

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

**Cliff's Liquor,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0249759**

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**FINAL AGENCY DECISION**

It is the decision of the United States Department of Agriculture (USDA) that there is sufficient evidence to support a finding that a six-month disqualification of Cliff's Liquor (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

**ISSUE**

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

**AUTHORITY**

7 USC § 2023 and the 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 USDA investigated the compliance of Appellant with federal SNAP law and regulations during the period of November 5, 2021, through November 17, 2021. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. As a result of evidence compiled during this investigation, by letter dated December 21, 2021, the Retailer Operations Division charged ownership with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a) and noted the violations warranted a six-month disqualification period. The letter also stated that

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under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification. The Retailer Operations Division did not receive a reply from Appellant regarding the charges.

After considering the evidence, the Retailer Operations Division notified Appellant in a letter dated January 13, 2022, that the violations cited in the charge letter occurred at the firm and that a six-month period of disqualification was warranted. The letter stated that eligibility for a hardship CMP was not applicable as there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

By letter dated January 18, 2022, Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal was granted and implementation of the disqualification has been 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, 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). 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 § 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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system . . .

Section 278.6(e)(5) of the SNAP regulations states, in part, that a firm is to be disqualified for six months:

[I]f 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.

In addition, 7 CFR § 278.6(f)(1) provides for civil money penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause "hardship" to SNAP households

benefit because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It reads:

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 benefit because there is no other authorized retail food store in the area selling as large a variety of staple food items.

### **SUMMARY OF CHARGES**

During an investigation conducted between November 5, 2021, through November 17, 2021, an investigator conducted four compliance visits at Appellant. A report of the investigation dated November 25, 2021, was provided to Appellant as an attachment to the charge letter. 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 compliance visits and involved the sale of foam bowls, plastic plates, and plastic cups. Upon review, the evidence indicates that Appellant established a record of selling non-food items, as defined by Section 271.2 of the regulations, on multiple occasions as noted in Exhibits A, B, and C, furnished with the charge letter.

### **APPELLANT'S CONTENTIONS**

In its January 18, 2022, administrative review request, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- The administrative action should be stayed pending the FOIA request.
- Appellant's reply to the charges was never received by the Retailer Operations Division.
- The owners deny each of the allegations of misconduct.
- The owners did not have any knowledge or evidence to indicate to them that any such alleged transactions occurred.
- The clerk initially refused to sell non-food items to the undercover operative.
- The undercover operative alleges that he convinced the clerk to allegedly engage in a transgression
- The pattern of investigation discloses government misconduct rising to the level of entrapment.
- Counsel references several court cases in support of its contentions.
- A liability may not lawfully imposed upon an employer for the misconduct of an employee when the employer has taken all reasonable precautions to prevent such.
- The record demonstrates that the owners have engaged in substantial, preventative processes pertaining to SNAP violations.
- Owners are not so liable unless there is clear and convincing proof that some act or omission by them proximately caused or contributed to the misconduct.
- Appellant requests a CMP in lieu of a term disqualification.
- During the first two weeks of employment, every employee was personally supervised at some time during every employment shift or period by one of the owners.
- The purpose of the supervision was to ensure compliance with all SNAP regulations.

- Owners maintained a video surveillance system so that employees knew that the owners were watching.
- The owners made unannounced visits to the store to monitor.
- The owners were not present during the transactions.
- All employees have been continuously advised that any violations of the SNAP regulations would result in termination of employment.
- The employee involved in the committing the alleged transgressions has an unblemished record as a store clerk dealing with SNAP.

In support of its contentions, counsel provided a copy of its initial reply to the charges that was never received by the Retailer Operations Division.

The preceding may represent only a summary of the Appellant's contentions presented 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.

## **ANALYSIS AND FINDINGS**

The investigation report documents that the charges of violations are based on the findings of a formal investigation. The transactions cited in the letter of charges are thoroughly documented. A complete review of this documentation has yielded no error or discrepancy. The investigation report is specific and thorough regarding the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The documentation presented by the Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm.

Counsel reports that the employee refused to sell the ineligible items to the investigator, but the investigator convinced the employee to complete the violative transactions. The report is well detailed and as written the employee refused the fourth transaction but willing sold the ineligible items on the first three visits. The evidence does not support that the employee refused the transactions and then was convinced to sell the ineligible items by the investigator.

