

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

Ace High,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0249335

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA) that there is insufficient evidence to support a finding that a six-month disqualification of Ace High (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate. The determination is modified. A warning letter is warranted.

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 April 5, 2022, through April 10, 2022. 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 May 3, 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

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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.

Appellant replied to the charges by e-mail on May 5, 2022. Appellant apologized and explained that it fired the employee who conducted the transactions. After considering the retailer's reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated May 9, 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 e-mail sent on May 12, 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 April 5, 2022, and April 10, 2022, an investigator conducted four compliance visits at Appellant. A report of the investigation dated April 22, 2022, 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 toothpaste, deodorant, and sanitary products. 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

Appellant, through counsel, made the following summarized contention in its administrative review request dated May 12, 2022, in relevant part:

- The report showed that an employee failed to maintain SNAP rules and regulations.
- Appellant truly apologizes on behalf of its employee’s action.
- Appellant fired the employee.
- Appellant assures that the violations will not happen again.

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

This review is to either validate or to invalidate the determination made by Retailer Operations, and it is limited to the facts at the basis of Retailer Operations Division’s determination at the time it was made. Appellant was investigated by the USDA for compliance with SNAP laws and regulations. On review, it is decided that there is insufficient evidence to support the six-month disqualification of Appellant. The determination is modified. The violations warrant a warning letter per 7 CFR §278.6(e)(7).

CONCLUSION

The preponderance of the evidence in the record supports that Appellant warrants a warning letter for violations too limited to warrant a disqualification.

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.

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

November 2, 2022