

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

1208 Stratford Ave Inc,

Appellant,

V.

Case Number: C0211294

Retailer Operations Division,

Respondent.

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 a six-month disqualification of 1208 Stratford Ave Inc. (hereinafter Appellant), from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as initially imposed by the Retailer Operations Division.

ISSUE

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

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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 conducted an investigation of the compliance of 1208 Stratford Ave Inc., with Federal SNAP law and regulations from December 4, 2018 through December 17, 2018. In a letter dated March 6, 2019, Retailer Operations Division charged the Appellant firm with accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three (3) out of five (5) compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

In correspondence dated March 12, 2019, Appellant replied to the charge letter and generally stated that ownership traveled out of the country during the investigation and employees were instructed about eligible and ineligible items. According to the report the female employee did not follow instructions and did not separate the eligible items from the ineligible but the male employee followed instructions. The Appellant stated that the disqualification period will cause hardship to the firm and guaranteed that these violations will not reoccur.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated April 4, 2019. The determination letter informed the Appellant it was disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter dated April 13, 2019, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The appeal was accepted and the implementation of the six-month disqualification was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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

The controlling statute in this matter is contained in the Food & 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) establish the authority upon which a period of disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, inter alia: "Coupons may be accepted by an authorized retail food store only from eligible households.... Only in exchange for eligible food"

7 CFR § 271.2 states, inter alia: "Eligible food 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, inter alia: "FNS may disqualify any authorized retail food store... if the firm fails to comply with the Food and Nutrition Act of 1977, 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...”

7 CFR § 278.6(e)(5) states, inter alia: “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, inter alia: “FNS may impose a civil money penalty as a sanction in lieu of when... the firm’s disqualification would cause hardship to Food Stamp [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.”

APPELLANT’S CONTENTIONS

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

1. Respondent respectfully denies that the violations were proven of that the business sold ineligible items for SNAP benefits.
2. The Investigative Report asserts that some improper sales took place but they are vague or ambiguous in the precise details. They don’t identify the seller who made the alleged sales nor do they stat the time of day when the incidents occurred. They also don’t state how much was allegedly charged for ineligible items.
3. Ownership states that he has participated in SNAP for many years and have never had any issues with any permits.
4. Ownership has an established training policy program and trained every worker, every quarter, to ensure the proper procedures are understood especially those working at the counter and processing EBT.
5. Respondent believes that the decision was in error in denying eligibility for a hardship civil money penalty in lieu of a six month disqualification.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

FNS initially authorized 1208 Stratford Ave Inc. as a small grocery store on June 18, 1998. During an investigation from December 4, 2018 through December 17, 2018, the USDA conducted five (5) compliance visits at Appellant’s store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated October 25, 2018. 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 committed during three (3) of the five (5) compliance visits. They involved the sale of four

various 10 ounce bottles of Tide laundry detergent, one 12.6 ounce bottle of Dermassage dishwashing liquid and one 15.2 ounce bottle of Sauvitel fabric softener. A clerk refused the purchase of three ineligible items in Exhibit C and one ineligible item in Exhibit E. A clerk also refused the exchange of an undisclosed amount of SNAP benefits for cash in exhibit E.

In its response to the charge letter, the Appellant did not deny that the violations took place during the investigation. Appellant, through counsel, contends that the violations were not proved that the business sold ineligible items for SNAP benefits. With regard to this contention and based on a review of the evidence in this case, there is no question that program violations did occur. The record reflects that one unidentified female clerk, working at Appellant, sold common ineligible items to a FNS, USDA Investigator on three occasions. In Exhibits A, B and D, the clerk had the option and choice to refuse the ineligible items once she was aware that the purchase was with SNAP. These transactions are clear violations of the SNAP regulations as cited herein. The investigative record is specific and accurate with regard to the dates of the violations, the exchange of SNAP benefits for ineligible items, and in all other critically pertinent detail. A review of this official documentation has yielded no indication of error or discrepancy in any of the reported findings. As such, the contentions presented do not constitute valid grounds for dismissal of the current charges of violations, or for mitigating the impact of those charges. The Retailer Operations Division's initial determination to impose a six-month disqualification in this matter was proper, and the determination is sustained.

The Appellant, through counsel, contends that the Investigative Report asserts that some improper sales took place but they are vague or ambiguous in the precise details. They don't identify the seller who made the alleged sales nor do they state the time of day when the incidents occurred. They also don't state how much was allegedly charged for ineligible items. With regard to these contentions, it is noted that the redacted portions of the Investigative Report are necessary and regulatory for the purpose of the investigator's anonymity. The clerks involved in the transactions are identified in the Investigative Report as observed by the investigator and the pricing of the purchased items are listed in the report as were observed and identified on the purchased item. Moreover, as previously stated, a review of this official documentation has yielded no indication of error or discrepancy in any of the reported findings.

The Appellant, through counsel, contends that it has participated in SNAP for many years and has never had any issues with any permits. With regard to this contention, it is important to note that a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Appellant, through counsel, contends that the decision was in error in denying eligibility for a hardship civil money penalty in lieu of a six month disqualification. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement

provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA.

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

Furthermore, it is important to clarify for the record that the purpose of this review is to determine if the earlier decision of the Retailer Operations Division, to disqualify Appellant from participation in the SNAP for a period of six months, was in fact a correct one. It is not within the scope of this review to consider what subsequent actions Appellant may have taken so that its store may begin to comply with program requirements.

Based on a review of the evidence in this case, there is no question that program violations did occur. A Clerk working at Appellant sold common ineligible items to an FNS investigator on three (3) separate investigative visits. The investigative record is specific and accurate with regard to the dates of the violations, the exchange of SNAP benefits for ineligible items, and in all other critically pertinent detail. As such, the contentions presented do not constitute valid grounds for dismissal of the current charges of violations, or for mitigating the impact of those charges. Based on a review of the evidence in this case, it appears that the SNAP violations at issue did, occur as charged.

CIVIL MONEY PENALTY

Appellant requested consideration of a civil money penalty. Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR §278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification because there were at least 107 SNAP authorized retailers within a one-mile radius of Appellant. These retailers included 20 medium grocery stores, eight (8) large grocery stores, seven (7) supermarkets, 10 superstores and 62 additional small grocery stores and all are selling as large a variety of staple foods at comparable prices.

CONCLUSION

The documentation presented by Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm. 7 CFR § 278.6(e)(5) specifies 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 common nonfood items due to carelessness or poor supervision by the firm's ownership or management.

The violations were determined by Retailer Operations Division to represent the first sanction for the firm and evidence carelessness and poor supervision. Therefore, the imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

It is therefore established that the violations as described in the letter of charges did in fact occur at the Appellant firm warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). Based on the discussion herein, the decision to impose a six-month disqualification against 1208 Stratford Ave Inc. is appropriate and the action is sustained.

In accordance with the Act and regulations, the six-month period of disqualification shall become effective thirty (30) days after receipt of this letter. The Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you reside or are 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 (30) days of receipt of this Decision.

Under the Freedom of Information Act (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

October 16, 2019