

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

Big Four Grocery,

Appellant,

v.

Case Number: C0185031

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 in its administration of the SNAP, when it imposed a six-month disqualification against Big Four 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 Big Four Grocery with Federal SNAP law and regulations from February 2017 through May 2017. In a letter dated July 7, 2017, 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 four (4) out of five (5) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

The charge letter stated the Appellant had 10 days after receipt of the letter to respond. The charge letter was delivered to the store on July 10, 2017 as confirmed by a UPS delivery notice in the casefile. The Appellant failed to respond to the charge letter.

After reviewing all the evidence in the case, the Retailer Operations Division issued a determination letter dated September 29, 2017. The determination letter informed the Appellant it was disqualified from the SNAP for a period of six 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.

In a letter postmarked October 11, 2017, the Appellant 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... 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....

7 CFR § 278.6(e)(5) states, in part:

*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.

SUMMARY OF THE CHARGES

During an investigation conducted from February 2017 through May 2017, the USDA conducted five (5) compliance visits at Big Four Grocery. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated July 7, 2017. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during four (4) of the five (5) compliance visits. The chargeable violations (Exhibits A

through D) involved the sale of the following ineligible items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a):

- Pack of 20 Count *Smart & Simple* Foam Compartment 8.875 Inch Plates
- Pack of 48 Count *Chenard* Heavy Duty Knives, Spoons & Forks
- Box of 20 Count *Glad* Extra Thick and Durable Quart Size Freezer Bags, Extra Thick & Durable
- Bag of 48 Count *Chenard* Heavy Duty Plastic Spoons
- Pack of 30 Count *DG Home* 12 fl. Oz. Foam Bowls
- 48 Count Pack of *Smart & Simple* Heavy Duty Plastic Spoons
- 4 Pack of *Charmin* Ultra Soft, 154 2-Ply Sheet of Bathroom Tissue (x3)
- Package of 48 Count *Smart & Simple* Heavy Duty Forks
- Box of 20 Count *SC Johnson* Ziploc Freezer Pint Size Plastic Bags

The above violations were conducted by two (2) different clerks. One of these clerks in Exhibit D refused to exchange cash for SNAP benefits. A third clerk in Exhibit E refused to exchange cash or ineligible items for SNAP benefits.

APPELLANT'S CONTENTIONS

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

- The Appellant does not deny the charges made against the store.
- The store has taken corrective action in disciplining the employees involved in the violations and has provided training to all employees regarding the SNAP rules and regulations.
- The local SNAP community will suffer a hardship if the store is disqualified for six months as Big Four Grocery is located in a rural community without ready access to other SNAP authorized stores.

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 Appellant does not dispute that the violations described in the investigation report occurred. 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.

Violations Warrant a Six-Month Disqualification

The SNAP regulation at 7 CFR § 278.6(e)(5) states, in part:

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.

FNS considers the sale of a total of three (3) inexpensive non-food items over one, two or three transactions to equate to carelessness and the lack of thorough supervision on the part of ownership or management. The investigation report documents that the chargeable violations in this case consisted of eleven (11) inexpensive non-food items exchanged for SNAP benefits over four (4) out of five (5) transactions; therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification. A clerk refused to exchange cash for SNAP benefits in Exhibit D and a different clerk refused to exchange cash and non-food items for SNAP benefits in Exhibit E; but this does not ameliorate or mitigate the penalty for exchanging non-food items for SNAP benefits.

Corrective Action

The Appellant contends it has taken action in disciplining the employees who engaged in the violations and that it has provided all of its employees with additional training on the SNAP rules and regulations. 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 corrective actions may have taken place 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 after-the-fact corrective actions implemented subsequent to investigative 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.

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."

The Appellant contends that Big Four Grocery is located in a rural area without ready access to other SNAP authorized stores. The Appellant further states that most of the people who frequent Big Four Grocery must depend on others for their transportation. Therefore, the Appellant alleges that a six-month disqualification will greatly affect the SNAP community who depend on the store to meet their daily needs.

The case record documents that the Retailer Operations Division determined that a six-month disqualification of Big Four Grocery, a convenience store, would not cause a hardship to SNAP households as there are five (5) other SNAP authorized stores located within a three-mile radius. These stores include a supermarket located 0.79 miles away from Big Four Grocery. Based on this evidence, a six-month disqualification of Big Four 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 Big Four Grocery warranting a disqualification of six 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 Big Four 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.

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
Administrative Review Officer

December 13, 2017