U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302

648 Corner Store LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0196277

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a three-year disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against 648 Corner Store LLC (hereinafter "648 Corner Store" or "Appellant") by the Retailer Operations Division. It is also USDA's final decision that a civil money penalty in lieu of disqualification is not appropriate in this case.

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 three-year disqualification against 648 Corner Store.

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, 648 Corner Store, was initially authorized for SNAP participation as a convenience store on February 16, 2016. On February 1, 2017, FNS

conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. During the investigation, agents from FNS discovered that 648 Corner Store was allowing its SNAP authorization to be used at an adjacent store that was not authorized to accept SNAP benefits. This unauthorized store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is a carryout and catering restaurant that is located in the same building as 648 Corner Store, but has a separate entrance for customers and appears to be under different ownership. 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

In a letter dated February 16, 2017, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). Specifically, the letter stated that 648 Corner Store violated the regulations when it "allow[ed] another business to utilize [its] FNS authorization number to process EBT SNAP benefits at a different location."

The charge letter stated that the violation warranted a disqualification period of three years pursuant to regulations at 7 CFR § 278.6(e)(3)(ii). The letter further stated that under certain conditions and in accordance with 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In correspondence between February 22, 2017 and March 3, 2017, the Appellant responded to the charge letter. In its response, the Appellant did not make a specific denial that its FNS number was used at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), but contended that customers purchase items at 648 Corner Store, but utilize a "you-buy-we-fry" system through the Appellant's "contract" with 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In this system, eligible food items can be heated at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for a fee of $1.00/lb. or $2.00/lb., depending on the items purchased.

The Appellant further contended that its employees have been trained on the proper usage of SNAP and that the firm conducts periodic training sessions to ensure that employees properly handle SNAP transactions. In support of its contentions, the Appellant provided a copy of a letter from Key Bank, indicating that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) has "its own Merchant Processing separate from 648 Corner Store."

After considering the Appellant's reply to the charges as well as the evidence in the case, the Retailer Operations Division issued a letter of determination dated March 7, 2017. This letter informed the Appellant that it was the determination of the Retailer Operations Division that the violations did occur as outlined in the letter of charges and that a three-year 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 CMP was given, but that the Appellant was not eligible for a CMP because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked March 20, 2017, the Appellant, now through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the sanction has been held in abeyance pending completion of this review. It is noted that in its request for review, Appellant's counsel

offered few contentions, but explained that it would be submitting a written argument and additional supporting information at a later date.

On April 20, 2017, Appellant's counsel submitted via e-mail a request for the agency's case information under the Freedom of Information Act (FOIA). On that same date, the administrative review officer sent Appellant's counsel a letter explaining that the administrative review would be held in abeyance pending completion of the agency's FOIA response. The letter explained that once a FOIA response was issued, the Appellant would then have 21 days in which to submit any additional contentions or evidence.

On May 23, 2017, the administrative review officer received an e-mail from FNS's FOIA office indicating that the Appellant had withdrawn its FOIA request. No additional information or contentions were submitted by the Appellant or its counsel.

On October 4, 2017, the administrative review officer sent Appellant's counsel an e-mail to find out if it had intended to send any additional information about this case. On October 16, 2017, Appellant's counsel responded to the e-mail by stating he was no longer representing 648 Corner Store and that no additional information would be submitted by counsel. Even though the Appellant is no longer represented by counsel, an administrative review was still conducted based on the contentions submitted.

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 & 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)(3) establish the authority upon which a three-year disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, *inter alia*:

> *Coupons [i.e., SNAP benefits] may be accepted by an authorized retail food store only from eligible households… and only in exchange for eligible food… An authorized retail food store may not accept coupons from another retail food store, except that public or private nonprofit homeless meal providers may redeem coupons for eligible food through authorized retail food stores.* [Emphasis added.]

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.... 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.

7 CFR § 278.6(c) states, *inter alia*:

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, *inter alia*:

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

(3) Disqualify the firm for 3 years if it is to be the first sanction for the firm and the evidence shows that:

(ii) Any of the situations described in paragraph (e)(2) of this section occurred and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations.

