Division to disqualify the firm for a six month period is the appropriate penalty in this situation and there is not any valid basis for dismissing the charges or for mitigating the penalty imposed. The regulations do allow SNAP retailers to pay a hardship CMP under certain conditions as explained in the next section.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications.

A hardship CMP as an optional penalty in lieu of a six month disqualification was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and its disqualification would create a 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. FNS records show there are 16 other comparably sized or larger SNAP retail stores located within a 1.0 mile radius of the Appellant firm that includes three super stores, two supermarkets, as well as a similarly sized international market located in proximity to Appellant's location selling comparable ethnic/specialty foods. All of the comparable or larger stores stock adequate varieties of food in all four staple food categories and in perishables as required by FNS. The nearby comparable or larger stores appear readily accessible to SNAP recipients, since the area is serviced by mass transit, and offer a variety of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at other stores. It is recognized that some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience, however, does not rise to the level of hardship required by the regulations.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged and as admitted to by Appellant. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA special agent and signed under penalty of perjury. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail. Accordingly, the determination by the Retailer Operations Division to impose a disqualification of six months against the Appellant firm from participating

as an authorized retailer in SNAP is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. A new application for participation in SNAP may be submitted ten (10) days prior to the expiration of the six month disqualification period. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS retailer web site. Any questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

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.

ROBERT T. DEEGAN
Administrative Review Officer

January 30, 2019