

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

AJ's Liquor Mart,

Appellant,

v.

Case Number: C0216966

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 a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against AJ's Liquor 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 AJ's Liquor 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, AJ's Liquor Mart, was initially authorized for SNAP participation as a convenience store on September 14, 2011. Between May 13, 2019, and October 15, 2019, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigation report documented that personnel at AJ's Liquor Mart accepted SNAP benefits in exchange for ineligible merchandise on five separate occasions. According to the report, the Appellant firm sold scrub sponges, plastic cutlery, soap, paper bowls, and trash bags in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible food.

In a letter dated March 30, 2020, 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 a letter dated April 9, 2020, the retailer replied to the charge letter and expressed a number of concerns about the investigator's report. For example, the Appellant was concerned that FNS took a long time to notify the firm that violations may have been occurring, going back as far as May 2019. According to the Appellant, its video surveillance system does not save footage for that long. The Appellant also took exception to the description of the clerks provided by the investigator. For instance, the Appellant claimed that one female clerk was 5-foot-1, not 5-3 to 5-6, as the investigator claimed. Further, that clerk apparently weighs 160 pounds, not 120-130; and her hair is blonde, not black. Additionally, the Appellant claimed that a male clerk was improperly described. While the report says that the male clerk was 170-180 pounds, 50-55 years old, and had black hair, the Appellant claimed that it has two male clerks, both weighing over 200 pounds, both over age 60, and both with gray hair.

The Appellant further argued that the store has always followed the law and program rules. It submitted four letters from state and local agencies commending the store for abiding by rules, such as prohibitions against the sale of tobacco and alcohol to minors. The four letters are dated between December 21, 2005, and January 3, 2020. Finally, the Appellant stated that the store is a small, family-run business and expressed hope that FNS would be lenient on whatever decision it made.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated May 7, 2020. 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 CMP was given, but that 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 May 11, 2020, the Appellant appealed the agency's determination by requesting an administrative 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 May 13, 2019, and October 15, 2019, FNS completed seven compliance visits at AJ's Liquor Mart. The agency's record indicates that a report of the investigation was provided to the Appellant as an attachment to the March 30, 2020, charge letter. The investigation report includes Exhibits A through G, and provides full details on the results of each compliance visit. SNAP violations were documented during five of the seven visits; specifically, the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the following nonfood items were purchased by an investigator using SNAP benefits:

- One scrub sponge (*Scotch-Brite* brand), Exhibit A
- One 24-count box of plastic cutlery (*Springfield* brand), Exhibit B
- One scrub sponge (*Scotch-Brite* brand), Exhibit C
- One 4-ounce bar of soap (*Ivory* brand), Exhibit C
- One 24-count box of plastic forks (*Springfield* brand), Exhibit C
- One 24-count box of plastic forks (*Sunset* brand), Exhibit D
- One 12-count package of paper bowls (*Aspen* brand), Exhibit D
- One scrub sponge (*Scotch-Brite* brand), Exhibit D
- One 12-count package of paper bowls (*Aspen* brand), Exhibit E
- One scrub sponge (*Scotch-Brite* brand), Exhibit E
- One 12-count box of kitchen trash bags (*Sure-Tuff* brand), Exhibit E

The report indicates that in Exhibit F, the investigator did not attempt to purchase any ineligible items with SNAP benefits. In Exhibit G, the clerk on duty refused to allow an exchange of SNAP benefits for cash (i.e. trafficking). The report states that three different clerks conducted the five violative transactions. The charge letter states that the violations that occurred in Exhibits C, D, and E warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

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

- Appellant owner has owned the store for 18 years and has always followed all rules.
- Appellant does not agree with how FNS's Retailer Operations Division handled the investigation. There is not enough evidence that the firm's employees made any mistakes.
- Appellant does not understand why FNS is barely opening up the case when it supposedly happened a year ago.
- If the disqualification is upheld, FNS is hurting the neighborhood more than the owner. There are many elderly and non-driving people living near the store. The store is their only source for food and other daily shopping items. The closest business is 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is a mile away over a steep hill. There are two hotels across the street and a lot of poor families in those hotels.

- Now with COVID-19 and with more people out of work and low on money, poorer people depend on AJ's Liquor Mart.
- The business has been in the neighborhood for the past 60 years.
- If a punishment is necessary, Appellant requests that it be a civil money penalty, even though Appellant does not believe any punishment is deserved.
- Appellant invites FNS to send an undercover employee into the neighborhood to ask people how good the owner is to them and how many of them he helps for free.

In support of its contentions, the Appellant resubmitted the same information it provided to the Retailer Operations Division, and added another letter from the California Department of Public Health, dated April 1, 2020, which indicates that the firm successfully prevented an underage decoy from purchasing a tobacco product.

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 in this document.

ANALYSIS AND FINDINGS

The Appellant has disputed that violations occurred as described by the investigator. The Appellant contends that the store has always followed the rules and regulations and claims that each employee is trained to adhere to USDA guidelines. The Appellant has provided five letters from state and local agencies dating back as far as 2005 confirming the store's compliance with program rules involving alcohol and tobacco licensing. The Appellant also disputes the physical description of the store clerks as reported by the investigator.