7 CFR § 278.6(e)(2)(v) states:

Personnel of the firm knowingly accepted coupons from an unauthorized firm or an individual known not to be legally entitled to possess coupons.

7 CFR § 278.6(f)(1) states, *inter alia*:

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 on February 1, 2017, the USDA completed a compliance visit at 648 Corner Store, a small convenience store with limited staple food inventory. The agency record indicates that during this visit, the investigator attempted to purchase cigarettes with SNAP benefits. However, the clerk on duty refused to allow the

transaction. So the investigator left the store having purchased three 20-ounce sodas. On the way out the door, the investigator asked the clerk if the food at the restaurant next door was any good. The clerk replied, "Our restaurant? Yeah, the food is real good." So the investigator exited 648 Corner Store and walked to the entrance of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Once there, the same clerk who conducted the SNAP transaction at 648 Corner Store was there to take the investigator's restaurant order. The clerk explained that a $1.00 cooking fee would be required. The investigator attempted to pay the cooking fee with SNAP benefits, but the clerk stated that it must be paid for in cash. So the investigator handed the clerk one dollar and an EBT card.

After approximately 15 minutes, the clerk returned with a hot meal and gave the investigator an EBT receipt showing a purchase 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The investigator noted that the EBT receipt identified not 5 U.S.C. § 552 (b)(6) & (b)(7)(C), but 648 Corner Store, and agency records confirm that a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction took place on the Appellant's EBT machine at the time noted on the receipt.

The Retailer Operations Division's charge letter states that permitting another firm to use its SNAP permit constitutes a violation under 7 CFR § 278.2(a), which states that "an authorized retail food store may not accept coupons from another retail food store…"

The charge letter further states that the violation warrants a disqualification period of three years pursuant to regulations at 7 CFR § 278.6(e)(3)(ii).

APPELLANT'S CONTENTIONS

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

- Appellant seeks to challenge the nature of the disqualification.
- In addition to what has already been included in the record (i.e., Appellant's original response to the charge letter), Appellant's counsel would like to submit a written argument at a later date. [As noted earlier, no additional arguments were submitted.]

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 presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

As noted earlier, the Appellant offered no specific denial that 648 Corner Store was accepting SNAP benefits from an unauthorized store, but seemed to believe that such an arrangement was acceptable, since 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was "contracted" to provide food heating services for 648 Corner Store. Therefore, this case hinges on one chief question: Did the Appellant knowingly accept SNAP benefits from an unauthorized firm? [See 7 CFR § 278.6(e)(2)(v) and (e)(3)(ii).]

Separate Permits for Each Location

The regulation at 7 CFR § 278.2(a) states that "coupons may be accepted by an authorized retail food store..." and that "an authorized retail food store may not accept coupons from another retail food store, except that public or private nonprofit homeless meal providers may redeem coupons for eligible food through authorized retail food stores" (emphasis added).

This regulation was published when SNAP benefits were known as food stamps. Such food stamp benefits were issued to households in the form of paper coupons. These coupons could be redeemed by households only at retail food stores that were authorized to participate in the Food Stamp Program. These authorized stores would then take the spent food stamp coupons to their financial institution, which was required to be insured by the Federal Deposit Insurance Corporation (FDIC) or insured under the Federal Credit Union Act. The financial institution would then appropriately complete an exchange of the food stamp coupons for the equivalent amount of cash or credit. Sometimes, however, a retail store violated the law by accepting food stamp coupons from customers even though the store had not been authorized by USDA to do so. Because financial institutions could only redeem used food stamps from stores that were properly authorized, unauthorized stores would take their paper coupons to an authorized retailer, which would give them cash in exchange for the used food stamps.

Stores caught violating the Food Stamp Program in this manner were subject to sanctions by USDA. This included both the authorized store and the unauthorized store.

