

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review
Alexandria, VA 22302**

Bobo Asian Grocery & Gift,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0201894

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to assess a civil money penalty against Bobo Asian Grocery & Gift (“Appellant”) in the amount of \$6,408 in lieu of a six-month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(5) and (f)(1) in its administration of SNAP when it assessed a civil money penalty in the amount of \$6,408 in lieu of a six-month disqualification against Appellant on December 5, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of Appellant’s compliance with federal SNAP law and regulations during the period of August 21, 2017 through October 11, 2017. The investigation reported that personnel at Appellant accepted SNAP benefits in exchange for ineligible

merchandise on four separate occasions. These items sold during these impermissible transactions are best described in regulatory terms as “common ineligible nonfood items” and “major ineligible non-food items.” The investigation revealed that one unidentified female clerk was involved in the impermissible transactions. As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated November 14, 2017, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant replied to the Retailer Operations Division’s charges in writing. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

The Retailer Operations Division notified Appellant in a letter dated December 5, 2017 that the firm was being disqualified for six months from participation as an authorized retailer in SNAP. This determination letter also stated that an assessment of a hardship civil money penalty (CMP) was appropriate. Therefore, a civil money penalty in the amount of \$6,408, in lieu of a six-month disqualification, was offered as an option to Appellant.

On December 13, 2017, Appellant appealed the Retailer Operations Division’s decision to impose a six-month disqualification, and requested an administrative review of the action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented 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.

Section 278.6(e)(5) of the SNAP regulations states, in part, when a firm is to be disqualified for six 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(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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system

7 CFR § 278.6(f)(1) 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.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- Appellant did not have any previous issues with SNAP;
- The violations were due to mistakes;
- The errors were made by a new employee lacking detailed knowledge of SNAP regulations;
- Appellant has increased supervision, posted SNAP training documents, and retrained all employees. Appellant provided four pages of SNAP training materials;
- The civil money penalty would pose a hardship to Appellant; and,
- Appellant would like the amount of the CMP reduced.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant contends that the owner takes responsibility for the mistakes. Appellant explained the errors were made by a new employee lacking detailed knowledge of SNAP regulations. When ownership signed the FNS application to become a SNAP authorized retailer, this included a certification and confirmation that Appellant 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

document include selling ineligible non-food items. Regardless of whom the ownership of a store may use to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions.

This review is limited to considering the circumstances at the time the Retailer Operations Division's decision was made. It is not within this review's scope to consider actions that Appellant may have taken subsequent to this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's staff training, increased supervision, and posting of SNAP training documents do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

First SNAP Violation

Appellant's maintains that this is the first time there has been an issue related to SNAP. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present charges of sale of nonfood items. In addition, the investigation report shows that of the four times that nonfood violations were attempted, store personnel permitted them, in whole or in part, four times. The Retailer Operations Division attributed violations to "carelessness, or poor supervision by the firm's ownership or management," pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations, which results in a disqualification of six months. This is consistent with Appellant's contention that it committed violations in error. Further, this penalty is only permitted if the firm has not been previously sanctioned. Therefore, a six-month disqualification for the violations committed, the minimum, is the appropriate sanction in this case.

No Undue Hardship to Appellant

Appellant maintains that disqualification would pose an extreme hardship to the firm. Economic hardship is a likely consequence whenever a store is disqualified from SNAP participation. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to the firm for economic hardship would forsake fairness and equity to competing stores and other participating retailers who are complying fully with program regulations, and also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that it will incur economic hardship due to an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the imposed penalty.

Investigative Record

Based on a review of the evidence, it appears that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted under the supervision of a USDA investigator and all are fully documented. The investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail.

CIVIL MONEY PENALTY

Appellant requested a reduction in that the amount of the CMP. The calculation of the amount of a CMP is based on regulations that delineate the exact formula to be used when calculating a CMP. These regulations at 7 CFR § 278.6(g) state, in relevant part:

FNS shall determine the amount of the civil money penalty as follows:

(1) Determine the firm's average monthly redemptions of coupons for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations.

(2) Multiply the average monthly redemption figure by 10 percent.

(3) Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph (e) of this section. The civil money penalty may not exceed an amount specified in §3.91(b)(3)(i) of this title for each violation.

5 U.S.C. § 552 (b)(7)(E)

As stated above, the formula for the calculating the CMP is specific per 7 CFR § 278.6(g) and does not allow for any reductions. However, the regulations do provide the option of an installment plan for paying the CMP over the period of disqualification. The regulations at 7 CFR § 278.6(h), state the following:

A firm has 15 days from the date the FNS regional office notifies the firm in writing in which to pay the civil money penalty or to notify the regional office in writing of its intent to pay in installments as specified by the regional office . . . The civil money penalty must be paid in full by the end of the period for which the firm would have been disqualified. (Emphasis added.)

Appellant can contact Financial Management at 703-305-2830 to discuss payment of this penalty in installment payments or online in one lump sum.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to assess a civil money penalty against Bobo Asian Grocery & Gift of \$6,408 in lieu of a six-month period of disqualification from participating as an authorized retailer in SNAP is sustained.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. To pay the civil money penalty, Appellant should refer to the information provided in the determination letter dated May 16, 2013. Should Appellant choose to accept disqualification rather than pay the civil money penalty, a new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the six-month period of disqualification.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

RICH PROULX
Administrative Review Officer

January 29, 2018