

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

Xing Grocery Inc.)
)
Appellant,)
)
v.) Case Number: C0185668
)
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 of Xing Grocery Inc. (hereinafter Appellant), from participation as an authorized retailer in 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 in its administration of the SNAP, when it imposed a six-month disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations 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 Xing Grocery Inc. with Federal SNAP law and regulations from March 30, 2016, through April 7, 2016. In a letter dated April 22, 2016, Retailer Operations Division charged the Appellant firm with accepting SNAP benefits in exchange for merchandise which included major 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 violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

The Appellant replied to the charges in a letter dated May 1, 2016. The Appellant generally stated that there was an immediate family issue and family members were asked to help out during March and April. They were shown the basics of how to use the food stamp machine and briefly informed about transaction types. The information provided to them was misinterpreted as shown in Exhibits B through D. A lot has been learned from this and the store is more careful with transactions.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated July 22, 2016. 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 Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). 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.

In a letter dated July 26, 2016, and subsequent correspondence dated August 9, 2016, the Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal was accepted and the 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, 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 law in this matter is covered in the Food and 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 period of 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 food 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 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.”

APPELLANT’S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review request and in subsequent correspondence, in relevant part:

- As described in my appeal letter I will be training and explaining the approval acceptance of SNAP transactions. I have been conducting trainings for everyone that helps out at the store, whether full-time helpers or part-time helpers.
- My business relies on SNAP and I promise that the violations that took place will never happen again. Please reconsider this decision.

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

FNS initially authorized Xing Grocery Inc. as a small grocery store on February 5, 2014. During an investigation from March 30, 2016, through April 7, 2016, the USDA conducted five (5) compliance visits at Appellant’s store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated April 22, 2016. 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 committed during three (3) of the five (5) compliance visits and involved the sale of two 40 ounce bottles of Pantene Shampoo, and a 40 ounce bottle of Head & Shoulder shampoo and conditioner. Store personnel refused to exchange an undisclosed amount of cash for SNAP benefits during Exhibit E.

With regards to Appellant’s contentions, it is important to note that as owner of the store, Appellant is liable for all violative transactions handled by store personnel. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. 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 Stamp Act and the enforcement efforts of the USDA. Additionally, any remedial actions taken subsequent

to program violations do not provide a valid basis for dismissing the charges or for mitigating the impact of the penalty imposed. Therefore, the Appellant's contentions do not constitute valid ground for dismissal of the current charges of violations or for mitigating the impact of those charges.

CIVIL MONEY PENALTY

The Appellant, through counsel, requested reconsideration of the denial of a civil money penalty under the circumstances of the investigation. The Retailer Operations Division considered Appellant's eligibility for a hardship 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 at least 271 other authorized retail stores, within a one-mile radius of Appellant, including superstores, supermarkets, large grocery stores, medium grocery stores, small grocery stores and convenience stores, selling as large a variety of staple foods at comparable prices. There are also at least three or more authorized retailers selling ethnic and specialty foods comparable to Appellant's stock, in less than ½ mile of Appellant.

CONCLUSION

The documentation presented by Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm. 7 CFR § 278.6(e)(5) specifies that FNS shall "disqualify the firm 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.

The violations were determined by Retailer Operations Division to represent the first sanction for the firm and evidence carelessness and poor supervision. Therefore, the imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

It is therefore established that the violations as described in the letter of charges did in fact occur at the Appellant firm warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). Based on the discussion herein, the decision to impose a six-month disqualification against Xing Grocery Inc. 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 participation ten (10) days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If the USDA receives such a request, it will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

/S/

MONIQUE BROOKS
ADMINISTRATIVE REVIEW OFFICER

October 3, 2016
DATE