

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

Isaly's,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0245918

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 finding that a six month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Isaly's (hereinafter "Isaly's" or "Appellant") by the Retailer Operations Division of FNS.

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 period of disqualification against Isaly's.

AUTHORITY

7 U.S.C. § 2023 and its 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 Department of Agriculture conducted an investigation of the compliance of Isaly's with Federal SNAP law and regulations during the period July 27, 2021 through August 18, 2021. In a letter dated December 7, 2021, the Retailer Operations Division charged the Appellant with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three out of five 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 letter also stated

that under certain conditions, FNS may impose a hardship civil money penalty (CMP) in lieu of a disqualification as provided in 7 CFR § 278.6(f)(1).

The charge letter noted that per SNAP regulations Section 278.6(b), the Appellant has the right to present any information, explanation or evidence regarding the charges and must reply within 10 calendar days of the date of receipt of the charge letter. Per UPS confirmation, the charge letter was delivered to the Appellant at the store address of record on December 10, 2021.

In a response to the Retailer Operations Division of December 16, 2021, the Appellant replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After giving consideration to the Appellant's response and the evidence of this case, the Retailer Operations Division issued a determination letter dated February 23, 2022. The determination letter informed the Appellant that the firm 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 the Retailer Operations Division considered the Appellant's eligibility for a hardship civil money penalty 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 other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked March 4, 2022, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated March 15, 2022. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this review. In an email response of April 5, 2022, the Appellant, through counsel, submitted additional information in support of the request for administrative 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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulations under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e) establish the authority upon which a 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 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, 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 disqualification 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.

SUMMARY OF THE CHARGES

During an investigation conducted from July 27, 2021 through August 18, 2021, USDA conducted five compliance visits at Isaly's. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated December 7, 2021. 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 recorded during three of the five compliance visits and involved the sale of a variety of items best described in regulatory terms as "common nonfood items". The misuse of SNAP benefits noted in Exhibits B, C, and D warrant a disqualification as a SNAP retail food store for a period of six months. The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the reply to the charge letter, in the administrative review request, and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The owner was caught by surprise upon receiving the charge letter because he has never done anything intentionally to violate the SNAP regulations.
- The owner apologizes for the violations that took place.
- The Appellant was charged with accepting SNAP benefits in exchange for sponges and basic household cleaning items, amongst the most common type of ineligible goods and often referred to as "food-adjacent" ineligible products. Common ineligible items, as in the instant matter, typically consist of paper products, cooking supplies, or household products.
- This case involves the sale of extremely low-value ineligible items.
- The sale of common ineligible items is the least egregious violation that is issued by FNS.
- This is an isolated incident as the Appellant has never been cited for prior SNAP violations.
- Any alleged violation of the SNAP regulations was not due to carelessness or poor supervision by ownership and management.
- Ownership/management tries to and does exercise the most amount of supervision that is reasonably possible. To wit, one or more of the owner, his son, or daughter are almost always at the firm while it is open. As such, ownership/management cannot be said to have exercised poor supervision over employees. Ownership/management always makes themselves available for questions and encourages employees to seek assistance when needed.
- As stated in 7 CFR 278.6(e)(5), a six month disqualification may only be issued where there was a sale of ineligible items which was the result of managerial or ownership neglect or carelessness. The regulations clearly contemplate that mistakes or violations on the part of employees will happen, but for sufficient grounds to exist for FNS to impose a six month disqualification, there must be evidence to indicate a lack of managerial oversight or neglect. In the instant matter, no such oversight or neglect existed or continues to exist now.
- The clerk in Exhibit A refused the investigator's request to purchase ineligible items with SNAP benefits and the clerk in Exhibit E refused the investigator's attempt to exchange SNAP benefits for cash. As such, the evidence does not support the notion that the Appellant's management and ownership were neglectful or careless.
- Ownership and management have developed a comprehensive training program/compliance policy which all employees must abide by before being allowed to process any type of transaction, let alone SNAP transactions.

