

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

**East Point Venture 92, LLC
Appellant,**

V.

**Retailer Operations Division,
Respondent.**

Case Number: C0239867

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 East Point Venture 92, LLC (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 the 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 East Point Venture 92, LLC, with Federal SNAP law and regulations from December 23, 2020, through January 13, 2021. In a letter dated April 22, 2021, Retailer Operations Division charged the Appellant firm with accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on four (4) out of six (6) 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).

In email correspondence dated April 30, 2021, Appellant through counsel, responded to the charge letter and generally stated that my clients contest the Department's allegations as set forth in the charge letter, but have been unable to compile their evidence in response. Counsel requested an extension of time in which to send an additional response to the charge letter. In email correspondence dated June 2, 2021, Appellant, through counsel, responded to the charge letter and generally stated that deprivation of Freedom of Information Act (FOIA) is a violation of the regulations. Counsel stated that Appellant had no opportunity to evaluate and respond to all the information considered by FNS. Counsel submitted information regarding the store's history, demographics and habits of SNAP households, local business environment, hardship implications for different communities and quoted various administrative and judicial case law.

After reviewing the evidence of the case and the Appellant's response, through counsel, Retailer Operations Division issued a determination letter dated August 12, 2021. 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 August 16, 2021, Appellant, through counsel, 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 statute in this matter is contained 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 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 1977, 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, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

1. After careful review of the Department’s allegations set forth in the Charge Letter, and a review of the pertinent case law on this issue, the Department lacked sufficient evidence upon which to base a six (6) month disqualification of the Appellants.
2. Appellants vehemently denied that violations had occurred at the Store – a position substantiated by the Investigator’s notes.
3. The Department has neither audio nor video recordings that these transactions occurred as described, despite having the ability to do so, nor does the Department have any other witnesses.
4. Even if the allegations were accurate then the store’s violations warrant a warning letter rather than a six-month disqualification.
5. There is no evidence whatsoever in the record that the alleged sales of common nonfood items were due to carelessness or poor supervision by the store’s ownership or management.
6. Appellants would ask that a warning letter be issued in lieu of a six (6) month disqualification.
7. Given the circumstances, the evidence indicates that the surrounding stores fit the description found in the regulation: worse inventory, higher prices. Therefore, a hardship civil money penalty should be issued instead of a disqualification.

A copy of the 2018 Profile of SNAP Households in Georgia Congressional District 5 was provided in support of its position. 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 East Point Venture 92, LLC as a convenience store on March 13, 2018. During an investigation from December 23, 2020, through January 13, 2021, the USDA conducted six (6) 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, 2021. The investigation report included Exhibits A through F, which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during four (4) of the six (6) compliance visits. They involved the sale of two (2) rolls of POM toilet paper, one (1) bottle of Tide detergent, one (1) package of foam bowls, one (1) Hookah Pipe, one (1) box of Tide detergent, one (1) bottle of dish liquid, one (1) container of shaving cream, one (1) black phone cable, two (2) bottles of Flash Point wine, and one (1) box of plastic cutlery. No items were refused during this investigation. Clerks charged double for the non-food items purchased in Exhibit C.

With regard to Appellant's contentions, through counsel, it is important to note that as owner of the store, Appellant is liable for all volatile transactions handled by either paid or unpaid 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.

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contentions, through counsel, do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Furthermore, it is important to clarify for the record that the purpose of this review is to determine if the earlier decision of the Retailer Operations Division, to disqualify Appellant from participation in the SNAP for a period of six months, was in fact a correct one. It is not within the scope of this review to consider what subsequent actions Appellant may have taken so that its store may begin to comply with program requirements.

It is important to note that 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. There is no provision in the Act, regulations, or agency policy that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

Based on a review of the evidence in this case, there is no question that program violations did occur. Clerks working at Appellant sold common ineligible items to an FNS investigator on four (4) separate investigative visits. The investigative record also documents that the clerks in Exhibit C, charged the investigator double for the purchase of the non-food items during that particular visit. Additionally, the female clerk from Exhibit A, maintained control of the investigator's EBT card and pin number for the purpose of utilizing the SNAP benefits on the card in an agreed amount of \$50. The record reflects that the SNAP benefits were never utilized, and the card was returned to the investigator a couple weeks later.

The investigative record is specific and accurate with regard to the dates of the violations, the exchange of SNAP benefits for ineligible items, and in all other critically pertinent detail. The cost of the ineligible items purchased with SNAP benefits does not determine if the purchase is a violation. The purchase of any ineligible items, regardless of cost, is considered a SNAP violation. As such, the contentions presented do not constitute valid grounds for dismissal of the current charges of violations, or for mitigating the impact of those charges. The record also reflects that there are photographs of the purchased items as well as documented records of donations of those purchased items. Based on a review of the evidence in this case, it appears that the SNAP violations at issue did, occur as charged.

CIVIL MONEY PENALTY

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 10 authorized retailers within a one-mile radius of Appellant including two (2) superstores and eight (8) additional convenience and/or combination other stores, and all are selling as large a variety of staple foods at comparable prices.

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 East Point Venture 92, LLC 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, as amended, (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), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

May 23, 2022