

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

Broadway Grocery & Food Mart,

Appellant,

v.

Case Number: C0211779

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 Broadway Grocery & Food Mart (hereinafter “Appellant”) by the 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 Broadway Grocery & Food 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, Broadway Grocery & Food Mart, was initially authorized for SNAP participation as a convenience store on April 28, 2003. Between August 27, 2018, and October 1, 2018, 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 Broadway Grocery & Food Mart accepted SNAP benefits in exchange for ineligible items on four separate occasions. According to the report, the Appellant firm sold plastic cups and trash bags in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible foods.

In a letter dated December 14, 2018, 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 letter dated December 22, 2018, the Appellant, through counsel, responded to the charges, appearing to acknowledge a violation, but stating that the offense was minor and claiming that this was the first time the firm had been cited for such an infraction. The Appellant contended that the firm's long history of program compliance merited a lesser sanction, particularly since the investigator purposely set up the violating scenario after first making a legal purchase. The Appellant further stated that a disqualification would be financially devastating to the firm's owner and would create a hardship to the community. The Appellant also stated that the owner would make sure his staff is trained to correctly identify and separate SNAP purchases. Finally, the Appellant argued that it would be inequitable to cause the firm to forfeit a substantial amount of income for a loss of just \$1.00 for plastic cups and \$1.99 for trash bags.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated April 9, 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 April 17, 2019, the Appellant, through counsel, appealed the 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 August 27, 2018, and October 1, 2018, the Food and Nutrition Service completed five compliance visits at Broadway Grocery & Food Mart. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the December 14, 2018, charge letter. The investigation report includes Exhibits A through E, and provides full details on the results of each compliance visit. SNAP violations were documented during four of the five 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:

- Four plastic drinking cups (No brand indicated), Exhibit B
- Four plastic drinking cups (No brand indicated), Exhibit C
- One 10-count box of trash bags (*Best Buy* brand), Exhibit D
- One 10-count box of trash bags (*Best Buy* brand), Exhibit E

The report indicates that in Exhibit A, the investigator did not attempt to purchase ineligible items. In Exhibit E, the clerk on duty refused to allow an exchange SNAP benefits for cash (i.e. trafficking). The report states that two different clerks conducted the violative transactions.

The charge letter states that the violations that occurred in Exhibits B, C, D, and E warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

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

- This was the first offense by a Broadway Grocery & Food Mart employee, which is attributable to the owner's wife becoming distracted when the investigator engaged her in conversation about his personal relationship with her husband and then slipped a nonfood item on the counter after she had rung up all of the other items that were legitimate. This seems to be a clear case of purposeful entrapment. It is unconscionable that a public servant would engage in conduct that he knew was illegal and in violation of SNAP regulations.
- The owner's wife did not have any specific intent to violate the law, and the investigator did not observe any other violative conduct on the part of the employee.
- The pertinent SNAP regulation states: "...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." There is no evidence that there have been any other previous violations. The use of the plural term "violations" should be construed in favor of the retailer because the interpretation of statute is based on the "plain meaning" of the word.
- Many customers in this low-income neighborhood walk to the store. A disqualification will burden the customers in the neighborhood.

- The deprivation to the community and the small business owner is too harsh in comparison to the sale of a \$2.00 item.
- Appellant requests a civil money penalty in lieu of disqualification.

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 evidence or documentation to counter FNS's investigation report. In both its response to the charge letter and its request for administrative review, the Appellant appears to acknowledge that violations occurred. Because the violations themselves do not appear to be in dispute, it is the determination of this review that a six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Entrapment

The Appellant contends that this was the firm's first offense and was due to the owner's wife becoming distracted when the investigator engaged her in conversation about his personal relationship with her husband and then slipped a nonfood item on the counter after she had rung up other items that were legitimate. The Appellant contends that this is a clear case of purposeful entrapment. According to the Appellant, it is unconscionable that a public servant would engage in conduct that he knew was illegal and in violation of SNAP regulations. The Appellant further contends that the owner's wife did not have any specific intent to violate the law, and the investigator did not observe any other violative conduct on the part of the employee.