In accordance with 7 CFR § 278.6(e)(2)(v) and (e)(3)(ii), an authorized firm that knowingly accepted food stamp coupons from an unauthorized firm would be subject to a three-year disqualification penalty if was the firm's first sanction and the firm had *not* been previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations. The penalty would be increased to five years if it was the firm's first sanction and the firm *had been* previously advised of the possibility that violations were occurring.

As for the unauthorized firm, in accordance with 7 CFR § 278.6(m), FNS could impose a fine against any individual or firm "not approved by FNS to accept and redeem food coupons for any violation of the provisions of the Food Stamp Act or the program regulations, including violations involving the acceptance of coupons. The fine shall be $1,000 for each violation *plus* an amount equal to three times the face value of the illegally accepted food coupons."

On May 22, 2008, the Food, Conservation, and Energy Act of 2008 was enacted. Among the significant provisions of this law was the changing of the name of the Food Stamp Program to the Supplemental Nutrition Assistance Program (SNAP) effective October 1, 2008, and changing the name of the Food Stamp Act of 1977 to the Food and Nutrition Act of 2008. Additionally, the new law required that all food stamp coupons be de-obligated one year from the date of enactment. This meant that the only allowable form of payment of SNAP benefits was through the use of EBT cards. In order to conduct SNAP transactions, each store had its

authorization number (also known as an FNS number) programmed into its point-of-sale equipment.

Although these significant changes have occurred in the Act, the language of the regulation has been slower to be modernized. As a result, some portions of the regulations, such as 7 CFR § 278.2, still refer to SNAP benefits as "coupons." However, the principles remain the same. For example, it is still unlawful for an unauthorized store to accept SNAP benefits from customers. Since EBT is the only form of payment, one way this violation occurs is when an unauthorized store has the FNS number of an authorized store programmed into its point-of-sale equipment. Another way that this violation occurs is when an unauthorized firm takes the EBT card from a customer and physically uses the point-of-sale equipment of an authorized store to complete the transaction. The funds from the EBT sales are then transferred into the bank account of the authorized firm. While the process for an unauthorized store to redeem SNAP benefits is different today than in the days of paper food stamp coupons (it now happens electronically), it remains a violation for authorized stores to accept those benefits from another retailer.

The record shows that 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is under different ownership than 648 Corner Store, is not now and has never been authorized to accept SNAP benefits. The record further shows that at the time of the Retailer Operations Division's determination, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) had never submitted an application to accept SNAP benefits.

Additionally, the record shows that Appellant was made aware that 648 Corner Store's SNAP permit could only be used at one location. On the permit itself are the following words, in bold capitalized letters:

> *THIS PERMIT IS VALID ONLY FOR THE OWNER(S)/OFFICER(S) LISTED AND OPERATING AT THE LOCATION ABOVE.*

The SNAP permit shows the name 648 Corner Store LLC 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Nothing on the permit allows the Appellant to accept transactions that take place at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), a restaurant that would not be eligible to participate in SNAP.

It is clear from store photographs and the investigator's description of events that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is a separate business from 648 Corner Store, complete with separate entrances and completely different food offerings. Records from the Ohio Secretary of State's office also clearly show that the two firms are separate entities. Even if the businesses are owned by members of the same family, or even if they were owned by the same person, each location must be authorized individually.

The Appellant argues that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is under contract to heat food for 648 Corner Store in a "you-buy-we-fry" system. But regulations do not allow such arrangements between businesses.

It should be noted that virtually nothing on the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) menu is eligible for purchase with SNAP benefits. The Appellant appears to misunderstand or entirely ignores the concept of selling groceries vs. operating a restaurant. 7 CFR § 278.2(a) states that SNAP benefits "may only be accepted by an authorized retail food store only from eligible households…and only in exchange for eligible food" (emphasis added).

A key word in this regulation is "exchange." An exchange happens when SNAP benefits are expended and in return, the customer receives eligible food. Receipt of anything else is a violation of the rules. As best as can be determined from a review of the evidence in this case, none of the food from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) actually reaches the customer until it has already been cooked and is ready to eat. At that point, it is a hot food and is not eligible for purchase with SNAP benefits. Simply adding a $1.00 cooking fee to the total bill of a SNAP customer does not meet the regulatory requirement of *exchanging* SNAP benefits for eligible food.

