

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

N ALLEN NEWS DAILY,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0220948

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 that a 6-month disqualification against N ALLEN NEWS DAILY (hereinafter Appellant), from the Supplemental Nutrition Assistance Program (SNAP), was properly imposed by the Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action in its administration of SNAP, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it imposed a 6-month disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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 investigated Appellant's compliance of Federal SNAP law and regulations during the period of September 19, 2019 through October 1, 2019. A Report of Investigation, dated July 22, 2020, documents Appellant personnel accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. The items sold are best described in regulatory terms as common nonfood items. As a result of the evidence compiled from this investigation, Retailer Operations charged Appellant with violating the terms and conditions of 7 CFR § 278.2(a), in a letter dated September 8, 2020. Misuse of SNAP benefits were noted in Exhibits A, B, and C, that warrants a 6-month disqualification, as provided in 7 CFR § 278.6(e)(5). The Charge Letter states 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 further states that Appellant has the right to present any information, explanation, or evidence regarding the charges and must reply within 10 calendar days of receipt of the Charge Letter per SNAP Regulations at § 278.6(b).

The record shows Appellant's Representative provided a Letter of Representation by email dated September 10, 2020. In an email dated September 15, 2020, Appellant's Representative requested an extension to respond to the charges. By email and letter dated September 17, 2020, Retailer Operations approved the extension to respond to the charges to October 1, 2020. It was noted; however, that the time to request a CMP and to provide documentation to support such a request has not been extended. Appellant's Representative responded to the charges by email dated September 25, 2020.

After considering Appellant's responses and the evidence in the case, Retailer Operations informed Appellant by Determination Letter dated November 23, 2020, that the violations cited in the Charge Letter occurred at Appellant and that a 6-month disqualification was warranted. This letter also states that Retailer Operations considered Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1), but it was not eligible, because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

By letter dated December 1, 2020, Appellant's Representative requested an administrative review of this action. The administrative review was granted by letter dated December 17, 2020.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. This means Appellant has the burden of providing relevant, credible evidence that 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 untrue.

CONTROLLING LAW AND REGULATIONS

The controlling law 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 7 CFR § 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.

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 § 278.2(a) states, in part: Coupons may be accepted by an authorized retail food store only from eligible households only in exchange for eligible food.

7 CFR § 278.6(a) states, in part: Disqualify the 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 or poor supervision by the firm's ownership or management.

7 CFR § 278.6(e)(5) states, in part, that a firm is to be disqualified for six months if it is to be the first sanction 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 CMP as a sanction in lieu of disqualification when the 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.

SUMMARY OF THE CHARGES

The Report of Investigation was provided to Appellant as Exhibits with the Charge Letter. The Report of Investigation provides details on the results of each compliance visit and documents SNAP violations by different personnel during multiple store visits at Appellant. SNAP violations of § 278.2(a) involved the sale by Appellant's personnel of common nonfood items for SNAP benefits. The nonfood items exchanged by Appellant's personnel included plastic forks, a scrubber sponge, paper plates, sandwich bags, and plastic spoons. The Report of Investigation indicates that these violative transactions were handled by two different clerks. The Report of Investigation further notes that one clerk refused to exchange SNAP benefits for cash in Exhibit C but did allow the purchase of three ineligible nonfood items in the same Exhibit.

APPELLANT'S CONTENTIONS

Consideration was made of all contentions presented, whether recapitulated here or not.

- There are extraneous circumstances revolving around Appellant that legitimize its need for a hardship CMP.
- There are no favorable alternatives to Appellant due to many reasons.
- A local store that had previously been able to utilize SNAP has been permanently disqualified from the Program. This means the closest alternative for the people of the community to visit are nonlocal retail stores.
- Our regular customers of old and young age are confined to their homes and if the store is to be disconnected for six months, these folks will have to travel by foot and bus to a nearby retail store that accepts SNAP. The next store that accepts SNAP is a little distance away that some customers, especially the older age, will find it unreceptive.
- People of the surrounding neighborhood, the elderly as well as the children, will be forced to venture out of their safe zone and into a petri dish of germs just to acquire food for their families that they had previously been able to get right down the street. Though COVID cases are not as high here as they may be in the city, the people here are still in just as great a danger and any unnecessary trips to further out stores just increase that risk by a significant

percentage. Ultimately, it would be best for the people of our surrounding community as well as people outside the community if a local store was able to provide them with their necessities without them needing to increase their exposure.