As noted earlier, in an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. Unfortunately, the Appellant's claims and evidence do not meet this standard. For instance, the letters from state and local agencies appear to demonstrate that the firm has, at times, been compliant with rules for other programs. But rules related to the firm's tobacco and alcohol licenses are not the same as SNAP regulations. Because the standards of compliance for SNAP participation are very different from alcohol and tobacco licensing, letters confirming compliance with those other programs cannot be considered evidence of SNAP compliance.

Regarding the investigator's physical description of the clerks involved in the violations, the Appellant has offered no counterevidence to support its assertions. Such evidence might have included photo identification for the employees in question as well as a record of employment and dates worked. It should be noted that physical descriptions of store personnel based on one investigator's recollection are unlikely to be exact. Estimating one's age or weight is particularly subjective and can vary from investigator to investigator. As such, this review considers such descriptions to be of little overall value in this matter. Much more critical is evidence of the transactions themselves. In this case, the investigator not only produced a written record of the transactions, including a listing of the specific items purchased and total amount spent, but provided receipts of each transaction and photographs of the merchandise purchased. The investigator also submitted copies of donation sheets certifying that the items purchased were

later donated. These donation sheets were signed by both the investigator and the representative of the receiving organization. There is also an electronic record of every transaction claimed by the investigator. While the agency's electronic records do not identify what was purchased, they do prove definitively that transactions occurred at AJ's Liquor Mart for the amounts claimed by the investigator on the same dates as listed on the report.

In this case, the preponderance of the evidence leans decidedly in the agency's favor. As such, it is the determination of this review that SNAP violations did occur as charged and a penalty is warranted.

No Prior Violations

The Appellant owner contends that he has been the owner for the past 18 years and claims that the firm always follows program rules. This contention implies that the firm's history of compliance with program regulations should be grounds for dismissal or a reduction of the disqualification penalty.

With regard to this contention, the regulations at 7 CFR § 278.6(e)(5) are clear that when program violations occur, specifically the exchange of ineligible nonfood items for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management, a six-month disqualification is the required penalty, even on the first occasion. And while the Appellant claims that the firm has always followed program rules, it should be noted that at no time during the investigation did a store clerk deny a purchase of ineligible items with SNAP benefits. Violations occurred with three different employees on five consecutive visits to the store. This strongly suggests that the violations were the result of employee carelessness or failure on the part of ownership or management to properly train and supervise its employees. Accordingly, a six-month disqualification penalty is appropriate and is entirely in line with SNAP regulations. This penalty is also consistent with sanctions imposed upon other retailers that have committed similar violations. As such, a reversal or modification of the penalty based on the firm's history with SNAP is not appropriate.

Length of Time between Investigation and Charge Letter

The Appellant has stated that it cannot understand why it took so long for FNS to notify the firm of the charges when the investigation occurred a year ago.

With regard to this contention, it is noted that the charge letter was issued on March 30, 2020 – approximately five months after the final visit to the store by the investigator, and just under four months after the date of the investigation report (dated December 4, 2019). This review does not find this to be an unreasonable delay, as it routinely takes time for an investigation to clear all internal reviews before charges are brought against a firm. It should be noted that in this case, the investigator did not release the investigation report to the Retailer Operations Division until March 19, 2020, which is just 11 days before the charge letter was issued.

It should also be noted that the Food and Nutrition Act of 2008 and the accompanying SNAP regulations are silent with regard to timeframes between the conclusion of an investigation and

the issuance of a charge letter. Since a statute of limitations does not exist in this matter, this review has little option but to conclude that the issuance of the charge letter and subsequent disqualification action taken by the Retailer Operations Division are wholly supported by the Act and SNAP regulations.

Hardship to Households / Civil Money Penalty

The Appellant contends that the firm's disqualification from SNAP would be a hardship to the community, especially those who are elderly or lack transportation. According to the Appellant, the nearest SNAP-authorized store is a supermarket called 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant claims that this store is a mile away over a steep hill. The Appellant further contends that many poor people, including those who occupy two hotels across the street, rely on AJ's Liquor Mart as their source for food and other necessities. With the current coronavirus pandemic and resulting challenges, people are depending on the firm. Finally, the Appellant requests that if a punishment is necessary, a civil money penalty be imposed instead of disqualification.

With regard to this contention, it is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store is disqualified and households are forced to use their benefits elsewhere. To address potential hardship situations that SNAP households might incur when a firm is disqualified, regulations at 7 CFR § 278.6(f) allow, in certain circumstances, for a civil money penalty to be imposed instead of disqualification. Paragraph (f)(1) of this regulation states that this alternative sanction is allowed when a firm's disqualification would cause "hardship" to SNAP households. According to this regulation, hardship 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."

It is the determination of this review that a disqualification of AJ's Liquor Mart would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are at least three similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of AJ's Liquor Mart, including a supermarket less than three-quarters of a mile away. 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 civil money penalty in lieu of disqualification is not an available option.

CONCLUSION

Based on a review of all 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 AJ's Liquor Mart during a USDA 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 Appellant has not offered any compelling evidence that would persuade this review to dismiss or modify the penalty. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, AJ's Liquor 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.

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

June 29, 2020