It should be further noted that on the Appellant's SNAP Application, signed on January 15, 2016, the following language is recorded:

> *Supplemental Nutrition Assistance Program authorization may not be transferred to new owners, partners or corporations. An unauthorized individual firm accepting or redeeming [SNAP] benefits is subject to substantial fines and administrative sanctions.*

The Appellant owner's signature on the application indicates that he had read, understood, and agreed with the conditions of SNAP participation.

Finally, with regard to the letter from Key Bank, which states that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) has its own merchant processing that is separate from 648 Corner Store, this letter only confirms that serious violations were likely occurring at the two stores. If the two businesses have separate merchant processing equipment, then there would be no need for clerks at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to swipe EBT cards at 648 Corner Store, as occurred in the undercover investigation. But since 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is not SNAP-authorized, the clerk elected to use the equipment of an authorized store to process an illegal transaction.

Based on the information that was provided to the Appellant during the application and authorization process, it is the conclusion of this review that it is more likely true than not true that the Appellant was aware that 648 Corner Store was not permitted to accept SNAP transactions from an unauthorized store. Further, while the language in the regulations is somewhat dated, the prohibition is clear that an unauthorized firm may not accept SNAP benefits, and an authorized firm may not accept SNAP benefits from such a firm.

Employees Trained on SNAP Usage

The Appellant has argued that its employees were regularly trained on the proper usage of SNAP. It claims that its employees used the *SNAP Training Guide for Retailers*, published by

USDA, and were familiar with SNAP rules and regulations. The Appellant also stated that employees were monitored and given refresher trainings as necessary.

Unfortunately, this contention has little relevance to the issue at hand. There is nothing in the regulations that would permit a lesser period of disqualification or dismissal of the charges based on the firm's training of employees. This review also finds the Appellant's claims to be somewhat hollow. While the investigator was rebuffed when trying to purchase ineligible items at 648 Corner Store, the firm's employees were unaware of or disregarded regulations that prohibited 5 U.S.C. § 552 (b)(6) & (b)(7)(C) from using the Appellant's FNS number to process transactions for ineligible food items.

Therefore, the contention that employees received regular SNAP training does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

As noted earlier, the Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty because there were other authorized retail food stores in the area selling as large a variety of staple food items at comparable prices.

It is the determination of this review that a disqualification of 648 Corner Store, classified by FNS as a convenience store, would not cause hardship to SNAP households because there are other comparable or larger SNAP-authorized stores located in the area. According to agency records, there are currently 13 similar or larger SNAP-authorized retail stores located within one a one-mile radius of 648 Corner Store.

It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified and the households are forced to use their SNAP benefits elsewhere. However, in accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Therefore, pursuant to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be granted in this case.

CONCLUSION

Based on a review of the evidence in this case, there is little question that program violations of 7 CFR § 278.2(a) did occur during a USDA investigation. The transactions alluded to in the letter of charges were either conducted or supervised by a USDA investigator and were 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 is specific and accurate with regard to the dates of the violations, including the Appellant's acceptance of SNAP benefits from an unauthorized firm, and in all other critically pertinent details. Pursuant to 7 CFR § 278.6(a) and (e)(2) and (3) the decision to impose a three-year disqualification against the Appellant, 648 Corner Store, is sustained.

Further, the decision by the Retailer Operations Division to not impose a civil money penalty in lieu of disqualification is also sustained. Pursuant to 7 CFR § 278.6(f)(1) it is the determination of this review that SNAP households will not incur hardship as a result of the Appellant's disqualification because there are other authorized stores in the area selling as large a variety of staple foods at comparable prices.

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 participation may be submitted 10 days prior to the expiration of the three-year disqualification period. Pursuant to 7 CFR § 278.1(b)(4), at the time of any new application for participation in SNAP, the firm will be required to submit a collateral bond or irrevocable letter of credit as a condition for again being authorized to participate in the program. This bond requirement is due to the firm's sanction of a period longer than six months.

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.

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

October 16, 2017