

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

Pantry 1 Food Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0236861

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Pantry 1 Food Mart (hereinafter “Appellant”) by FNS’s Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a six-month disqualification against Pantry 1 Food Mart.

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

FNS records show that the Appellant firm, Pantry 1 Food Mart, was initially authorized for SNAP participation under the present ownership on April 30, 2019. Between January 24, 2021 and February 3, 2021, an FNS contractor conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigation report documented that personnel at Pantry 1 Food Mart accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold plastic cups, paper bags, plastic cutlery, foam bowls, foam plates, toilet paper, and aluminum foil in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible food.

In a letter dated June 17, 2021, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the acceptance of SNAP benefits in exchange for ineligible merchandise warranted a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In an e-mail dated June 18, 2021, the Appellant responded to the allegations, explaining that at the time of the investigation, the firm was experiencing difficulties due to COVID-19. According to the Appellant, the two owners and a store manager all tested positive for COVID-19 and were in quarantine when the investigation occurred. Due to that chaos, the firm was forced to use whatever help it could get. The Appellant further stated that the cashiers involved in the violations are no longer employed with the firm, and stated that it would be upgrading its point-of-sale system to ensure that ineligible items cannot be purchased with SNAP benefits. The Appellant also stated that it was making sure all staff members are well-trained.

In support of its response, the Appellant submitted copies of COVID-19 test results for the three individuals mentioned above. One positive test occurred on January 25, 2021, while the other two occurred the following day.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated June 29, 2021. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the charge letter and that a six-month disqualification penalty would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that consideration for a hardship civil money penalty was given, but the Appellant was not eligible for a CMP because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked July 1, 2021, the Appellant appealed the agency's determination by requesting an administrative review. On July 22, 2021, Appellant's newly retained counsel provided additional information in support of the firm's request for review. The request was granted and implementation of the disqualification has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated 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.

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

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 § 278.6(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....

Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e) (1) of this section. [Emphasis added.]

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

7 CFR § 278.6(e) states, in part:

FNS shall take action as follows against any firm determined to have violated the Act or regulations...The FNS regional office shall:

(5) 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, in part:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm subject to a disqualification is selling a substantial variety of staple food items, and 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.

INVESTIGATION DETAILS

During an undercover investigation conducted between January 24, 2021 and February 3, 2021, an FNS contractor completed four compliance visits at Pantry 1 Food Mart. The agency's record indicates that a report of the investigation was provided to the Appellant as an attachment to the June 17, 2021 charge letter. The investigation report includes Exhibits A through D, and provides full details on the results of each compliance visit. SNAP violations were documented during each of the four visits; specifically, the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that store personnel allowed the investigator to purchase the following nonfood items:

- One 25-count package of plastic cups (*Imperial* brand), Exhibit A
- One 40-count package of paper bags (no brand indicated), Exhibit A
- One 24-count box of plastic forks (*White Rose* brand), Exhibit B
- One 45-count package of foam bowls (*Hefty* brand), Exhibit B
- One 24-count box of plastic spoons (*White Rose* brand), Exhibit C
- One 20-count package of foam plates (*Hefty* brand), Exhibit C
- One roll of toilet paper (*Atlas* brand), Exhibit D
- One 25-square-foot roll of aluminum foil (*Home Select* brand), Exhibit D
- One 25-count package of plastic cups (*Imperial* brand), Exhibit D

The report shows that in Exhibit D, the clerk on duty refused to allow an exchange of SNAP benefits for cash (i.e. trafficking). The report indicates that two different clerks were involved in the SNAP violations. The charge letter states that the violations that occurred in Exhibits A, B, C, and D warrant a disqualification from SNAP for six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

The Appellant and its counsel made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant requests that FNS consider alternative penalties instead of disqualification.
- Because of being quarantined for the period of the investigation, the firm's owners did not have other options. It has been difficult to find help.
- The firm has been handling SNAP at the same location since 2009 and has never had any violations. Appellant requests one chance to prove itself.

- Appellant’s counsel is aware that USDA can assess a financial penalty in lieu of suspension if it obtains proof from the Appellant “as to the eligibility to apply for relief.” Appellant’s counsel believes that the firm can meet the requirements of the regulations.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions submitted, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

The Appellant has not provided any information or evidence to counter FNS’s investigation report. In fact, the Appellant appears to acknowledge that violations occurred, implying that they were caused by COVID-19 conditions that were being experienced by the firm’s owners and managers. Because the violations themselves do not appear to be in dispute, it is the finding of this review that SNAP violations did occur as charged and a penalty is warranted. The balance of this review will examine the Appellant’s remaining contentions.

No Prior Violations / Extenuating Circumstances

The Appellant contends that it has been in business since 2009 and has never committed any program violations. The Appellant further argues that the violations were caused by extenuating circumstances from the national COVID-19 health crisis. According to the Appellant, the firm’s two owners and a store manager tested positive for COVID-19 on January 25 and 26, 2021, which is shortly after the agency’s investigation began. The Appellant stated that while store management was under quarantine, the firm was forced to use whatever help it could find.

