

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

Exxon Gas Station,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0245791

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination by the Retailer Operations Division to impose a six-month disqualification of Exxon Gas Station (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). However, the determination is modified to permit a civil money penalty (CMP) in the amount of \$3,492.00 as an option in lieu of the six-month disqualification.

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, when it imposed a six-month disqualification against Exxon Gas Station.

AUTHORITY

7 U.S.C. § 2023 and 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

Exxon Gas Station was initially authorized to participate in SNAP on February 2, 2009. Between October 16, 2021, and November 1, 2021, the USDA conducted an undercover investigation of Exxon Gas Station to ascertain the firm’s compliance with Federal SNAP law. Agency records show that during the investigation Appellant violated SNAP regulations by accepting SNAP benefits in exchange for ineligible non-food items on three separate occasions.

In a letter dated December 13, 2021, the Retailer Operations Division charged Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise, in violation of 7 CFR § 278.2(a). The charge letter informed Appellant that the violations warranted a six-month disqualification period from SNAP, as provided in 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions, and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

Appellant responded to the charge letter on December 20, 2021. In the response, Appellant acknowledged that the store's employees had made some mistakes but said immediate action had been taken to resolve the issue, including issuing written notices to the employees who had committed the violations, posting signage at the cash register, and implementing of strict rules for employees.

After considering the Appellant's response and further evaluating the evidence, the Retailer Operations Division issued a determination letter, dated January 21, 2022. This letter informed the Appellant that the Retailer Operations Division found that the violations did occur as outlined in the charge letter and that a six-month disqualification would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that Appellant was considered for a hardship CMP but was ineligible because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

On January 30, 2022, Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the six-month disqualification has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, the appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. This 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 law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and is promulgated through regulation under Title 7 CFR Part 278. Specifically, 7 CFR § 278.6(a) and (e) establish the authority upon which a six-month disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

7 CFR § 271.2 states, in part:

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 § 278.6(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 on the basis of evidence that may include facts established through on-site investigations....

Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.[Emphasis added.]

7 CFR § 278.6(e) states, in part:

FNS shall take action as follows against any firm determined to have violated the Act or regulations...

(5) 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, in part:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm subject to a disqualification is selling a substantial variety of staple food items, and 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.

7 CFR § 284.1 Pandemic Electronic Benefits Transfer (P-EBT) states in part:

(a) Overview. Section 1101 of the Families First Coronavirus Response Act (FFCRA; Pub. L. 116-127), as amended, authorized supplemental allotments to certain households. These benefits shall be referred to as Pandemic Electronic Benefits Transfer (P-EBT) benefits. This section establishes the retailer integrity regulations for P-EBT for retailers in any State as defined in Section 3(r) of the Food and Nutrition Act.

(b) Definitions. For this section:

(1) Trafficking means the activities described in the definition of trafficking at § 271.2 of this chapter when such activities involve P-EBT benefits.

(2) Firm's practice means the activities described in the definition of firm's practice at § 271.2 of this chapter when such activities involve P-EBT benefits.

(3) Involving P-EBT benefits or involve P-EBT benefits means activities involving PEBT benefits as well as supplemental nutrition assistance program (SNAP) benefits, or only P-EBT benefits.

(c) Participation of retail food stores and wholesale food concerns, and redemption of PEBT benefits. Requirements and restrictions on the participation of retail food stores and wholesale food concerns and the redemption of coupons described at §§ 278.2, 278.3 and 278.4 of this chapter, including the acceptance of coupons for eligible food at authorized firms, also apply to activities involving P-EBT benefits....

(e) Penalties. For firms that commit certain violations described at §§ 278.6 and 278.2 of this chapter where such violations involve P-EBT benefits, FNS shall take the corresponding action prescribed at § 278.6 or § 278.2 for that violation. For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. Specifically, FNS shall: (7) Disqualify the firm for ineligibles violations for such circumstances and corresponding time periods as described at § 278.6(e)(2)(i), (e)(3)(i), (e)(4)(i), and (e)(5) of this chapter, where such violations involve P-EBT benefits....

(g) Administrative and Judicial review. Firms aggrieved by administrative action under paragraphs (d), (e), and (f) of this section may request administrative review of the administrative action with FNS in accordance with part 279, subpart A, of this chapter. Firms aggrieved by the determination of such an administrative review may seek judicial review of the determination under 5 U.S.C. 702 through 706.

SUMMARY OF INVESTIGATION

During an undercover investigation conducted between October 16, 2021, and November 1, 2021, FNS completed five compliance visits at Exxon Gas Station. A report of the investigation was provided to Appellant as an attachment to the charge letter, dated December 13, 2021. The report included Exhibits A through E and provided full details on the results of each compliance visit. SNAP violations documented during three of the five visits included the exchange of ineligible non-food merchandise for SNAP benefits. Three different clerks committed the violations. The report noted that the following ineligible non-food items were sold in exchange

for SNAP benefits: boxes of sandwich bags, boxes of plastic cutlery, and packages of paper bowls, .