- The situation that brought about this original disqualification has been dealt with. The transactions you cite as evidence were made by an elderly worker who, although trained, was not well versed with the rules and regulations of SNAP. This worker has been reallocated and will not be handling transactions any longer.
- Appellant has taken the initiative to clearly label EBT approved items and distinguish them from non-EBT items. This distinction benefits both the business as well as the customers, as those who may have been at a loss in the past as to what did or did not qualify as EBT items no longer face any confusion.
- The likelihood of a repeat offense is slim to none, thanks to the swift and effective policy implemented by Appellant. Employees will be terminated for the sale of ineligible items and unlawful transactions.
- We feel strongly that a CMP is a necessity in the case of Appellant. The current overwhelming COVID threat felt by everyone in America does not allow room for the luxury of shopping wherever you choose. A local store with the ability to offer EBT products is detrimental to assuring the safety of our community.
- The threat of a similar act occurring is close to nonexistent as all previous errors have been rectified and new stratagems are being wielded.

In support of these contentions, sample images of new signage for customers and store clerks were provided.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the earlier determination made by Retailer Operations and is limited to the facts at the basis of Retailer Operations' determination at the time it was made. The documentation under review supports that the violative transactions were conducted at Appellant by its personnel on different dates. The record includes photos of the items purchased by the investigator, copies of the EBT total receipts with the store name and address, and donation sheets of the items donated by the investigator to a non-profit signed by a non-profit representative. All of the EBT transactions were verified in the USDA system database.

Retailers are informed that it is their responsibility to ensure that store personnel are properly trained regarding SNAP rules. Regardless of whom the owner of a store may utilize to handle store business, the owner is accountable for the proper training of personnel, and the effective monitoring and handling of SNAP benefit transactions. Upon review, the evidence supports that Appellant's personnel established a record of selling nonfood items on multiple occasions, as defined by 7 CFR § 271.2. Three violations are considered evidence of carelessness. The violations in this case are not too limited to warrant a disqualification period of six months. SNAP Regulations at § 278.6(e)(5) specify that FNS shall "disqualify the 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 nonfood items due to carelessness or poor supervision by the firm's ownership or management."

CIVIL MONEY PENALTY (CMP)

Retailer Operations determined that Appellant was not eligible for a hardship CMP under 7 CFR § 278.6(f)(1). That regulation reads, in part, “FNS may impose a CMP as a sanction in lieu of disqualification when 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 case record documents that Retailer Operations determined that a 6-month disqualification of Appellant, a convenience store, would not cause a hardship to SNAP households as there are 38 SNAP authorized stores within a 1-mile radius of Appellant. These stores include 20 convenience stores, 7 small grocery stores, 4 medium grocery stores, 6 supermarkets, and 1 super store. These larger stores likely carry a greater selection and depth of stock at likely better prices than a convenience store like Appellant. Lastly, there is no evidence that Appellant carries any specialty or international foods that cannot be obtained at these other SNAP authorized locations. Based on the analysis above, a 6-month disqualification of Appellant would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, Retailer Operations’ decision not to assess a hardship CMP in lieu of a 6-month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

The preponderance of the evidence in the record supports that Program violations, as described in the Charge Letter, did in fact occur at Appellant warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). Therefore, the decision to impose a 6-month disqualification against Appellant, the least severe penalty allowed by regulation, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and regulations thereunder, the 6-month disqualification shall become effective 30 days after delivery of this Decision. A new application for SNAP participation may be submitted 10 days prior to the expiration of this 6-month disqualification. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS website. Questions regarding the SNAP application process can be answered by calling the Retailer Service Center at 877-823-4369. For questions regarding operations, contact Crushonda Searcy at (404) 562-1989 or crushonda.searcy@usda.gov.

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 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 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 30 days of delivery of this Decision. Please note that the judicial filing timeframe is mandated in 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.

Kim Dameron
Administrative Review Officer

November 19, 2021