With regard to the first contention, the regulations do not contemplate a firm’s history of compliance with program rules when determining whether or not a penalty is warranted. When program violations occur, specifically the exchange of ineligible nonfood items for SNAP benefits due to employee carelessness or poor supervision by the firm’s ownership or management, a six-month disqualification is the required penalty, even on the first occasion.

As to the contention related to COVID-19, this review is sympathetic to the chaotic circumstances experienced by many retailers during the pandemic. However, such circumstances do not provide a valid basis for dismissing the charges or modifying the penalty in any way. The record shows that the Appellant owner signed an application to participate as a retailer in SNAP. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm’s employees, whether paid or unpaid, new, full-time or part-time. Regardless of which clerks are operating the cash register at a given time and regardless of whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions.

Based on the actions of the clerk in Exhibit D, in which she refused to allow the investigator to exchange SNAP benefits for cash, it is likely that some employee training related to SNAP had previously taken place. But with program violations being committed by two different clerks on four consecutive visits to the store, it is apparent to this review that employee carelessness or poor supervision was more prevalent at this store than it should have been, and COVID-19 pandemic conditions cannot be used as justification for violative actions. Accordingly, this review finds that a six-month disqualification penalty is proper and is entirely in line with SNAP regulations at 7 CFR § 278.6(e)(5). This penalty is also consistent with sanctions imposed upon other retailers that have committed similar violations.

Remedial Actions Taken

In its response to the charge letter, the Appellant stated that it had taken or would be taking corrective actions to ensure that program violations do not happen again, including terminating the employment of the cashiers involved in the violations, upgrading its point-of-sale system to ensure that ineligible items cannot be purchased with SNAP benefits, and making sure that all staff members are adequately trained.

With regard to these steps taken by the 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 retraining employees or upgrading systems, 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 actions do not provide a valid basis for dismissal or modification of the disqualification determination.

Civil Money Penalty

Both the Appellant and its counsel have requested an alternative penalty, such as the assessment of a fine, in lieu of disqualification. Appellant's counsel believes that the firm meets the criteria for a financial penalty.

In a case involving the sale of ineligible items, regulations at 7 CFR § 278.6(f)(1) only allow for a civil money penalty in lieu of disqualification in limited circumstances. Specifically, the regulation states that a CMP is permitted when a firm's disqualification would cause "hardship" to SNAP households. Regulations do not allow FNS to consider possible economic hardship to a firm or its owners when determining whether or not a CMP is appropriate. Prior to its disqualification determination in this case, the Retailer Operations Division evaluated the Appellant's eligibility for a hardship civil money penalty, but determined that the firm was not eligible for this alternative penalty.

While it is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store is disqualified for a period of time and households are forced to use their benefits elsewhere, such inconvenience does not rise to the level of "hardship" unless there are

no comparable SNAP-authorized stores in the area at which customers can shop. The regulation states that hardship to SNAP households occurs when 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); in such circumstances, a CMP in lieu of disqualification may be considered.

It is the determination of this review that a disqualification of Pantry 1 Food Mart, a convenience store, would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are at least a dozen similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of Pantry 1 Food Mart, including three superstores. There is also no evidence that the inventory at other stores in the area is not comparably priced. Because hardship conditions do not exist in this case, a CMP in lieu of disqualification cannot be granted.

CONCLUSION

Based on a review of all available information in this case, this administrative review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Pantry 1 Food Mart during a USDA-contracted investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record appears to be specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood merchandise, and in all other critically pertinent details. Furthermore, the contentions and evidence presented by the Appellant do not persuade this review to dismiss or modify the penalty in any way. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, Pantry 1 Food Mart, is sustained.

In accordance with the Act and regulations, the disqualification penalty shall become effective 30 days after receipt of this decision. A new application for SNAP authorization may be submitted 10 days prior to the expiration of the six-month disqualification period.

Important Note: When the Appellant submitted its request for administrative review on July 1, 2021, it sent the request to the Retailer Operations Division via e-mail instead of to the Administrative Review Branch (ARB) as instructed in the determination letter. As such, it was not immediately recognized by ARB as a valid request for administrative review. When Appellant’s counsel submitted additional information related to the request on July 22, 2021, it was assumed by ARB that this communication from the attorney was the initial request for review. As such, ARB found that it did not meet the 10-day deadline for a request to be submitted. Upon further review, however, it was determined that the July 1 e-mail sufficiently met the requirements for an administrative review request, and the request was granted.

By the time the request for review was granted, the disqualification penalty had already taken effect. The disqualification took effect on July 22, 2021. In an administrative review, temporary disqualification actions are held in abeyance pending the outcome of the review. Once the case was assigned to a review officer, FNS took immediate action to reinstate the firm’s SNAP authorization. This reinstatement took place on October 1, 2021, and the authorization has

remained active since that time. In total, the store's authorization was suspended for more than two months, but fewer than three months. Accordingly, the Appellant is credited with two months of the six-month disqualification period required in this matter. The firm may now reapply for SNAP authorization four months from the new effective date of disqualification.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 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.

JON YORGASON
Administrative Review Officer

January 20, 2022