

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

7th Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0232454

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 six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP) was properly 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, when it imposed a six-month disqualification against 7th Grocery.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulation 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 7th Grocery with Federal SNAP law and regulations in November 2020. In a letter dated January 14, 2021, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for merchandise which included ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred during six (6) out of six (6) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a six-month disqualification period as provided in 7 CFR § 278.6(e)(5). The Appellant was informed it could respond to the charges within ten (10) calendar days following delivery of the charge letter. The charge letter

was delivered to the Appellant on January 15, 2021 as documented by a UPS delivery notification in the case record. The store owner requested an extension of time to respond to the charge letter which was granted to February 5, 2021.

The Appellant, through counsel, responded to the charges in a letter dated February 4, 2021. Among other contentions, the Appellant stated that the violations were not intentional and were due to a programming error in the store's point-of-sale (POS) system. The Appellant further stated that the store had a training system in place prior to the violations and has since taken corrective action regarding the POS system. In the alternative, if a violation is found, the store requested a civil money penalty (CMP) as a six-month disqualification would allegedly cause a hardship to the local SNAP community.

After considering the Appellant's contentions and the evidence in the case, the Retailer Operations Division issued a determination letter dated February 12, 2021. The determination letter informed the Appellant it was disqualified from the SNAP for a six-month period in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that the Retailer Operations Division considered the 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 other authorized retail stores in the area selling as large a variety of staple foods at comparable prices. The determination letter was delivered to the Appellant on February 15, 2021 as documented by a UPS delivery notification in the case record.

In a letter postmarked February 22, 2021, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The request for review was granted. Upon acceptance of the administrative review request, 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, might 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 covered 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 disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

Coupons may be accepted by an authorized retail food store only from eligible households ... and only in exchange for eligible food.

7 CFR § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the “Food and Nutrition Act of 2008, as amended, for the purchase of 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....

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 ... (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 non-food items** due to carelessness or poor supervision by the firm’s ownership or management. [Emphasis added.]

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’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.** [Emphasis added.]

SUMMARY OF THE CHARGES

During an investigation conducted in November 2020, the USDA conducted six (6) compliance visits at 7th Grocery. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated January 14, 2021. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during all six (6) compliance visits as documented by Exhibits A through F. The chargeable violations in Exhibits A, B, D, E and F involved the sale of seven (7) common ineligible non-food items in

exchange for SNAP benefits. The violations were conducted by three (3) different clerks. One of these clerks refused to exchange cash for SNAP benefits in Exhibit F. However, this refusal does not negate or mitigate the chargeable violations documented in Exhibits A, B, D, E and F.

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its reply to the charge letter, the store owner's affidavit and the request for administrative review, in relevant part:

- The investigation report makes it clear that no deliberate efforts were made by 7th Grocery to violate SNAP rules. When the investigator attempted to cause intentional violations by inducing the staff to collude in a violation, the staff refused to do so. The sole issue found by the investigator was the use of SNAP benefits for ineligible food items.
- The store owner found that a POS system that is in place to process transactions did not have correct entries for certain eligible and ineligible items. Due to the charge letter, the issue has now been corrected, and no further errors of this nature will occur going forward. These new processes will be added to the training that was already in place for employees to ensure compliance with SNAP rules, including the use of webinars and videos from the SNAP website.
- Because 7th Grocery undertook no deliberate or intentional efforts to violate SNAP rules, it respectfully requests that the disqualification be reversed and it be permitted to continue participation in the program.
- If a penalty is imposed, 7th Grocery requests the opportunity to pay a CMP in lieu of suspension. 7th Grocery serves SNAP households that rely on its products. If 7th Grocery is suspended from SNAP, it will harm its community by making staple food items harder to obtain at comparable prices.
- The store itself will suffer a hardship if it is disqualified for a six-month period.

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

Investigation Report

The investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation in the case record that confirms specific details of the transactions. The investigation report documents by a

preponderance of the evidence that personnel at the store exchanged ineligible items for SNAP benefits.

Owner Accountability

Store owners are at all times accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. The store owner signed the most recent SNAP application of 7th Grocery on January 13, 2020. That application included a signed certification that the owner(s) would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations including accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible non-food items.

Violations Warrant a Six-Month Disqualification

The Appellant states that store personnel did not intend to violate SNAP regulations and this was a mere oversight due to a programming error in the store’s POS system. Regarding this contention, please note that intent is not a required element of this violation. Also, even if a POS device was improperly programmed, store personnel should know not to accept SNAP benefits for non-food items.

The SNAP regulations at 7 CFR § 278.6(e)(5) states, in part, that “FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ... **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 non-food items due to carelessness or poor supervision** by the firm’s ownership or management.” [Emphasis added.]

The investigation report documents that the number of chargeable violations over multiple transactions in this case equate to carelessness or poor supervision by ownership. Therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification, **the least severe penalty** allowed by regulation under these circumstances. This review does not have the authority to waive or reduce the regulatory six-month disqualification in this case.

Corrective Action

In its response to the charge letter, the Appellant stated that it has taken corrective action to ensure these violations do not happen again. With regard to this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. It is not within the authority of this review to consider what subsequent remedial actions may have been taken so that a store may 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 subsequent to findings of program violations. Therefore, the Appellant's contention that corrective action has taken place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Hardship to the Store

In its response to the charge letter, the Appellant stated that a permanent disqualification will create a financial hardship for the store. 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 the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the owner, the firm or its employees resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

HARDSHIP CIVIL MONEY PENALTY

The Retailer Operations Division determined that the Appellant was not eligible for a hardship CMP under 7 CFR § 278.6(f)(1). That regulation reads, in part, "FNS may impose a civil money penalty as a sanction in lieu of disqualification when...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." [Emphasis added.]

The case record documents that the Retailer Operations Division determined that a six-month disqualification of 7th Grocery, a small grocery store, would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores in the area. The Retailer Operations Division determined through agency mapping systems that there are four (4) other comparable or larger SNAP authorized stores located within a one-mile radius of 7th Grocery. These SNAP authorized stores include three (3) medium grocery stores and a supermarket. The supermarket is only 0.32 miles away. These larger stores likely carry a greater selection and depth of stock at likely better prices. Lastly, there is no evidence that 7th Grocery carries any specialty or international foods that cannot be obtained at these other SNAP authorized locations.

Based on the analysis above, a six-month disqualification of 7th Grocery would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division decision not to assess a hardship CMP in lieu of a six-month disqualification is **sustained** as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is established that the violations as described in the letter of charges did in fact occur at 7th Grocery warranting a disqualification of six (6) months in accordance with 7 CFR §

278.6(e)(5). That regulation states that FNS **shall** “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 non-food items due to carelessness or poor supervision by the firm’s ownership or management.” Therefore, the decision to impose a six-month disqualification, **the least severe penalty** allowed by regulation, against 7th Grocery, Appellant, 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 authorization ten (10) days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

Under the Freedom of Information Act, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

June 7, 2021