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

Kwik Stop,

Appellant,

v.

Office of Retailer Operations and Compliance,

Respondent.

Case Number: C0242800

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a six-month disqualification against Kwik Stop ("Appellant") from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(5) in its administration of SNAP when it imposed a six-month period of disqualification against Appellant on August 9, 2021.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, "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

USDA conducted an investigation of Appellant's compliance with federal SNAP law and regulations during the period of May 10, 2021 through May 18, 2021. The investigation reported that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on

three separate occasions. These items sold during these impermissible transactions are best described in regulatory terms as "common ineligible nonfood items." The investigation revealed that two unidentified clerks were involved in the impermissible transactions. As a result of

evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated July 14, 2021, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations ". . . warrant a disqualification period of six months (Section 278.6(e)(5)). Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1))."

Appellant replied to the Office of Retailer Operations and Compliance's charges in writing. The record reflects that the Office of Retailer Operations and Compliance received and considered the information provided prior to making a determination.

The Office of Retailer Operations and Compliance notified Appellant in a letter dated August 9, 2021 that the firm was being disqualified for six months from participation as an authorized retailer in SNAP. This determination letter also stated that Appellant's eligibility for a hardship civil money penalty (CMP) according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated to Appellant that ". . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices."

On August 11, 2021, Appellant appealed the Office of Retailer Operations and Compliance's decision to impose a six-month disqualification, and requested an administrative review of the action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 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.

Section 278.6(e)(5) of the SNAP regulations states, in part, when a firm is to be disqualified 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.

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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system . . . .

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- Appellant requests an HCMP. Appellant sells as large a variety of staple food items at comparable or cheaper prices. Disqualification would pose a hardship to SNAP customers who rely on the firm. There are no nearby SNAP-authorized stores. Appellant provided 19 pictures of items labeled "only our store," one page of price comparisons, 16 pages of items labeled "cheaper price," five customers affidavits, one owner affidavit, and two affidavits signed by employees.
- Appellant contends the owner did not receive the charge letter until August 3, 2021.
- A six-month disqualification would pose a hardship to the business.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

The investigation report shows that of the three times that nonfood violations were attempted, store personnel permitted them three times. Repeatedly entrusting an unsupervised, inexperienced and/or untrained clerk(s) to handle SNAP benefits is reasonably viewed as careless or the exercise of poor supervision. Accordingly, the Office of Retailer Operations and Compliance attributed violations to "carelessness, or poor supervision by the firm's ownership or management," pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations, which results in a disqualification of six months. This penalty is only permitted if the firm has not been previously sanctioned. Therefore, a six-month disqualification for the violations committed, the minimum, is the appropriate sanction in this case.

No Undue Hardship to Appellant

Appellant maintains that disqualification would pose an extreme hardship to the firm. Economic hardship is a likely consequence whenever a store is disqualified from SNAP participation. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to the firm for economic hardship would forsake fairness and equity to competing stores and other participating retailers who are complying fully with program regulations, and also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that it will incur economic hardship due to an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Investigative Record

Based on a review of the evidence, it appears that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted under the supervision of a USDA investigator and all are fully documented. The investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail.

CIVIL MONEY PENALTY

Appellant requested a fine in lieu of the six-month disqualification. Appellant argues it sells as large a variety of staple food items at comparable or cheaper prices as nearby stores, that a disqualification would pose a hardship to SNAP customers who rely on the firm, and there are no nearby SNAP-authorized stores. Appellant provided 19 pictures of items labeled "only our store", one page of price comparisons, 16 pages of items labeled "cheaper price," five customers affidavits, one owner affidavit, and two affidavits signed by employees.

Appellant stated it did not have its HCMP request considered previously because the owner did not receive the charge letter in a timely manner. This request is considered as part of this administrative review.

A CMP as an optional penalty in lieu of a six-month disqualification was considered in this case. Such a finding is appropriate only if: 1) a store sells a substantial variety of staple food items, and; 2) its disqualification would create a 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.

In this regard, some degree of inconvenience to SNAP benefit users is inherent in the disqualification from the SNAP of any participating food store, since the normal shopping pattern of such SNAP benefit holders may temporarily be altered during that period. In this case, however, the Office of Retailer Operations and Compliance has rendered a finding pursuant to 7 CFR § 278.6(f) that it would not be appropriate to impose a CMP in lieu of a period of disqualification. The Office of Retailer Operations and Compliance has determined that Appellant is not the only authorized retail food store in the area "selling as large a variety of staple food items at comparable prices." In addition, the Office of Retailer Operations and Compliance notes that the subject store is classified in the FNS SNAP retailer database as a

convenience store. That database also shows a supermarket and a superstore located within a one-mile radius. All of these stores are easily accessible to customers and offer a variety and quality of staple foods comparable to, or better than, those offered by Appellant. Appellant's evidence that it carries unique items or foods that cannot be found at other stores, or offers lower prices than these stores, was unpersuasive. Therefore, the earlier determination that Appellant's disqualification would not create a hardship to customers, as differentiated from potential inconvenience, is sustained, and a CMP in lieu of disqualification is not appropriate in this case.

CONCLUSION

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a disqualification of six months against Kwik Stop from participating as an authorized retailer in SNAP is sustained. Appellant was inappropriately withdrawn from the SNAP program for one month after its timely request for administrative review. Therefore, the six-month period of disqualification is reduced to five months.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. A new application for participation in SNAP may be submitted ten (10) 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 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (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.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

October 13, 2021