

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

Bargain Liquor,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0207756

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 Bargain Liquor (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 Bargain Liquor.

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, Bargain Liquor, was initially authorized for SNAP participation as a convenience store on September 14, 2010. Between March 5, 2019, and April 16, 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 Bargain Liquor accepted SNAP benefits in exchange for ineligible items on four separate occasions. According to the report, the Appellant firm sold plastic snack bags, plastic sandwich bags, soap, plastic forks, deodorant, plastic spoons, and a scrub sponge in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible foods.

In a letter dated August 6, 2019, 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 nonfood 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 fax dated August 21, 2019, the Appellant responded to the charges, apologizing for the violations and stating that the employees involved have been fired. The Appellant further stated that it would be taking further precautions so that the mistakes would not happen again. The Appellant then thanked FNS for bring these violations to the firm's attention.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated September 5, 2019. 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 September 10, 2019, 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 March 5, 2019, and April 16, 2019, FNS completed six compliance visits at Bargain Liquor. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the August 6, 2019, charge letter. The investigation report includes Exhibits A through F, and provides full details on the results of each compliance visit. SNAP violations were documented during four of the six 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 50-count package of plastic snack bags (*GoodSense* brand), Exhibit B
- One 35-count package of plastic sandwich bags (*GoodSense* brand), Exhibit C
- One 135-gram bar of soap (*Dove* brand), Exhibit C
- One scrub sponge (*Scotch Brite* brand), Exhibit C

- One 36-count package of plastic forks (generic brand), Exhibit D
- One 2.25-ounce bar of deodorant (*Old Spice* brand), Exhibit D
- One 120-count package of plastic sandwich bags (*Table King* brand), Exhibit D
- One 2.25-ounce bar of deodorant (*Old Spice* brand), Exhibit E
- One 36-count package of plastic spoons (generic brand), Exhibit E
- One 120-count package of plastic sandwich bags (*Table King* brand), Exhibit E

The report indicates that in Exhibit A, the investigator did not attempt to commit program violations. In Exhibit F, the clerk on duty refused to exchange SNAP benefits for cash (i.e. trafficking). The report indicates that two different clerks conducted the four 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 sincerely apologizes for the violations. The store has never had such incidents in over 10 years.
- The incidents occurred due to carelessness of the firm’s employee.
- To improve its service, the Appellant has dismissed the employee involved in the violations and has hired a new set of employees. The owner is also more involved in monitoring what the employees should be doing.
- Appellant requests that the store remain authorized because there is an older population in the area who shop at the store due to its convenience. Also nearby is an addiction rehabilitation center, and those customers are unable to go to other locations late at night, while Bargain Liquor is open until midnight and is within walking distance of the facility.

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 not provided any information or evidence to counter FNS’s investigation report. In fact, the Appellant appears to acknowledge that violations occurred, apologizing for its employees’ mistakes and claiming that the violations were due to carelessness of the firm’s employees. Because the violations do not appear to be in dispute, it is the determination of this review that SNAP violations did occur as charged and a penalty is warranted.

No Prior Violations

The Appellant contends that it has been in business for over 10 years and has never had such incidents at the store. This contention implies that because of the firm’s history of compliance with SNAP rules, the disqualification penalty should be reconsidered or reduced.

With regard to this contention, the law is 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. In this case, the Appellant committed program violations on four consecutive visits by an investigator, and the Appellant acknowledged that the violations were due to employee carelessness. 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 dismissal or reduction of the six-month disqualification due to the firm's previous compliance history is not appropriate.

Remedial Actions Taken

The Appellant has stated that as a result of the violations, the employee involved has been dismissed and new employees have been hired. The Appellant has also stated that the owner will provide greater oversight and monitoring of the employees' activities.

With regard to this contention, it must be stated that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the facts that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions, such as the firing or hiring of employees, that may have been taken or that will take place so that a store may enhance or 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 after the discovery of program violations.

Accordingly, the Appellant's remedial actions do not provide a valid basis for reversing the agency's disqualification determination.

Hardship to Households / Civil Money Penalty

The Appellant contends that the disqualification should be reconsidered because households in the area, including elderly customers and residents of a nearby rehabilitation facility, frequent the store due to its convenient location and business hours. This contention implies that SNAP households will experience hardship if the firm's disqualification is upheld.

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 Bargain Liquor, a convenience store, would not cause hardship to SNAP households because there are many other shopping options in the area. According to agency records, there are at least 30 similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of Bargain Liquor, including four full-service superstores, one of which is less than a tenth of a mile away from Bargain Liquor. There is also no evidence that Bargain Liquor sells its inventory at unusually low prices in comparison to nearby stores. 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 Bargain Liquor 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. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, Bargain Liquor, 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.

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

February 10, 2020