

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

99 Cent Plus Thrift Store,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0240674

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 Office of Retailer Operations and Compliance to impose a one-year disqualification against 99 Cent Plus Thrift Store (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(5) in its administration of SNAP when it imposed a one-year period of disqualification against Appellant on May 5, 2021.

AUTHORITY

According to 7 U.S.C. § 2023 and its 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 investigated of Appellant’s compliance with federal SNAP law and regulations during the period of January 20, 2021, through February 4, 2021. The investigation reported that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. These items sold during these impermissible transactions are best described in regulatory terms as “common ineligible nonfood items.” The investigation revealed that one unidentified clerk was involved in the impermissible transactions. As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed

Appellant, in a letter dated March 8, 2013, 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)). Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Although afforded the opportunity to do so, Appellant did not reply to the Office of Retailer Operations and Compliance’s charges.

The Office of Retailer Operations and Compliance notified Appellant in a letter dated May 5, 2021, that the firm was being disqualified for one year from participation as an authorized retailer in SNAP. This determination letter also stated that Appellant’s eligibility for a hardship civil money penalty (CMP) according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated to Appellant that “. . . 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.”

On May 10, 2021, Appellant appealed the Office of Retailer Operations and Compliance’s decision to impose a one-year disqualification and requested an administrative review of the action. The appeal was granted, and implementation of the sanction has been on hold pending completion of this review.

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, 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 Part 278. 7 CFR § 278.6(a) and (e) (5 and 6) establish the authority upon which a one-year disqualification may be imposed against a retail food store or wholesale food concern.

Section 278.6(e) (5 and 6) of the SNAP regulations states, in part, when a firm is to be disqualified for one year:

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.(6) 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.

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 based on 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 . . .

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- FNS should consider Section 278.6(d) in deciding.
- Appellant meets the requirements for a trafficking civil money penalty. Appellant described its compliance policy and training program.
- Appellant hires employees who have experienced hardship, and regularly trains its employees.
- Appellant terminated the employee involved in the non-food transactions.
- Appellant is installing a new POS device to avoid future problems with SNAP transactions.
- Disqualification would pose a hardship to SNAP participants who rely on the firm. Appellant offers lower prices than nearby SNAP-authorized stores.

In support of its contention, Appellant provided the following documents:

- A letter signed by the owner.
- Four letters concerning training documents signed by employees.
- ~23 pages of store pictures.
- Two documents regarding the POS system purchase.
- Five pages of documents supporting Appellant signed by customers; and,
- A letter of support from a nearby low-income housing community.

These explanations may represent only a summary of Appellant's contentions.

These explanations may represent only a summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant contends it meets the requirements for a trafficking civil money penalty. Appellant was not charged with trafficking. Accordingly, this contention is not relevant to the charges in this case.

Appellant the owner hires employees who have experienced hardship and regularly trains its employees. While Appellant's hiring program may be laudable, when ownership signed the FNS

application to become a SNAP authorized retailer, this included a certification and confirmation that Appellant 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 document include selling ineligible non-food items. Regardless of whom the ownership of a store may use to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions.

This review is limited to considering the circumstances at the time the Office of Retailer Operations and Compliance’s decision was made. It is not within this review’s scope to consider actions that Appellant may have taken after this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty based on corrective actions implemented after investigative findings of program violations. Therefore, Appellant’s termination of the offending employee and installation of a new POS system, while positive steps, do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

The investigation report shows that of the four times that nonfood violations were attempted, store personnel permitted them three times. Repeatedly entrusting an unsupervised, inexperienced and/or untrained clerk(s) to handle SNAP benefits is reasonably viewed as careless or the exercise of poor supervision. Accordingly, the Office of Retailer Operations and Compliance attributed violations to “carelessness, or poor supervision by the firm’s ownership or management,” pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations, which results in a disqualification of six months. This penalty is only permitted if the firm has not been previously sanctioned. This is consistent with Appellant’s contention that it committed violations in error. As the firm had been previously subjected to a six-month disqualification, pursuant to 7 CFR § 278.6(e)(6) of the SNAP regulations this period is doubled. Therefore, a one-year disqualification for the violations committed, the minimum, is the appropriate sanction in this case.

Proper Reading of Regulations

Appellant asserted that FNS must consider 7 CFR § 278.6(d) before imposing a sanction: the nature and scope of the violations; whether the firm was warned violations were occurring; and any evidence of intent to violate the regulations. This argument is based on an incorrect understanding of the regulations. The severity of the penalties, set forth in the subsequent paragraph 7 CFR § 278.6(e), are based on the factors listed in 7 CFR § 278.6(d). For example, permitting the sale of cigarettes with SNAP benefits results in a three-year disqualification, but this becomes five years if the firm had been previously warned. Other sanctions consider intent, such as whether false information on an application was “knowingly submitted” or whether the sale of nonfood items was “the firm’s practice” (which carries a three-year disqualification) rather than “due to carelessness or poor supervision” (which results in a six-month disqualification for the first offense).

Investigative Record

Based on a review of the evidence, it appears that the program violations at issue did, in fact, occur as charged. 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 under the supervision of a USDA investigator and all are fully documented. The investigative record is specific and accurate regarding the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail.

CIVIL MONEY PENALTY

A CMP as an optional penalty in lieu of a one-year disqualification was considered in this case. Such a finding is appropriate only if: 1) a store sells a substantial variety of staple food items, and 2) 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.

In this regard, some degree of inconvenience to SNAP benefit users is inherent in the disqualification from the SNAP of any participating food store, since the normal shopping pattern of such SNAP benefit holders may temporarily be altered during that period. In this case, however, the Office of Retailer Operations and Compliance has rendered a finding pursuant to 7 CFR § 278.6(f) that it would not be appropriate to impose a CMP in lieu of a period of disqualification. The Office of Retailer Operations and Compliance has determined that Appellant is not the only authorized retail food store in the area "selling as large a variety of staple food items at comparable prices." In addition, the Office of Retailer Operations and Compliance notes that the subject store is classified in the FNS SNAP retailer database as a convenience store. That database also shows one medium grocery store and two superstores located within a one-mile radius. All these stores are easily accessible to customers and offer a variety and quality 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. Therefore, the earlier determination that Appellant's disqualification would not create a hardship to customers, as differentiated from potential inconvenience, is sustained, and a CMP in lieu of disqualification is not appropriate in this case.

CONCLUSION

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a disqualification of one year against 99 Cent Plus Thrift Store from participating as an authorized retailer in SNAP is sustained.

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 one-year 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 Appellant desires a judicial review, 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.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

July 27, 2021