With regard to these claims, there is nothing in the investigator's report to support the Appellant's version of events. As best as can be determined, the only conversation that took place between the clerk and investigator with respect to another person occurred in Exhibit A, which took place on August 27, 2018. In this conversation, the investigator mentioned being in the store two years earlier and asked the clerk "if the guy from Ethiopia still works at the store." But there is no evidence that the investigator "slipped a nonfood item" on the counter after other items were rung up in the cash register. In fact, in Exhibit A, the investigator did not attempt to purchase any ineligible items. The first attempt to purchase something ineligible occurred two days later on the investigator's second visit to the store.

As to the claim of entrapment, this review does not agree. The presence of entrapment depends upon whether or not the government's actions leading up to the violations amounted to inducing violative activity in persons who otherwise had no inclination to violate. There is no evidence, either in the report or provided by the Appellant, that such coercion took place. In every exhibit in the report, the investigator appears to have had only passing conversation with the clerks on duty, the type of standard conversation that occurs between a customer and a cashier. There is no evidence that any of these conversations were distracting, overbearing, or unusually persuasive as to cause an unwitting clerk to commit program violations. From all indications, the clerks involved in the violations were willing participants, or at the very least were careless or not

properly supervised, as they never refused to sell ineligible items and did not exhibit a reluctance to allow such transactions to take place.

5 U.S.C. § 552 (b)(7)(E). Such conduct on the part of the investigator does not constitute entrapment and does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

No Prior Violations

The Appellant refers to language in 7 CFR § 278.6(e)(5), and contends that because there have been no previous violations committed by the firm, the plural word “violations” in that paragraph should be construed in favor of the retailer because the interpretation of statute is based on the “plain meaning” of the word. The contention here appears to be that due to the firm’s history of compliance with SNAP rules, the disqualification penalty should be reconsidered or reduced.

It must be noted that this review has no objection to the word “violations” in connection with this case. The investigator’s record clearly shows that while the disqualification was based on a single investigation, multiple violations were committed during the course of the investigation. There is no evidence that the word “violations” in section (e)(5) refers to infractions that were committed during other investigations.

The law is clear that when serious violations occur, such as the exchange of ineligible nonfood items for SNAP benefits, a six-month disqualification is the appropriate penalty, even on the first occasion. In this case, the sanction imposed by the Retailer Operations Division for these first-time violations is entirely in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

Penalty Does Not Fit the Crime

The Appellant argues that the deprivation to the community and the small business owner as a result of a six-month disqualification is too harsh in comparison to the sale of a \$2.00 item.

With regard to this contention, the regulations at 7 CFR § 278.6(e)(5) do not allow for a modification or a reduction of a disqualification period based on punishment that appears to be excessive in comparison to the violations that were committed. The regulation states that FNS “shall disqualify the firm ... if ... 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” (emphasis added). The regulation does not mention transaction amounts or the value of the ineligible items purchased. There is nothing in the regulation which suggests that a firm can only be disqualified if the ineligible items purchased were expensive or were obvious nonfood items such as cigarettes or alcohol.

Therefore, the Appellant’s contention that the penalty in this case is too severe in comparison with the violations committed does not provide a basis for dismissing or reducing the charges.

Remedial Actions Taken

In its response to the charge letter, the Appellant stated that it was still adjusting to its new credit card machine and would make sure that staff is trained to correctly identify EBT purchases so that ineligible items are separated from SNAP-eligible items.

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 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.

Hardship to Households / Civil Money Penalty

The Appellant requests a civil money penalty in lieu of disqualification, claiming that many customers in the surrounding neighborhood walk to the store, and a disqualification would create a burden to households living in the community.

With regard to these contentions, 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 an alternative CMP sanction is allowed when the 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 Broadway Grocery & Food Mart, a convenience store, would not cause hardship to SNAP households because there are several other shopping options in the area. According to agency records, there are at least a dozen similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of Broadway Grocery & Food Mart, including a full-line supermarket. There is also no evidence that Broadway Grocery & Food Mart 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.

As to the Appellant's insinuation that a disqualification would cause hardship to the store owner, there are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself.

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 Broadway Grocery & Food 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. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, Broadway Grocery & Food 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.

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

July 24, 2019