- The Appellant first begins employee training by showing the new employee how to go about detecting fake/fraudulent currency. The training then shifts to coverage of the SNAP rules and which items can and cannot be purchased with SNAP benefits using the *SNAP Training Guide for Retailers* as a reference.
- The Appellant will then physically demonstrate (when a SNAP customer comes into the store) the procedure of how to process SNAP transactions. Included is a demonstration of how to properly separate a customer's goods by category of payment eligibility as this is vitally important because the store's POS system does not automatically separate such items.
- The Appellant has also taken the step to place reminders around the store in the form of handwritten signs and posters, reminding both its employees and customers what is and what is not eligible for purchase with SNAP benefits.
- Once the Appellant feels the new employee has demonstrated that he or she is ready to process transactions on their own, the employee is allowed to start working on their own. However, if the employee needs help or has a question, ownership/management always makes themselves available.
- The Appellant has a zero-tolerance policy when it comes to violations of its training/compliance policies and programs.
- The Appellant took immediate corrective action to address this issue.
- The owner will retrain employees on the SNAP rules.
- The clerk noted in Exhibits B, C, and D was immediately terminated.
- The Appellant requests the issuance of a warning letter as outlined in 7 CFR § 278.2 and § 278.6. If FNS finds that the violations are too minor to warrant a sanction, the store is sent an official warning letter, providing the store an opportunity to take corrective action and come into compliance.
- The regulations emphasize why warnings are essential. Without them, due process is reduced to a sheer formalistic exercise. The agency's own interpretations of both the statute and the regulations it promulgated recognize the importance of not only considering prior warnings, but actually giving them. See 77 Fed. Reg. 48465 (Aug. 14, 2012).
- Research by FNS has indicated that many firms assessed a six month disqualification due to the usual practice of selling common ineligible items tend to close and/or undergo a change in ownership. This is because the firms are typically located in areas that have higher concentration of SNAP recipients; therefore, even a limited six month suspension can result in the firm no longer being economically viable. See Supplemental Nutrition Assistance Program: Farm Bill of 2008 Retailer Sanctions, 77 Fed. Reg. 48465 (August 14, 2012). A SNAP disqualification will impose a financial hardship on the Appellant which has already been experiencing hardship due to the COVID-19 pandemic.
- In the event that the charges are not dismissed, the Appellant requests a civil money penalty in lieu of disqualification.
- The Appellant provides invaluable services to the surrounding community. The Appellant is the only SNAP eligible retailer within the surrounding area that provides cold sandwiches/cold prepared foods for later consumption. While there are a few other SNAP stores nearby, they do not have these vitally important cold foods for purchases.

In support of these contentions, the Appellant, through counsel, submitted the following documents for review:

- Statement of store owner (3 pages); and
- Two photos—one showing a sign on the store’s menu stating “EBT only accepted for cold sandwiches” and the second sign on the soup tureen stating “Soups are not accepted on EBT”.

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by the Retailer Operations Division; it is limited to the facts at the basis of the Retailer Operations Division’s determination at the time it was made.

The owner contends that he was caught by surprise upon receiving the charge letter because he has never done anything intentionally to violate the SNAP regulations. The owner apologizes for the violations that took place. The Appellant was charged with accepting SNAP benefits in exchange for sponges and basic household cleaning items, amongst the most common type of ineligible goods and often referred to as “food-adjacent” ineligible products. Common ineligible items, as in the instant matter, typically consist of paper products, cooking supplies, or household products.

When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP.

Regardless of who the store owner utilizes to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. 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 because of the wrongful conduct of an owner, manager, or someone acting on their behalf.

The transactions cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions.

The FNS investigative report shows that a female employee working at the Appellant firm accepted SNAP benefits for ineligible nonfood items on three separate occasions during the investigative period indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The investigation report documents by a preponderance of the

evidence that the store employee engaged in the misuse of SNAP benefits noted in Exhibits B, C, and D, warranting a disqualification as a SNAP retail food store for a period of six months.

SNAP benefits, in general, are only authorized to be used for the purchase of foods for the household to eat as well as seeds and plants which produce food for the household to eat. The common nonfood items purchased are clearly not edible foods and are not plants or seeds, so one has to question the level of training the employee received by store ownership and/or management. The basic concept of “if you can’t eat it, you can’t buy it using SNAP” is not a difficult one for employees to grasp, yet the employee allowed the purchase of ineligible items using SNAP benefits on multiple occasions. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items.

