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

8th Liquor & Market,

Appellant,

v.

Case Number: C0206107

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 from 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, when it imposed a six-month disqualification against 8th Liquor & Market.

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 8th Liquor & Market with Federal SNAP law and regulations from March 2018 through May 2018. In a letter dated November 13, 2018, 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 on five (5) out of seven (7) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a disqualification period of six (6) months 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 store via UPS on November 15, 2018.

The Appellant, through counsel, responded to the charges in a letter dated November 16, 2018. Among other contentions, the Appellant stated that the clerk who conducted the violations did so without the approval or knowledge of the store owners. In addition, the Appellant stated that a disqualification will likely cause the business to lose a significant amount of income.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated December 4, 2018. The determination letter informed the Appellant it was disqualified from the SNAP for a period of six (6) months 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 civil money penalty (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's counsel on December 6, 2018.

In a letter postmarked December 13, 2018, 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 case 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

During an investigation conducted from March 2018 through May 2018, the USDA conducted seven (7) compliance visits at 8th Liquor & Market. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated November 13, 2018. The investigation report included Exhibits A through G which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during five (5) of the seven (7) compliance visits as documented by Exhibits A, B, C, E, and F. The chargeable violations involved the sale of nine (9) ineligible non-food items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a). These ineligible items as documented in the casefile consisted of two (2) packages of paper bowls; two (2) bars of soap; sandwich bags; snack bags; paper plates; freezer storage bags; and plastic forks.

The chargeable violations documented by Exhibits C, E and F were conducted by three (3) different clerks. One of these clerks refused to exchange ineligible items for SNAP benefits as documented in Exhibit D and cash for SNAP benefits in Exhibit G.

APPELLANT'S CONTENTIONS

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

- A six-month disqualification is too harsh.
- The violations were conducted by one (1) employee who wanted to give favorable treatment to his friends and acquaintances living in the area. The owners were unaware and did not approve of these violations. The owners had no intent to violate the SNAP rules and regulations.
- The store has had no prior violations to this one.
- The store employee who committed the violations has been fired.
- The store has provided a signed petition from approximately 250 SNAP participants and 340 non-participants for the store to retain its SNAP authorization.
- The denial of the hardship CMP was based on larger and comparable stores in the area, but this does not fully reflect the actual situation of SNAP recipients living in the area. Some of the stores do not offer the same variety and convenience as 8th Liquor & Market.
- A six-month disqualification will cause a financial hardship for the store.

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 were conducted under the direction of a USDA investigator and 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 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.

It should be noted that the Appellant claims only one (1) employee conducted the violative transactions. However, a review of the investigation report indicates that there were three (3) different employees who conducted the chargeable violations described in Exhibits C, E and F.

Violations Warrant a Six-Month Disqualification

The Appellant states that this is the firm's first violation and that a six-month disqualification is too harsh. Regarding this contention, the SNAP regulation 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 large number of chargeable violations over multiple transactions equate to carelessness or poor supervision by ownership.

Although a clerk refused to exchange ineligible items for SNAP benefits in Exhibit D and cash for SNAP benefits in Exhibit G, this does not ameliorate or mitigate the penalty for exchanging SNAP benefits for non-food items as documented by Exhibits C, E and F. Therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification.

Owner Responsibility

The Appellant states that the store owners were not involved in the violations, did not have knowledge of the violations and had no intent to violate SNAP regulations. However, a store owner, on behalf of all owners, signed the SNAP authorization application for 8th Liquor & Market on September 26, 2013. 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.

Regardless of whom the owner(s) of a store may utilize to handle store business, the owner(s) are accountable for the training of staff and the monitoring and handling of SNAP benefit transactions. To allow store owners to disclaim accountability for the acts of persons whom the owners choose to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Corrective Action

The Appellant states that the store took corrective action by firing one of the employees who committed the violations. 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. This review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division's action. It is not 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 assessment 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 Firm

The Appellant contends that a six-month 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 owners personally or the firm 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 Appellant claims that this determination does not fully reflect the actual situation of SNAP recipients living in the area. The Appellant alleges that some of the stores do not offer the same variety as 8th Liquor & Market and other stores may be farther away for those who walk to the store. The Appellant also provided a petition from alleged SNAP recipients and non-SNAP recipients living in the area. Lastly, the Appellant provided letters of support from community organizations and some store pictures.

The case record documents that the Retailer Operations Division determined that a six-month disqualification of 8th Liquor & Market, a convenience 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 there were 23 convenience stores, seven (7) small grocery stores, two (2) medium grocery stores and two (2) superstores all within a one-mile or less radius from 8th Liquor & Market. In particular, there is a medium grocery store located 0.28

miles away and a superstore located 0.30 miles away. These larger stores likely have a superior depth and breadth of stock at comparable or better prices. Based on this evidence, a six-month disqualification of 8th Liquor & Market 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 8th Liquor & Market 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 8th Liquor & Market, 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.

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.

RONALD C. GWINN — March 19, 2019
Administrative Review Officer