

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

Am Pm Food Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0249041

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 AM PM Food Store (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 February 3, 2022, through February 21, 2022. The investigative report documented personnel at Appellant’s firm accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. As a result of evidence compiled during this investigation, by letter dated April 28, 2022, 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 under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

In a written response dated May 3, 2022, May 4, 2022, and May 6, 2022, the Appellant provided a response to the charge letter. Key points in the response included the following:

- Appellant owner was unaware that non-food items were scanning incorrectly in the POS system during each purchase and was ringing up as groceries instead. After reviewing this report, Appellant-owner has corrected the error in the POS system and thoroughly tested the system for its accuracy to ensure that this will not happen again.
- Appellant assures that such mistakes will not happen again by any of the employees and we all will be very attentive while handling SNAP/EBT purchases regardless of how busy we are.
- Appellant sincerely apologizes for the three unintentional mistakes that were made by selling nonfood items under SNAP/EBT.
- To demonstrate how serious they take these violations, Appellant has given a written warning memo/notice to the employee who violated the SNAP/EBT program by selling nonfood items which was is attached.

After considering the evidence, the Retailer Operations Division notified Appellant in a letter dated May 16, 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 email dated May 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 February 3, 2022, and February 21, 2022, an investigator conducted five compliance visits at Appellant's firm. A report of the investigation dated March 2, 2022, was provided to Appellant as an attachment to the charge letter. 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 trash bags, air freshener, detergent, fabric softener and sandwich bags. 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 C, D, and E, furnished with the charge letter.

APPELLANT'S CONTENTIONS

Appellant made the following summarized contentions in its administrative review request dated May 18, 2022, in relevant part:

- Appellant asks for reconsideration as this was an outcome of a categorizing mistake in our POS system which has been corrected.
- As one of the events stated that the agent asked to receive cash back and was denied> Such request clearly shows that Appellant store is knowledgeable in the SNAP guidelines and none of the wrongful transactions were intentional.
- Appellant's staff and management have been retrained in the SNAP guidelines and continue to be aware of items being purchased with SNAP to ensure that the incident(s) never happen again.
- Appellant understands that there are other authorized retail stores that can provide a larger variety of staple foods however there are customers who live within close proximity of Appellant store and do not have transportation and are able to walk to our store to get what they need.

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.

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.

The Appellant asserts that this outcome occurred due to categorizing mistake in their POS system which has been corrected. Additionally, Appellant claims that all staff and management have been retrained on SNAP regulations. With regard to these steps taken by Appellant, it must be made clear that this review is limited to the facts that existed at the time the violations were committed. This review has no authority to consider any subsequent remedial actions, such as fixing systems or retraining employees, 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 on the basis of alleged or planned corrective actions implemented after the discovery of program violations. Accordingly, the Appellant's remedial action does not provide a valid basis for dismissal or modification of the disqualification determination.

The Appellant argues that the rejection of the request for cash-back demonstrates that the employees are trained on SNAP regulations and that none of the transactions were intentional. This review acknowledges that there was an instance during the investigation in which a store clerk refused to engage in trafficking (see Exhibit E). However, the sale of non-authorized items on three separate occasions does demonstrate carelessness and leads one to a conclusion that additional training is necessary. Furthermore, the violation of exchanging ineligible items for SNAP benefits as described in the SNAP regulations at 7 CFR § 278.2(a) and 7 CFR § 278.6(e)(5) does not require an element of intent on the part of the violator. Therefore, whether the employee intended to violate SNAP regulations by exchanging non-food items for SNAP is irrelevant.

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 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.” The Retailer Operations Division determined that there are three other authorized stores located within a mile radius of Appellant. Thus, in its letter dated May 16, 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. This review finds that 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 AM PM Food Store 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 owner resides or is 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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

David A. Shively
Administrative Review Officer

May 5, 2023