The Retailer Operations Division determined that the violations committed by Appellant represent the first sanction for the firm and evidence carelessness or poor supervision. 7 CFR §278.6(e)(5) states that FNS shall disqualify a 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 and poor supervision by the firm's ownership or management. The imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

### **Entrapment**

During an undercover investigation, some level of deception is required on the part of the investigator. Specifically, it is his or her job to behave like a SNAP recipient who is inclined to commit program violations. In this case, the investigator merely provided an opportunity for a suspected violator to exchange ineligible items for SNAP benefits, and the store clerk readily

agreed. Such conduct on the part of the investigator does not constitute entrapment. As best as can be determined, the clerk involved in the trafficking violations was a willing participant. There is no evidence to support that the investigator entrapped the clerk or fabricated the violations as implied by the Appellant.

### **Ownership Involvement**

Appellant, through counsel, contends that a liability may not lawfully imposed upon an employer for the misconduct of an employee when the employer has taken all reasonable precautions to prevent such. Appellant further explains that the owners were not present when the violations occurred, and they also had no knowledge of any violations.

Regardless of whom the ownership of a store may utilize to handle store business, the ownership is accountable for the proper training of staff and the monitoring and 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 and Nutrition Act of 2008 and the enforcement efforts of the USDA. Ownership signed the FNS reauthorization application for SNAP retailers on February 17, 2004, and subsequent applications for re-authorization which included a certification and confirmation that the owner 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 for cash and as payment for ineligible items, a violation of the SNAP rules and regulations. 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.

### **No Previous Violations**

Counsel reports that the store employee that committed the violations has no previously documented instance of violations. However, this does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

### **FOIA Regulations**

Appellant contends that the failure to hold the case in abatement pending a FOIA response is a violation of 7 CFR § 278.6(b)(1). A final rule published on August 26, 2020, amended SNAP regulations to ensure that the FOIA process could no longer be used to delay administrative actions to sanction a retail food store for SNAP violations. The final rule added paragraph (p) to 7 CFR Section 278.6. Under this rule, FNS processes FOIA requests and FOIA appeals separately from administrative actions against SNAP retailers. Therefore, a FOIA request or appeal for records, does not delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm.

## **Case Law**

Appellant cites some case law which it claims supports its contentions. It should be noted that considerations of legal precedent through case law is beyond the scope of this review. Instead, this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any application of a supposed judicial precedent would best be addressed in a judicial review in a court of law.

## **Civil Money Penalty**

Counsel contends that the owns trainer their employees and conduct monitoring transactions by way of a video camera and unannounced store visit. It appears that counsel is trying to establish eligibility for trafficking CMP as described at 7 CFR 278.6(i). Retailers that are charged with trafficking can request a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i). This regulation allows for a CMP in lieu of permanent disqualification when retailers that had established and implemented an effective compliance policy and program to prevent violations of the SNAP which was in effect at the time of the violations. In such cases, retailers must submit evidence to demonstrate that the firm had established and implemented an effective compliance policy to prevent SNAP violations prior to the violations. However, since Appellant was not charged with trafficking, a trafficking CMP is not applicable.

Appellant, through counsel, requests a CMP in lieu of the six-month disqualification. 7 CFR § 278.6(f)(1) reads, in part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification when . . . the firm’s disqualification would case 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 Retailer Operations Division determined that there are 14 other authorized firms located within a one-mile radius of Appellant. Thus, in its letter dated January 13, 2022, the Retailer Operations Division determined that a hardship CMP would not be appropriate, as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices. Some degree of inconvenience to SNAP customers is inherent whenever any SNAP authorized retailer is disqualified. For example, the normal shopping pattern of SNAP customers may be temporarily altered during the period of disqualification. The determination of the Retailer Operations Division that the six-month disqualification of Appellant from the SNAP would not create a hardship to customers, as differentiated from potential inconvenience, is sustained and a civil money penalty in lieu of disqualification is not appropriate in this case.

## **CONCLUSION**

The determination by the Retailer Operations Division to impose a six-month disqualification against Cliff’s Liquor from participating as an authorized retailer in SNAP is sustained. In accordance with the Food and Nutrition Act, and the regulations, this penalty shall become effective 30 days after receipt of this letter. A new application for participation in SNAP may be submitted ten days prior to the expiration of the six-month disqualification period.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7CFR § 279.7. 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 the Appellant's owners 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 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.

MARY KATE KARAGIORGOS  
Administrative Review Officer

June 2, 2022