The report noted that an investigator attempted to exchange SNAP benefits for ineligible non-food merchandise on two other occasions, but both times, the attempts were refused by the clerks on duty. Likewise, the investigator attempted to exchange SNAP benefits for cash on one occasion but was also refused. These refusals are documented in Exhibits B and E. The charge letter states that the violations that occurred in Exhibits A, C, and D warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

Appellant's contentions regarding this matter are summarized as follows:

- The past couple of years have been extremely difficult to hire and maintain staff at our location. We are constantly hiring and training new employees. We have struggled to get the constant turnover of new employees to completely understand the importance of strict adherence to the program guidelines.
- We have learned that we could upgrade our point-of-sale software and program so it can control which items are paid for with an EBT card. We have installed and setup the new software to eliminate our ongoing problem with new employees. We feel this is the ultimate solution to our problem.
- We acknowledge and regret our firm as made mistakes under the program and respectfully request that an official warning letter be issued in lieu of disqualification, as allowed under Section 279.5(c) of SNAP regulations.

Appellant provided no additional evidence in support of its contentions on administrative review.

The preceding may represent only a summary of Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or referenced herein.

ANALYSIS AND FINDINGS

If a store has never been sanctioned and its personnel, due to carelessness or poor supervision, sells common nonfood items for SNAP benefits, then the penalty under SNAP regulations is a six-month disqualification of the store's SNAP authorization.

This review examines the relevant information regarding the Retailer Operation Division's determination. Once the Retailer Operations Division establishes a violation occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that the disqualification should be reversed. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

In this case, the report of investigation, signed by the investigator under penalty of perjury, documents that the charges of violations are based on the findings of a formal USDA investigation. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough regarding the dates of the violations, the critical facts related thereto, and is supported by documentation that confirms details of the transactions. The Retailer Operations Division has thoroughly documented the transactions in which personnel at the store exchanged ineligible items for SNAP benefits.

In response to the charge letter and on administrative review, Appellant did not offer any evidence or alternative theories to counter the agency's investigative report. In fact, Appellant, concedes that the violations occurred and reports that corrective actions have been taken as a result. Because the violations themselves do not appear to be in dispute, this review finds, by a preponderance of the evidence, that program violations did occur as charged by the Retailer Operations Division and a six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Violations by New Employees

Appellant contends that the violations were mistakes made by new employees and described the difficulty in hiring, maintaining, and training staff in the past couple of years. Appellant has struggled to get the constant turnover of new employees to completely understand the importance of strict adherence to the program guidelines.

Under SNAP regulations, 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 December 1, 2019, 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. 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.

Applicable Penalty

Appellant requests a warning letter in lieu of disqualification. However, SNAP regulations, at 7 CFR § 278.6(e), specifically provide that a six-month disqualification is the applicable penalty for the first sanction of a firm when evidence shows that store personnel have committed violations such as the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management. SNAP regulations do not require any threshold be met for the six-month disqualification to apply. This is the minimum penalty in this circumstance, and

accounts for the elements of 7 CFR § 278.6(d). Accordingly, the sanction imposed by the Retailer Operations Division in this case fully conforms to SNAP regulations and is consistent with sanctions imposed upon other stores that have committed similar first-time violations.

Remedial Actions Taken

Appellant provides that to combat the problem of training new employees on SNAP transactions, the store has acquired new point-of-sale software that can distinguish the items that are allowed for purchase with SNAP benefits. Appellant feels this is the ultimate solution to the problem.

It should be noted that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken, or that will take place, so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty based on alleged or planned corrective actions implemented after findings of program violations.

Therefore, the Appellant's contention that corrective action has taken place does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

Hardship Civil Money Penalty (CMP)

A review of the Retailer Operations Division's case file found insufficient evidence to support the denial of a CMP. Therefore, a CMP in the amount of \$3,492.00 is assessed as an option in lieu of the six-month disqualification.

CONCLUSION

This review finds, by a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at Exxon Gas Station. during a USDA investigation. However, the Retailer Operations Division's determination to impose a six-month disqualification period is modified to provide the option of a CMP in lieu of disqualification, in accordance with 7 CFR § 278.6(f). In accordance with 7 CFR § 278.6(g), this CMP shall be assessed in the amount of \$3,492.00. The Retailer Operations Division will be informed of this decision. Appellant may expect to hear from that office in the near future with respect to the arrangements for payment of this CMP.

In accordance with the Food and Nutrition Act and SNAP regulations, this penalty shall become effective 30 days after receipt of this decision. Should Appellant choose to accept disqualification rather than pay the CMP, Appellant may submit a new application for SNAP authorization 10 days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this determination are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in SNAP regulations, at 7 CFR § 279.7. If

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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a Complaint is filed, it must be filed within 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.

MICHELLE WATERS
Administrative Review Officer

September 30, 2022