The Appellant contends that this case involves the sale of extremely low-value ineligible items. However, neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of SNAP benefits for transactions involving the sale of ineligible items to be defined as violative. No mention of minimum cost or types of ineligibles is cited in Section 278.6(e)(5) of the SNAP regulations, which states that FNS shall disqualify a store 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 in exchange for SNAP benefits due to carelessness by store employees or poor supervision by the firm’s ownership or management.

The Appellant contends that the clerk in Exhibit A refused to allow the investigator to purchase ineligible items with SNAP benefits and the clerk in Exhibit E refused the investigator’s attempt to exchange SNAP benefits for cash, indicating the presence of training and compliance as well. As such, the evidence does not support the notion that the Appellant’s management and ownership were neglectful or careless. However, had an effective compliance policy and program been in effect at the firm, it is unlikely that the employee would have made such obvious mistakes. The more likely explanation is that store ownership and/or management failed to properly train and subsequently supervise the employee. Additionally, had store ownership and/or management been supervising the employee through occasionally monitoring her using videotape, if available, or in person, it would have readily noticed that she was allowing the sale of ineligible nonfood items in exchange for SNAP benefits.

It also would have been immediately evident to store ownership and/or management that the employee was deficient in her knowledge of SNAP rules and regulations had it periodically spot checked the employee’s knowledge and abilities by asking questions about SNAP eligible/ineligible items. Either of these basic supervisory techniques would have provided a no cost method for store ownership and/or management to ensure that store employees were not putting the firm’s SNAP authorization at risk.

These are clear signs of poor or no supervision by store ownership and/or management. It is highly improbable, based on the willingness of the employee to exchange SNAP benefits for ineligible nonfood items, that the only instances of SNAP violations were those transactions identified as part of the FNS undercover investigation. These actions more likely than not represent an ongoing pattern of SNAP violations at the Appellant firm. Under SNAP

regulations, the penalty for allowing the purchase of ineligible nonfood items using SNAP benefits as the result of poor supervision by ownership or management is a six month disqualification. The regulations do allow SNAP retailers to pay a hardship CMP, if eligible, as explained in the Civil Money Penalty section of this Final Agency Decision.

The Appellant requests the issuance of a warning letter as outlined in 7 CFR § 278.2 and § 278.6. If FNS finds that the violations are too minor to warrant a sanction, the store is sent an official warning letter, providing the store an opportunity to take corrective action and come into compliance. However, 7 CFR § 278.6(d)(2) & (3) of the SNAP regulations provides that “The FNS office making a disqualification or penalty determination . . . shall consider . . . any prior action . . . to warn the firm about the possibility that violations are occurring . . .”. The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn the Appellant about the possibility that violations were occurring because there were no prior warnings.

While the Appellant is correct in that the firm has not been cited for prior SNAP violations, a record of participation in the 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.

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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur.

Based on this discussion, the decision by the Retailer Operations Division to disqualify the firm for a six month period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

Corrective Action

The Appellant contends that it took immediate corrective action to address this issue. The owner will retrain employees on the SNAP rules. In addition, the clerk noted in Exhibits B, C, and D was immediately terminated.

However, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant’s contention that it has taken or will take corrective actions, though they

would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Financial Hardship

With regard to the Appellant's contention that a SNAP disqualification would impose a financial hardship to the firm, 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 or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty 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.

Furthermore, 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 contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

The Appellant requests the imposition of a civil money penalty in lieu of a SNAP disqualification. The Appellant provides invaluable services to the surrounding community. The Appellant is the only SNAP eligible retailer within the surrounding area that provides cold sandwiches/cold prepared foods for later consumption. While there are a few other SNAP stores nearby, they do not have these vitally important cold foods for purchases.

The Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty (CMP) under 7 CFR § 278.6(f)(1). That regulation reads, in part, "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 because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices." [Emphasis added]. **5 U.S.C. § 552 (b)(7)(E).**

Based on the evidence, the disqualification of Isaly's would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division's decision not to assess a hardship CMP in lieu of a six month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is therefore established that the violations as described in the letter of charges did in fact occur at Isaly's warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5).

That regulation states that FNS shall “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”. Therefore, the decision to impose a six month disqualification, the least severe penalty allowed by regulation, against Isaly’s, the Appellant firm, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six month period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this six month period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (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, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

May 5, 2022